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

As I write this, my sixth president’s column (but who is counting), I am over half way through my term as president. In fact, as you read this, I will be about to enter the last three months of my term. The time has gone by fast, but I have enjoyed every minute of it.

As the KBA president, I have learned many things. Not the least of which is, that I need to plan more ahead for this column. Since it is now March it is a little too late for a “State of the Association” column and a little too early for a “Year in Review.” But I do want to take this opportunity to briefly touch upon just a few matters of importance; things the KBA has been doing and working on and challenges that still lie ahead. It is not a complete list by any means.

In January, Chief Justice Lawton Nuss gave his State of the Judiciary address. The Chief, like the trial lawyer he was, and with the help of court personnel from across the state, effectively demonstrated and explained the scope of responsibilities and vast array of services our court system provides to the people of Kansas. As we all know, the state faces a significant budget crisis in 2015, and unless significant changes are made, it will persist into the foreseeable future. Unfortunately, our judiciary is not immune from the effects of this crisis. Our legislature is dealing with the issue as I write this column. Perhaps, though I fear not, the state’s financial problems will have all been solved by the time this column is published. On the chance that is not the case, proper and adequate funding for our courts and court personnel remains essential and critical. Obviously, among our membership, we have Republicans and Democrats, liberals and conservatives, or whatever other labels that might be assigned. But adequate funding for our judiciary is not a Republican or Democrat issue. It is not a conservative or liberal issue. And it is not just an issue for 2015, though that is the immediate and most pressing need. Adequate funding for our courts, a co-equal branch of our government, is a critical and essential issue, for this year and years to come. Nor is it just a lawyer or judge issue, as Chief Justice Nuss so capably demonstrated in his State of the Judiciary address. Access to justice and our courts is vital to every citizen or resident of Kansas. We must all support our judiciary and adequate funding for it. We can do that by contacting legislators, advocating for it among our friends and family, and by supporting the need publically. It is a responsibility we must all accept.

Along with court funding, the method by which our Supreme Court justices are selected remains a hot topic. Again, as I write this, the legislature is considering changes to our current method of selection. I have testified once before the House Judiciary Committee on the issue, and I am scheduled to do so yet again. By the time this article is published, I don’t know what, if anything, the legislature will have done or may still be considering. What I do know is that the KBA has long-supported and advocated for merit selection of the appellate court justices. And we will continue to do so in the future. Kansas has a well-established, long-standing, and effective method of selecting our justices for the Supreme Court. Voted in as a part of our Constitution by the people of Kansas over 50 years ago, merit selection has served the state of Kansas well ever since. There is no need to change what has worked so well and has produced what I believe is one of the most qualified and capable group of appellate court justices anywhere in the country. Unfortunately, last year the legislature decided to change the method of selecting our Court of Appeals judges. The KBA opposed those changes, and I believe the legislature’s decision was a big mistake. But it makes what happens at the Supreme Court level all that more important. The KBA opposes any efforts to politicize our Supreme Court, or to change the method of selecting the justices.

This time of year is always a busy time for the KBA, what with the legislature in session. A host of issues and topics important to lawyers, aside from just judicial funding and merit selection, are before the legislature for consideration. The KBA’s efforts and participation in the legislative process on topics of concern to the legal profession are led by our executive director, Jordan Yochim, and our legislative services director, Joe Molina. Considerable KBA staff time is devoted to matters before the legislature, and I thank and congratulate our entire staff on all of their efforts and undertakings while the legislature is in session, all the while, balancing that with their other jobs and responsibilities.

I am also pleased to report that our Lawyer Referral Service, since being brought “in house” under the able direction of Dennis Taylor, continues to move positively forward. Lawyer referral is of critical importance, not only to the bar, but also to the citizens of Kansas. Many people, when confronted with the need for legal services, often for the first time in their lives, don’t know where to turn. While there are many and varied ways by which individuals can find a lawyer, and some undoubtedly better than others, I believe a well-run LRS is a critical and extremely valuable part of the process. The goal of the KBA is to have just such an LRS.

Finally, I want to remind everyone to be thinking about this year’s annual meeting from June 17-19 in Overland Park. If you have read any of my previous columns, you know the annual meeting has been the subject of, or at least mentioned in, more than one. That is because I believe the annual meeting remains an important service the KBA can provide its members. This year’s planning committee has been working long and hard planning the meeting. Some new and different ideas are being implemented, but many of the traditions are retained. I urge everyone to plan on making this year’s meeting a priority. If you have not previously attended one before, or if it has been a few years since you have done so, this is a perfect opportunity to see what the annual meeting is all about. If nothing else, you can attend to make sure my term as president comes to an end, and our president-elect, Natalie Haag, is sworn in. The KBA will remain in good hands, actually, make that better hands, under Natalie’s leadership. Hope to see you all in Overland Park this June.

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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(620) 662-0537
March Madness: 5 Takeaways to Achieve Legal Victory

Since our firm is in Lawrence, it probably comes as no surprise that we are big basketball fans. (Rock chalk.) And it likely goes without saying that this time of year—from the close of the regular season conference games through the Big 12 and the NCAA Tournaments—is an exciting time around the office. (Let’s just say that the conference room TV was an excellent investment.)

But contrary to popular belief, March is not a total wash for productivity. Instead, I would argue that watching basketball makes us better lawyers. Thus, I give you five basketball lessons that are essential to successfully practicing law.

1. Defense makes a win possible.

Sportscasters love to repeat the adage, “Offense wins games; defense wins championships.” The saying makes me laugh because in order to win, a team obviously needs to score more points than the opponent. But the idea is that a consistently good defense will place you in a position to be able to win over and over again—not just in the one game where your sixth man went on a dunking frenzy.

The same is true for practicing law. Attorneys who are truly great are not reactionary; instead, they control the “tempo” of a case or negotiation. When they draft a contract, these attorneys foresee every contingency to minimize uncertainty and costly lawsuits down the road. In litigation, they preempt and neutralize opposing counsel’s arguments before they are even made.

2. But you can’t win if you don’t score.

Of course, even if your team has the greatest defense in the world, you’re not going to win the game if you only score 12 points in a half. (KU tested that theory in its game against Kentucky early this season. Spoiler alert: It did not end well.)

Similarly, even if you work hard to anticipate every move by the attorneys across the aisle, it’s not going to matter if your case-in-chief or defense has no merit. The lesson is one of case selection and realistic case evaluation. Justice is not served by bringing frivolous lawsuits or by ostrich-like obstruction. It’s our job to counsel clients about the realistic chances of a case’s success, to litigate only the cases where there is a possibility of a positive outcome, and to resolve other disputes to the best of our ability.

3. Effortless mastery only is achieved through practice.

It’s easy to be in awe of a player who can sky for a rebound or dunk with elbows at rim-height, or who is automatic at the free-throw line. But then I’m reminded that people like Phil Forte III shoot hundreds of free throws every day in order to develop muscle memory. This level of skill is not luck; it is the product of countless hours of hard work and preparation.

As a lawyer fairly early in her career with high self-expectations, I have to remind myself of this more than I care to admit. Building a successful legal career is not something that happens overnight. Courtroom skills, briefing expertise, reputation, client development—all of these are the product of years of sweat and effort.

4. Don’t underestimate the little guy.

During my last semester as a 3L, KU was a four-seed in the NCAA Tournament, with the first two rounds played in Detroit (not far from where we lived). The attorneys at the firm where I worked knew we were avid (rabit!) Jayhawk fans, so they surprised Brandon and me with third-row seats for the weekend. We arrived at the arena feeling smug. After all, who was this Bradley team, anyway? We hadn’t even heard of them. We were looking forward to the match-up against Pittsburgh on Sunday.

I learned my lesson. And I have to tell you—as a young lawyer, I relish the role of underdog. Though I am somewhat ashamed to admit it, there is something very satisfying about being consistently underestimated and yet helping your client to a successful resolution in the end. Maybe the other lawyer is less experienced. Maybe he or she has fewer resources, or less of a name, or is representing an underdog client. But maybe that same lawyer is a skilled writer, or an excellent researcher, or is going to pour his or her heart and soul into the litigation. Or maybe the law is on his side. The bottom line is that it’s never a good idea to undervalue the attorney on the opposite end of the table.

By the way, we learned that night that Bradley University is located in Peoria, Illinois. Oh, the agony.

5. Success is a team effort.

Mario Chalmers made the game-winning shot in the 2008 national championship game. Media outlets went into a frenzy over “Mario’s Miracle.” Darrell Arthur scored 20 points in the game, ensuring that he would be a first-round draft pick. But does anyone honestly believe the Jayhawks could have won the game if Russell Robinson hadn’t been the point guard? And what if the freshman Cole Aldrich hadn’t been able to take care of business against North Carolina’s Tyler Hansbrough in the semifinals?

Greatness is not achieved in a vacuum. Rather, practicing law—like playing basketball or any other team sport—hinges on building a network we can rely on for excellence, a structure that makes us better than we are on our own. I’m fortunate—as I’m sure that you are—to be surrounded by people in my life who challenge and support me. From the other attorneys in our offices, to our fantastic support staff, to our lawyer-friends who act as sounding boards for ideas and frustrations, to the people in our community, to our amazing and understanding families … we don’t do this on our own.

Take a minute today to give the members of your team a “high-five.” After all, we’re all in this together.

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, and is a member of both the KBA Appellate Practice Section executive committee and Board of Publishers.

sarah.warner@trqlaw.com
The Appellate Practice Section of the KBA just completed its annual CLE this past February. It was a half-day CLE and featured topics focusing on e-filing, common appellate hurdles, a case-law update, and the ethical responsibilities of the appellate lawyer. The speakers included Justices William D. Biles and Caleb Stegall of the Kansas Supreme Court, as well several attorneys with vast experience in the Kansas appellate courts.

Members of the section received a discount on the CLE, actually saving more on the registration than it cost to join the section (what a bargain!). Each year, this section provides CLE targeted toward Kansas appellate attorneys, but the CLE events are also great for those attorneys who are looking to get their feet wet in the appellate courts.

The Appellate Practice Section also provides fun networking opportunities for appellate lawyers and judges (we’re currently working on a possible event for later this year). The section has even proven to be a valuable resource for attorneys who are looking for other appellate-focused attorneys who are willing to edit briefs or participate in moot courts.

By Carl Folsom, Appellate Practice Section President, Federal Public Defender, Topeka
SNAP OUT OF IT!

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In 2014, the Kansas CASA program received $8,000 from the Kansas Bar Foundation in an IOLTA grant. The money was dispersed by the state office to 23 CASA programs in 24 judicial districts (see the chart at the end of the article) for the purpose of providing funding for staff positions that work with CASA volunteers and oversee cases.

The members of the Kansas CASA Association believe that volunteer advocates have a positive impact on the lives of children they serve. They have defined three outcome measurements to demonstrate the impact.

1. **Child Safety.** In placement, 98 percent of children had no substantiated recurrence of abuse or neglect while a CASA was assigned to the case.
2. **CASA Stability.** Eighty-nine percent of children had no change in their CASA volunteer.
3. **Children Remain in Safe & Permanent Homes.** Ninety-four percent of children did not return to their jurisdiction’s court system two years after the case closure, due to abuse or neglect.

In Salina, the CASA program trained 20 new volunteers in one quarter. The Leavenworth program established an office in Atchison County which will provide a way to recruit volunteers and raise awareness in that county. The Junction City program has seen a huge growth in volunteers and plans to expand into their other counties. The Kansas City program provided Fostering Futures training to eight Douglas County CASA volunteers. Those are just a few examples of the accomplishments in 2014.

In 2014, the program served an important need in our communities and for the Court. Current challenges of meeting those needs include still struggling with an insufficient number of volunteers. In Garden City, the need for bilingual volunteers has increased. Another challenge is having enough funds to pay staff.

Additional requirements, such as the National CASA background screening requirements, have created an additional need for staff time to rescreen volunteers. Board recruitment is another area where they could use some help.

On top of volunteer recruitment and training, the Kansas CASA program provides marketing and outreach to the communities they serve to create awareness about child abuse and neglect. The Iola program participated in outreach for National Child Abuse Prevention Month in April 2014. They partnered with Hope Unlimited Child Advocacy Center and Women’s Shelter in hosting over 30 events in five counties in Southeast Kansas. Over 1,200 elementary students and others helped in these efforts.

In 2014, there were approximately 7,000 children in the custody of the Kansas Department for Children and Families. About 6,200 were in out-of-home foster care placement. In 2015, the Kansas Bar Foundation provided the Kansas CASA with $10,000. That grant will be used for capacity-building in their offices throughout the state. Their ability to advocate for more children is dependent on their ability to increase the number of trained volunteers. Kansas attorneys participating in the Kansas IOLTA program make it possible for us to provide funding. If you are not yet an IOLTA participant, please consider it.

### 2014 IOLTA Individual Program Allocation to Kansas CASA Programs

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We seek professionals and students who wish to develop their leadership skills, continue their education, mentor and network.

KPA needs help from the legal community to establish a collection of firms, offices, and companies that may be interested in participating in paralegal student internships as hosting sites. Many paralegal students and educators reach out to KPA for assistance with placement for internships.

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Who Taught You to Write? Reflections on a Writing Education in Kansas

In a recent blog post,¹ Wayne Schiess of University of Texas Law School suggests that few people ever learn writing as a discipline. Intermediate and high school English classes emphasize reading comprehension, literature and literary analysis, and vocabulary for college entrance exams. College classes focus on their subject matters.² Schiess observes that although both high school and college classes may include writing papers as part of their teaching and assessment methods, they may not include much instruction on writing itself—what’s correct, what’s effective, how to make yourself clear, or how to convince someone you’re right.³ Schiess’ point is that by the time we get to law school, beginning our careers as professional legal writers, we might have never actually received instruction on how to write.² It’s assumed that we know how to write. One-Ls are expected to come to law school with a mastery of grammar, punctuation, syntax, and word choice. Law school writing classes focus on teaching students to adjust their organization and style to fit legal analysis and a law-trained audience. But what if we never learned to organize and write for non-lawyers?

I was lucky to learn to write from excellent teachers in the Auburn-Washburn School District in Topeka. My English classes from seventh grade on taught reading comprehension and literary analysis, spelling and vocabulary. And they also included lessons on fundamental writing skills that I still remember and use to this day.

Grammar & Syntax

My seventh and eighth grade teachers, Mrs. Johnson and Mrs. Pomeroy, made us diagram sentences. That sentence-diagramming happened kind of a long time ago, but it wasn’t exactly the olden days—it was the 1980s, not the 1880s.⁴ We were in honors English; maybe that time would have been better spent on more SAT vocabulary to bump up our test scores. Nevertheless, those teachers made sure we knew the parts of speech and how to fit them together into nice clear sentences.

Among other things, we learned the difference between passive voice and active voice. In active voice, the subject of the sentence does the action described by the verb: Zombies chased Philip. In passive voice, the subject of the sentence isn’t acting; instead, some other party is doing the action, often (but not always) described with a prepositional phrase beginning with “by”: Philip was chased by zombies.

Legal writing tends to prefer active voice because it’s less ambiguous and more concise and dynamic than passive. Both passive and active voice are grammatically correct. In legal writing, the decision to use one or the other depends on what the writer wants to emphasize: the actor, the action, or the person acted upon. Legal writers need to know the difference so we can achieve the desired emphasis.

Just like in legal writing class, in seventh and eighth grade we learned the virtues of simple sentence structure. Subject-verb-object is always clear. Descriptive verbs are clearer than nominalizations, in which a noun describes the action. For instance, I could correctly write: I have a preference for sentences that have been edited to be shorter. But it’s clearer and more readable to write: I prefer shortened sentences.

Paragraph Structure

Mrs. Peterson (11th grade) taught us paragraph composition in lessons I have adopted for my first-year Lawyering Skills classes.

In my memory, Mrs. Peterson deserves all the credit for this analogy: A paragraph is like a sandwich. A sandwich has top bread, bottom bread, and fillings. If it’s missing the top bread, the sandwich is formless and messy, difficult to consume. If the bottom bread is missing, the sandwich falls apart. And the fillings must match each other—you can have peanut butter and jelly, or you can have ham and Swiss cheese, but hardly anyone wants to eat a peanut butter-and-cheese sandwich.

Likewise, a paragraph must have a topic sentence, a conclusion, and related content. If the topic sentence (or more often in legal writing, the thesis?) is missing, the paragraph is amorphous and the reader has to guess at its subject. If the paragraph has no conclusion, the point is lost. Finally, if the contents are unrelated, the paragraph will ramble and lack cohesiveness. It will be unappealing for your audience to read. These ideas are just as important in legal writing as they were in eleventh grade essays.

Outlining

Mrs. Morse (12th grade) spent much of the year teaching us to organize our ideas before writing. Outlining takes time, but it’s well-spent: The organization process helps clarify what you want to say, as well as the order in which you want to say it. If you invest time in a thorough outline, writing the prose is usually quicker and easier.

Footnotes

1. Wayne Schiess, True Writing Classes Are Rare, LEGIBLE (May 26, 2014), http://sites.utexas.edu/legalwriting/2014/05/06/true-writing-classes-are-rare/.

2. The exception is university first-year composition. But unfortunately, universities have downplayed its importance to the point it’s now often adjunct-taught nationwide. Courses devoted to writing as a discipline literally are shunted to the side of most universities’ primary mission. See, e.g., Josh Boldt, First-Year Commodity: The Adjunct Professor Labor Crisis in Composition Departments, ORDER OF EDUCATION (Oct. 19, 2012), http://orderofeducation.com/first-year-commodity-the-adjunct-professor-labor-crisis-in-composition-departments/.


4. Id.

5. I know an eighth grader in the Shawnee Mission School District who assures me that even though sentence-diagramming appears to be dead, he still has to learn structures of grammar in his English/Language Arts class.

To create a good outline, Mrs. Morse taught, you need to consider the relationships between ideas. What is the main point of the paper? What points support that main thesis? What ideas relate to each of those supporting points? She taught us to identify the distinct parts of our analysis and categorize the information that fit with each part. To that end, we had to create physical outlines, with each section and subsection labeled clearly and indented appropriately for its level. Writing it on the page helped us see the skeleton of our work.

The exercise made complex work seem possible. By the time the skeleton was complete, so was most of the analysis. Little by little, the outline helped build the parts of a long and complicated whole. For this reason, outlining is, of course, essential to legal writing. The very process of creating an outline can help a legal writer generate analysis or arguments.7

I remain grateful for these English teachers’ combined efforts, and the Kansas public school system in which I received them. The result was that when I graduated from Washburn Rural High School, I had well-developed writing skills because I had received specific, devoted instruction on how to write. I understood the choices I had that could make my points clearer and more readable. When I got to law school, I had to learn to adapt those skills for the new context, but the fundamentals were already in place. I was not learning grammar, syntax, and organization for the first time. I had been, effectively, working as a writer for a long time—since I was a 12-year-old in seventh grade English class.

About the Author

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

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

7. See Edward H. Telfeyan, Outlining from Scratch: How to Make the Process Meaningful, 19 PERSPECTIVES: TEACHING LEGAL RESEARCH & WRITING 52 (Fall 2010).
Some Guidelines for Handling Clients’ Social Media Baggage

Florida man recently forfeited an $80,000 settlement when his daughter posted on Facebook, “Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT!” Her post revealed that her father had disclosed the settlement in breach of his agreement to keep it confidential.

As this example shows, many social media users are oblivious or indifferent to what may happen when their “travel logs, photographs, streams of consciousness, rants, and all manner of [postings] . . . find their way into the hands of family, potential employers, school admission officers, romantic contacts, and others.” It should be no surprise that attorneys not only seek out opposing parties’ publicly available YouTube videos, Facebook photos, and other social media information but also demand access to the password-protected portions of their social media sites. In light of the interest that adversaries may have in the information posted on those sites, what advice may a lawyer give to a client about the client’s social media postings?

Several recent ethics opinions have observed that the duties of competence and diligence may require lawyers to gain a basic understanding of how social media sites work, review a client’s social media postings, advise the client how the content may affect the client’s legal interests, and explain what the client may do to preserve information that may be relevant to legal disputes. Because social media also lends itself to inaccurate and exaggerated profiles and postings, lawyers also need to remember that it is professional misconduct to engage in conduct “involving dishonesty, fraud, deceit, or misrepresentation” or that is “prejudicial to the administration of justice.”

With those duties in mind, the following guidelines have been synthesized from the previously referenced ethics opinions:

- Lawyers generally may advise clients to use the highest level of privacy/security settings available.
- Provided that removal would not violate laws regarding destruction or spoliation of evidence, lawyers may advise clients concerning what material should be taken down from social media sites, particularly if the substance of the posting is preserved. Of course, if litigation is contemplated or pending, the client will need to comply with its obligations to preserve evidence, and the lawyer will need not only to advise the client of those obligations but to comply himself or herself with the rules requiring candor to the tribunal and fairness to opposing counsel, not to mention the rules against engaging in misconduct. A sobering case occurred in Virginia when a lawyer instructed his client to delete certain photographs from his Facebook page, withheld the photos from discovery, and omitted from a privilege log submitted to the trial court the email instructing the client to “clean up” his Facebook account. The trial court imposed sanctions of $542,000 on the lawyer and $180,000 on the client to compensate the opposing party for its legal fees; and the state bar suspended the lawyer for five years.
- Lawyers may review what a client plans to publish on a social media page, advise the client concerning those plans, and also help the client formulate social media policies. Of course, a lawyer may not assist the client in publishing false or misleading information.
- Consistent with the ethical obligations under KRPC 3.1 requiring meritorious claims and contentions, lawyers should be careful if a client’s social media postings reveal that the client’s claims are frivolous or involve the assertion of material false factual statements.
- Clients are required to testify truthfully if asked whether changes were made to a social media site. A lawyer must take reasonable remedial measures under KRPC 3.3 if he or she comes to know that the client offered material false testimony on the subject.

About the Author

Mark M. Iba is a partner with Stinson Leonard Street LLP, practicing in the firm’s business litigation division, where he focuses on complex civil litigation and arbitration. He received his J.D. from the University of Chicago and is a member of both the Kansas and Missouri bars.

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Footnotes

3. “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Kansas Rules of Professional Conduct (KRPC), Rule 1.1.
4. “A lawyer shall act with reasonable diligence and promptness in representing a client.” KRPC 1.3.
6. See KRPC 8.4(c)-(d).
7. See KRPC 3.3 (prohibiting false statements by the lawyer and offering evidence the lawyer knows to be false and requiring remedial measures upon discovery that false statements or evidence were supplied).
8. See KRPC 3.4 (prohibiting the unlawful obstruction of access to evidence, falsification of evidence, failure to comply with proper discovery requests) and 4.1 (prohibiting false statements to a third person or failure to disclose material facts when necessary to avoid fraud).
June 17-19 in Overland Park: Will You Be There?

Reports of my death are greatly exaggerated” – a statement famously attributed to Mark Twain in May 1897, at a time when Twain was feeling poorly for an extended period. The expression has been borrowed, bastardized and plagiarized by politicians, sports figures, and pop culture flash-in-the-pan.

But allow me to add another icon to the list of others who might likewise borrow the turn of phrase – the KBA Annual Meeting. Several years ago the expanding Internet and the ease of access to virtual meetings lead some to believe that conventional face-to-face meetings were going the way of the dodo bird. But actually the opposite is proving true. The conference industry is growing, and with it, the new understanding of the value of actually talking to people in person.

More people are attending conferences and meetings than ever before. TED Conferences, for instance, are all the rage. Physician conferences continue to expand as more and more cities fight to host them. Turns out that people attend conferences for two reasons: to learn and network. Experts note the value of professionals attending in person and staying current with changing legal developments and making and affirming existing relationships.

Which brings me to this year’s KBA conference, set for June 17-19 in Overland Park. The last time the event was held in Overland Park, there were 250 attorneys who attended. One of those in attendance was me. It was informative, interesting, and fun. I played golf, enjoyed some libations, and saw friends from days gone by. And yes, picked up the pesky ethics credit hours.

Over the last five years, the KBA conference has averaged 245 attendees. But with a total KBA membership of 6,500, those numbers reflect less than 4 percent of the total membership. You may well be in the 96 percent who don’t see the attraction.

But permit me to offer five reasons you should save the date:

Fifth: Baseball. The Royals, the defending American League champs, are playing in town that week. The team has added Kendrys Morales and Alex Rios, and of course returns the “law firm” of Herrera, Davis & Holland. They play the Milwaukee Brewers on June 17-18, and then the Boston Red Sox June 19-21. Take in a game, make a memory, pick up some CLE, and deduct the entire trip. Except for maybe those super-sized beers sold in a commemorative Royals cup.

Fourth: The program. Allow me to be frank: this is not your grandfather’s convention. Yes, you will have the standard “updates in the law,” but there are other topics that might be more relevant to what’s going on in our profession these days. With that in mind, one of the presentations is this one: “Well-Being and the Practice of Law: The Choices Happy Lawyers Make” presented by Duke Law Professor Daniel Bowling. His focus is exploring the connection between happiness, legal professionalism, and work satisfaction.

Continuing that theme, the Bar enlisted the author of the award winning book – “Happy Lawyers: Making a Good Life in the Law,” published by my KU law school classmate and now UMKC professor Nancy Levit. She will provide tools in a toolbox of happiness – things that make people more or less happy in their work – as well as suggestions for law firms to increase the satisfaction of their lawyers and for individual lawyers to increase their own levels of contentment.

There are other programs, including one I’m putting together directed at lawyers 35 and under. Titled “Law Student to Happy Lawyer: Making a Successful Transition to the Real World. Lessons Learned from Attorneys Under 35.”

There are social events planned at Prairie Fire in Overland Park on Thursday night, June 18.

Third: Wake up, McFly! Unless you just woke up from a coma, you know our profession is under siege. Permit me to quote another well-known historical figure – Ben Franklin – “If we do not hang together, we shall surely hang separately.” This year’s gathering may not resemble a pep rally, but arguably the time has arrived to gather together and remind ourselves that if we don’t champion legal service to our communities and to our legal order, no one else will either.

Second: Here comes the judge: As in previous years, the judges will be joining us for Thursday night’s activities and the Friday morning breakfast. A good lawyer knows the law; a great lawyer knows the judge.

First: We need you. The profession needs you. I need you. If that sounds like a plea, well then add perceptiveness to your skill set. The time is now, the place is now. Unless you just woke up from a coma, you know our profession is under siege. Permit me to quote another well-known historical figure – Ben Franklin – “If we do not hang together, we shall surely hang separately.” This year’s gathering may not resemble a pep rally, but arguably the time has arrived to gather together and remind ourselves that if we don’t champion legal service to our communities and to our legal order, no one else will either.

About the Author

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

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E-Filing Account Reconciliation

Were Moltke the Elder a computer system designer rather than a German field marshal, he likely would have said, “No system survives first contact with the end user.” The vast array of users with their myriad skill levels, objectives, computer systems, and luck seemingly conspire to break what was working just fine in a sanitized environment monitored and maintained by experts.

Electronic case filing has been operational for months but Douglas County made it mandatory in January. Simultaneously, complaints about account reconciliation started bubbling. Interestingly, the reconciliation issues turn out to be much older than Kansas’ system appearing earlier in the federal and other state filing systems. It took outside auditors from clients to raise the warning.

Missing Information

Attorneys may use either ACH transfers or credit cards to pay docket fees and court costs when e-filing. Those choices are not a convenience – they are a requirement. You cannot start a tab with the court nor will they invoice you at the end of the month. You can only pay by ACH or credit card and so it is important that those transactions be unambiguous and transparent both for internal firm reconciliations and for outside auditors like the disciplinary administrator or clients. Therein lies the rub.

E-filing uses CitePay to process ACH and credit card payments and a unique transaction ID is created for each charge. CitePay sends that transaction ID with other charge information to the filing attorney’s bank. Optimally, an attorney (or auditor) could look at a bank statement and identify definitively the court and case for each charge. That transparency ensures that funds were used as represented and, as importantly, verifies that the court charged the proper fees. Two issues currently prevent that transparency.

First, not all banks print the transaction ID on account statements. It is discretionary information. I reviewed statements from different credit card issuers and none provided the transaction ID on their statements. Calling customer service did not alter the policies. As I write this, the only information found on credit card statements are CitePay’s name, a charge amount, and the date the transaction processed (but not necessarily the date the e-filing occurred).

The second issue occurs even when the transaction ID is provided. Local bank statements reviewed for ACH transfers do print the transaction ID on statements. The transaction ID is not a case number, however, and the attorney has no independent access to a Rosetta Stone linking it to one. E-filing courts must provide a special report which ties the transaction ID to a case number. There is one slight hitch. The charge shown on that report is just statutory fee while the bank statement is the total of the statutory fee plus the CitePay transaction fee. There is not a one-to-one match of charges on the statement and the report from the court.

In short, reconciling firm accounts used for e-filing involves some guesswork and assumptions. The account detail necessary to definitively link a transaction on a statement to a specific case is missing altogether in some cases (credit cards) or inadequate in others (ACH transfers). A best guess can tie transactions together by amount and date but that approach breaks down when an attorney incurs charges in several cases and counties. Some automation gains in filing are paid for with labor-intensive and inexact reconciliation of accounts.

No Easy Fix

Hopefully, something better will be figured out by the time this goes to press but there is not an easy fix right now. The problem has been around a while in various e-filing systems so it seems intractable. Various parties are working on solutions and have some good ideas, but most are a kludge acknowledging that “it’s complicated.” Any e-filing attorney should be alert to the issue and develop good faith, reasonable processes for linking charges to cases and accounting for all client funds. Cooperative courts producing regular statements for attorneys will be vital to those efforts.

Neighbors

One other unexpected issue presents an ominous cloud on the near horizon. No storms are expected in Kansas but the Missouri Office of Chief Disciplinary Council (OCDC) is making an attorney’s life miserable over credit cards. The OCDC has not responded to requests for information but it believes it is misconduct for attorneys to use a credit card offering rewards (e.g., cash back, store credit, airline miles), and it is prosecuting an attorney for doing so. That appears to be a unique position, and what little information has been presented is not a particularly strong case. The Kansas Disciplinary Administrator has not agreed, nor does my own research aided by the American Bar Association Center for Professional Responsibility. Nevertheless, they do not have to be right to shove an attorney into diversion.

An unrelated hiccup in an unrelated computer system design popped up in live use when the Nebraska Supreme Court attempted a roll-out of E-Notice on January 5. That system would allow courts to transmit orders, notices, and other court entries via email using E-Notice. However, it was discovered several weeks in that attorneys with a hyphen in their email address were not getting notices. All such attorneys were “in the dark” from January 5 through January 21 and the Nebraska Supreme Court had to send a mass notice reminding attorneys of Rule 6-414 relating to transmission technical problems and corrective orders. We feel your pain.

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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Same Story, Different State: A Comparative Look at Judicial Selection in Kansas and Iowa

When relocating from the Hawkeye State (Go Hawks!) to the Sunflower State well over two years ago, I couldn’t help but notice so many similarities between the two: sports fans passionate about their respective college teams, country music dominating about 80 percent of the radio airwaves, and of course, a hardworking class of citizens excited to welcome you to their state. But almost immediately, I noticed a more serious issue that Kansas shares with my home state. The judicial selection system in both states has come under intense scrutiny within the last decade, and in both states, the uproar has been in the immediate aftermath of a controversial state Supreme Court decision or two. Now that I consider myself to be both an Iowan and a Kansan, I feel it is my dual-citizen duty to address this important issue for both states and express my concerns for the judicial selection system in the future.

Complaints and calls for reform of the judicial selection process are nothing new. Indeed, most states have gone through at least one significant change in the process during their histories. As we all know, Kansas, like Iowa, has maintained a merit selection system for several decades. Merit selection seems to have become a lightning rod for criticism in recent years, highlighted by controversial decisions. In Iowa, backlash over the 2009 Varum v. Brien decision, which effectively legalized same-sex marriage in the state, led to the defeat of the three justices up for retention in 2010. The retention defeat was preceded by a well-funded and well-organized blitz by out-of-state interest groups in direct response to the decision. In Kansas, cuts in court funding and courthouse access are representative of a larger call for reform to the system. So is there a solution? Following the 2010 Iowa retention ouster, the state Supreme Court began taking their oral arguments on the road to high schools and community centers as a means of educating the public on the role of the courts. The 2012 election saw the retention of all the justices on the ballot, and the outlook for 2016 is hopeful. Perhaps it is time for Kansas courts or the KBA to undertake similar action, if for nothing more than the opportunity to demystify the courts somewhat in the eyes of the public. This is an issue that will not go away, and momentum for advocates of reform is accelerating, but there is still time for merit selection to reclaim its reputation in this great state.

Moving forward, I am fearful for the future of merit selection. Following the 2010 retention elections in Iowa, there were lawsuits filed against the nominating commission and even a call for impeachment of the remaining Supreme Court judges. In Kansas, cuts in court funding and courthouse access are representative of a larger call for reform to the system. So is there a solution? Following the 2010 Iowa retention ouster, the state Supreme Court began taking their oral arguments on the road to high schools and community centers as a means of educating the public on the role of the courts. The 2012 election saw the retention of all the justices on the ballot, and the outlook for 2016 is hopeful. Perhaps it is time for Kansas courts or the KBA to undertake similar action, if for nothing more than the opportunity to demystify the courts somewhat in the eyes of the public. This is an issue that will not go away, and momentum for advocates of reform is accelerating, but there is still time for merit selection to reclaim its reputation in this great state.

About the Author

Dylan Dinkla is a 3L at Washburn University School of Law. Before law school, he interned at the American Judicature Society, a nonpartisan nonprofit organization dedicated to the advancement of merit selection. After graduation, Dinkla plans to return to central Iowa and enter into private or government practice.

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Members in the News

Changing Positions

Francis J. Baalmann, Charles E. McClellan, and Matthew D. Stromberg have become partners of Foulston Siefkin LLP, Wichita. Wesley J. Kimmel has become an associate in the firm’s Wichita office.

Lisa M. Brown has joined Goodell, Stratton, Edmonds & Palmer, Topeka, as an associate.

Bret T. Christiansen has become vice president and trust officer of Peoples Bank, McPherson.

Christopher C. Confer and Thomas J. Koehler have become shareholders with Yeretsky & Maher LLC, Overland Park.

Danielle N. Davey has become a member of Sloan, Eisenbarth, Glassman, McEntire & Jarboe, Topeka.

Sean D. Ervin and Nancy J. Woodworth have joined Douthit Frets Rouse Gentile & Rhodes LLC, Leawood.

Van Z. Hampton has been named chief judge of the 16th Judicial District, Dodge City.

Amy L. Harth has been named chief judge of the 6th Judicial District, Paola.

Garth Herrmann has been named a director in the Wichita office of Gilmore & Bell.

Rachel Lomas has been named partner of Hite, Fanning & Honeyman LLP, Wichita.

Stephanie A. Preut was elected a shareholder of McDowell Rice Smith & Buchanan P.C., Kansas City, Missouri.

Bethany J. Roberts has joined Barber Emerson L.C., Lawrence, as an associate.

Mark D. Trainer II has joined MiMedx Group, Marietta, Georgia.

Miscellaneous

Jeffrey N. Lowe, Wichita, has achieved board certification as a family trial advocate by the National Board of Trial Advocacy.

At McDowell Rice Smith & Buchanan P.C.’s annual meeting, Greg T. Spies was elected to the executive board along with the re-election of R. Pete Smith as chairman, Thomas R. Buchanan as president, Kristie Remster Orme as general counsel, and Brian J. Niceswanger.

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~ Joseph Seiwert, Snider & Seiwert LLC, Wichita

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State of the Judiciary

Delivered by Chief Justice Lawton R. Nuss on Wednesday, January 21, 2015

Good afternoon distinguished members of the House and Senate, Attorney General Schmidt and other members of the executive branch, judges and justices, honored guests, and my fellow Kansans.

I was recently watching a television clip that showed a man wearing a badge in a 1950s western. He was knocking down the bad guys with a few powerful punches. And in true 1950s TV style, he wasn’t hurting anyone.

He was supposed to be that famous Kansas sheriff, Bat Masterson. Now the tag line describing this clip is a bit off color for a State of the Judiciary speech. But if you all agree that here I am only quoting from the television, I will share it. Have you braced yourselves? It said: “Bat Masterson, a real Bat ass.”

I’ve always liked Masterson, in part because he was my great-grandparents’ sheriff. He was friends with Wyatt Earp, a fellow law enforcement officer in Dodge City—and in Wichita. Abilene, Hays—and yes, Johnson County—were patrolled by Kansas lawman Wild Bill Hickok. Even Buffalo Bill Cody served as a government detective in Kansas. And yet another Bill—Tilghman of Dodge City—wore a badge for almost 50 years. His legendary work provided the title for his biography: “Guardian of the Law.”

The true adventures of these real Kansas law enforcement officers were larger than even Hollywood and TV could invent. We tip our hats to them because they kept the peace and enforced the law. We also tip our hats to the thousands of law enforcement officers in Kansas today who make this state a safer and a better place. But even these dedicated men and women will admit that they cannot do this alone. Other state agencies must also qualify as “guardians of the law.”

Today, I will talk about some of these other Kansans—the 250 judges and 1,500 employees in your judicial branch of government, who perform a critical role in providing public safety and who, every day, make a difference in the lives of their neighbors and fellow Kansans. This is a timely message of protection and safety and who, every day, make a difference in the lives of their neighbors and fellow Kansans. This is a timely message of protection and safety and who, every day, make a difference in the lives of their neighbors and fellow Kansans.

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Now I suppose some of our judges might have pondered the hypothetical question of whether they would have sent the Royals’ Alex Gordon home from—third base. But here, they must decide the real question, of whether to send the defendant home—from jail or whether to keep him behind bars for the safety of their fellow Kansans.

The judge often makes these decisions about bonding and release based upon input from the prosecutor, defense lawyer, and perhaps from experience with this defendant.

In some courts, the judge will also ask for input from court services officers, or CSOs. These folks, also known as probation officers, may interview the defendant in jail, determine his criminal history, and make recommendations to the judge.

Let’s further say Judge Alford issued this warrant, and the officers then found the cocaine and a stolen handgun. And they arrested the man.

2. Based on these and other facts, the prosecutor files a complaint or information with the district court. In our example, we’ll say defendant is charged with a serious felony: possession of drugs with intent to sell.

– Here is CSO Brian Swenson of Saline County in central Kansas. Mr. Swenson represents 350 CSOs in the state who can supply this information.

4. Next comes a court proceeding called the preliminary hearing.

Here, after considering the evidence presented, the judge must determine whether a crime has been committed and whether there is probable cause to believe it was committed by the defendant. If so, the judge binds the defendant over for trial and arraignment. This hearing, like some of the others I
mention, can be conducted by either district magistrate judges like Judge Alford or by the district judges like Judge Jack. As with many court proceedings, a court reporter may participate in this important hearing.

5. Then comes the arraignment.

This is where the judge advises the defendant of the charges for which he’s been bound over and the possible range of his sentence and where the defendant must enter a plea to the charges. If he pleads not guilty, the judge sets the case for trial.

Because our example involves a felony, the presiding jurist here generally is a district judge such as Judge Jack. A court reporter like Ms. Bailey generally is also present to make a record of the hearing.

6. Additionally, there can be other hearings. In our example, the defendant may try to keep out of evidence the cocaine and handgun seized through the search warrant, claiming they were illegally obtained. A judge must hear these suppression arguments and make these rulings. The court reporter usually attends and makes a record of the hearing.

7. Next is the jury trial itself, where Judge Jack and other district judges preside. Sometimes the judge’s administrative assistant attends, acting as the courtroom bailiff. Typically, this assistant has coordinated the various schedules of the judge, the prosecutor, and defense counsel to arrange the trial.

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– Here is Marilyn Bailey, court reporter from Thomas County in northwest Kansas. Like the other 130 court reporters across the state, Ms. Bailey records everything and produces a verbatim transcript. These transcripts can be valuable in this case’s later proceedings at the district court. And they are indispensable at the case’s appeal.

8. If the jury convicts the defendant, next comes the sentencing hearing.

For the felony in our example, Judge Jack would preside, and a court reporter like Ms. Bailey would certainly record.

Before this event, the CSO such as Mr. Swenson would conduct a presentence investigation. This includes calculating the defendant’s criminal history, the sentencing ranges for his crimes, and other relevant background information. Mr. Swenson’s report would be filed with the clerk—Ms. Lumbreras or one of her colleagues—and a copy would be given to the prosecutor and defense counsel. Judge Jack would use the report to help him decide the appropriate sentence.

Because our example involves a serious felony, the defendant could be sent to prison and become the responsibility of the Department of Corrections. Depending on his criminal history, however, he might be placed on probation supervised by a CSO like Mr. Swenson.

Last year Mr. Swenson and his 350 colleagues supervised the probation of nearly 17,000 people convicted of crimes in your communities. To put that in perspective: approximately 175 people are in this courtroom right now. So look around you, and multiply that by about 100.

9. Post-sentencing

If Mr. Swenson later believes this man is not meeting the terms and conditions of his probation—perhaps failing to check in with Swenson—he will file a report asking for the probation to be revoked.

If the prosecutor files a motion to revoke, then Judge Jack will conduct a hearing where he may decide to revoke the defendant’s probation and then reinstate it, sometimes with additional conditions, or to revoke and put him in jail for a period of time, or, under the right circumstances, put him in prison to serve his original sentence. Court reporter Ms. Bailey will attend. The administrative assistants like Ms. Schuman will help with scheduling the hearing.

This is a fast overview of one example of the 35,000 criminal cases filed last year in the district courts of Kansas, which I have greatly simplified because our judges and employees handle many more types of hearings and do much more in the criminal justice system than time permits me to explain.

The criminal law, however, is not the only vehicle courts use to protect Kansans from those who would do them harm.

Last year we also issued restraining orders to protect more than 12,000 Kansans from abuse or from stalking by another: protection from abuse that was directed toward an intimate partner or household member, including minor children, and protection from stalking that was directed toward an adult or minor children.

Last year your courts also issued orders to protect more than 6,000 Kansas kids who unfortunately qualified as “children in need of care.” By statute, this includes children who “have been physically, mentally or emotionally abused or neglected or sexually abused . . . or abandoned.”

These cases involving the safety of Kansans are just some of the various types of the 400,000 cases handled by your courts last year. For we also decided approximately 105,000 civil contract cases, more than 9,000 probate cases, and almost 8,000 property disputes. On the heartwarming side, we also granted nearly 1,800 adoptions of children.

I assure you our clerks, court reporters, administrative assistants, and judges work just as hard on the civil cases as they do on the criminal matters I mentioned.

Oh yes. Last year our court clerks—Ms. Lumbreras and her colleagues—also collected approximately $180 million. This included restitution for crime victims and monies for private judgments, for some state agencies, and for the general funds of counties and the State. Of that $180 million, we collected $54 million to fund state government.

The judicial branch of your government did all this and more, with an annual budget of approximately $133 million. This figure represents less than 1 percent of the entire state budget.
Now I don’t claim to be a financial expert. But, for these
core services our branch of government provides—that is, fair
and impartial courts to administer justice for nearly 3 million
people of Kansas—I believe most Kansans would say, “This is
a good investment.”

But it’s not enough for me to simply say we provide these
important services. I should tell you how we are getting better in
providing them. Again, because of time constraints, I will
mention just a few.

I will start with a reminder about our Project Pegasus.

Pegasus contained a blue ribbon commission of 25 Kansans
from various backgrounds. Its members performed the most
extensive review of judicial branch operations statewide since
the 1970s. In 2012 they made recommendations to the Su-
preme Court for improvement.

Pegasus also contained Kansas’ first ever weighted case-
load study. This allowed us to accurately determine, by actual
workloads, how many judges and court clerks were needed,
and where they were needed.

We have kept the weighted caseload study current by ad-
justing it based upon case filing statistics every year. These
adjustments have allowed it to remain a valuable resource for
the Supreme Court in making statewide personnel decisions.
But by limiting its review to the workloads of only judges and
court clerks, this study had to leave out the important work
of other employees such as you see today, Mr. Swenson and
350 probation officers, Ms. Schuman and 150 administrative
assistants, Ms. Bailey and 130 court reporters, among others.

So the Supreme Court has launched a statewide “position
inventory.” We have begun working with our 31 chief judges
across the state to complete a comprehensive assessment of all
judicial branch personnel needs, based not only upon our hard
data, but also the experience and observations of chief judges
and their employees. Our goal is to identify staffing levels we
need to provide efficient, effective, and timely service to Kan-
sans. This inventory will also allow us to consider the impact of
recent technological advancements on staffing needs.

Speaking of technology, let me update you on our electronic
courts project.

I will begin with electronic filing (or E-filing). You all know
this allows lawsuits and related legal documents to be filed
with the courts electronically. I’m pleased to report that im-
plementation of a statewide E-filing system continues to forge
ahead. Today’s E-filing locations include both appellate courts
in Topeka and the district courts in 10 counties. These in-
clude Ms. Lumbreras’ Sedgwick County, and Ms. Schuman’s
Johnson County with its JIMS E-filing system. During this
past calendar year, more than 100,000 electronic filings were
completed. We will continue to roll out this system statewide.

I told you in past years that E-filing will be integrated with the
different electronic case management and document manage-
ment systems presently used by court personnel in processing
cases. In other words, through a complete centralized E-courts
environment, we will shift from the present paper-based sys-
tem to one that will provide judges—like Alford and Jack—and
litigants with immediate, statewide access to case information,
details, and records provided by the Kansas courts.

Eventually it will also allow our employees in any location
to work “virtually” on Court business in any other location.

This additional advantage is a big one, as it allows the Supreme
Court to more effectively and efficiently manage the state’s
court system. The value of this E-court system was recognized
by the Legislature last year when it allocated approximately $3
million for this year and for several years to come.

As for our increased use of other technology, we are making
strides to expand videoconferencing well beyond those dis-
trict courts where it is currently used. This technology should
save law enforcement, attorneys, and their clients the time
and expense of traveling to courthouses for various hearings
conducted by Judges Alford, Jack, and their colleagues. The
videoconferencing committee already has developed uniform
rules and technical standards which it provided to the public
for your comment. Those have now been issued to district
judges and staff. Increased implementation of videoconfer-
encing is expected to begin soon in many more locations.

We have also increased our efforts to collect more of the
monies actually ordered by the courts—such as fees, fines, and
court costs. The National Center for State Courts helped re-
view our processes and develop best practices and standardiza-
tion of our collection methods. Acting on these recommenda-
tions will assure that court orders are taken seriously and will
be enforced. They will also increase the receipts going into
the public treasuries I mentioned earlier. To help accomplish
these goals, our debt collection committee has recommended
a number of statutory changes. For now, we have submitted
two proposed changes to the legislature this session.

We have also closely examined our increasing number of
specialty or problem-solving courts. They obviously differ
from the usual courts because they coordinate services pro-
vided to criminal offenders with direct, sometimes intense,
supervision by a judge.

Most of these are drug courts, which attempt to address an
offender’s underlying substance abuse problems—problems
that often lead to criminal offenses, then more offenses even
after conviction, resulting in a frustrating cycle that expands
considerable judicial and correctional resources. Our specialty
courts commission is currently establishing statewide stan-
dards for better serving the increasing number of users of this
unique system.

For the last six months Johnson County has worked on cre-
ating our state’s first veterans court for those military veterans
who have committed misdemeanors or lower-level felonies
and who are eligible for treatment by the Veterans Admin-
istration. The goal of veterans courts is similar to drug courts
As one expert said recently, that goal is “to treat those vet-
ers who have diagnosed conditions that are at the root of
their behavior.” District Judge Timothy McCarthy of Johnson
County hopes to have this court operational by October. As
a Marine Corps veteran myself, and as the father of a soldier
who is a veteran of the wars in both Iraq and Afghanistan, I
appreciate these efforts to help those who have served their
country.

Our Court of Appeals also continues its pilot project for
mediating its cases where participation is strictly voluntary
and where the mediators serve at no cost. So far 18 cases have
been assigned to this project. We look for more to come be-
cause successful settlement of cases can save resources of Kan-
sans and the appellate courts. Just as important, it can permit
the appellate courts to concentrate efforts on the other hundreds of cases that would remain on their dockets every year.

Similarly, the Supreme Court has looked at reducing, if not eliminating, those lawsuits in our district courts whose main purpose apparently is to abuse the legal system. One of our committees has developed guidelines for judges like Judge Jack to consider in deciding whether to restrict, and how to restrict, court filings from those litigants who have filed frivolous, malicious, harassing, or simply repetitive lawsuits and motions.

As you can see, your courts are constantly trying to improve their operations through these and other methods because the time saved through improvements can otherwise be spent securing public safety and enforcing the rights of Kansans.

But rather than proceed alone, we continue to welcome your input. As with the videoconferencing committee report, the committee on abusive lawsuits has also forwarded its recommendations to the public for comment. We hope the response is similar to the one we received when we asked for citizen volunteers to serve on our state child support guidelines advisory committee. For these four positions, we received 231 applications.

But if you prefer a more direct communication with the Supreme Court justices and the Court of Appeals judges, you have that opportunity also. Numerous communities will be visited this year by the Court of Appeals as it continues its long-standing practice of hearing cases argued across the state.

And beginning 4 years ago, the Supreme Court started a similar tradition. Most recently, on October 29 we heard cases argued on the beautiful campus of Kansas City Kansas Community College. We had set that date months earlier. And I have to admit, I had not foreseen that later that night the Royals would be playing in game seven of the World Series in Kansas City. Judge Dan Duncan told me his community would love to have us back—if we would again bring the World Series with us.

This April we will hear cases argued in a town one of its judges calls, “Hays City, America.” And while we are there, I will ask him to show me the streets where Wild Bill Hickok once walked as another “guardian of the law.”

In closing, I want to thank you for coming here today. And to thank those who are watching us right now on the Internet because having access to information about your Kansas courts is nearly as important as having access to justice in those courts.

As I did last year, I invite you all to attend our reception downstairs and to participate in tours of the Judicial Center, which are available starting right here.

And as you visit with us, please consider personally congratulating two Kansas judges. As I mentioned last January, two Kansas judges won national awards in 2013. But today I’m talking about two more national award winners.

Two months ago Judge Steven Leben received the William Rehnquist Award from the National Center for State Courts—the first Kansas judge to receive this award in its 19-year history. It was personally presented in the United States Supreme Court in Washington, D.C., by the Chief Justice of the United States and was awarded for Judge Leben’s continual promotion of procedural fairness in our courts.

And his Court of Appeals colleague, Judge Karen Arnold-Burger, learned just last week she is to receive the Burnham Greeley Award from the American Bar Association. It will be presented next month in Houston for her excellent work increasing the public awareness of the need for a fair and impartial judiciary.

Unlike Masterson and Earp, Hickok and Tilghman, these two national award winners probably will not be the subject of books, Hollywood movies, or television programs. But the judicial branch is still very proud of them both and what they stand for.

All Kansans should be as well.

Thank you again for your careful attention. I bid you Godspeed.

About the Chief Justice

Chief Justice Lawton R. Nuss was appointed as a justice on the Supreme Court of Kansas by Gov. Bill Graves in August 2002. He became chief justice in August 2010. Nuss is a member of the Kansas and Topeka bar associations.
The U.S. Census Bureau projects that more than 83 million Americans will be age 65 or older by 2050, nearly double the 2012 level of 43.1 million. According to the Consumer Financial Protection Bureau, older Americans lost at least $2.9 billion in 2010 to financial exploitation, which has become the most common form of elder abuse. In Kansas alone, the attorney general’s Abuse, Neglect, and Exploitation Unit recently reported that over 58 percent of all substantiated cases of adult abuse in Kansas involved financial exploitation or fiduciary abuse. The relevance of this issue has become indisputable.

Former Vice President Hubert Humphrey said, “The moral test of a government is how it treats those who are at the dawn of life, the children; those who are in the twilight of life, the aged; and those who are in the shadow of life, the sick, the needy, and the handicapped.” And for those seeking to protect the state’s older population, the 2014 legislative session proved fruitful. Effective July 1, 2014, there are significant amendments to the statute governing mistreatment of a dependent adult, K.S.A. 2014 Supp. 21-5417, including the addition of a subsection (b), which adds similar provisions criminalizing mistreatment of elder persons aged 70 or older. The purpose of this brief article is to inform readers of these changes.

The reworked K.S.A. 2014 Supp. 21-5417 left intact the provisions addressing physical mistreatment and neglect. Instead, the changes focused on financial mistreatment, broadening the scope of the statute in three primary ways: covered conduct, victim class, and potential defenses.

Covered Conduct

Previously, the statute criminalized “taking unfair advantage of a dependent adult’s physical or financial resources for another’s personal or financial advantage by the use of undue influence, coercion, harassment, duress, deception, false representation, or false pretense.”

T
The relevant statutory sections, effective July 1, 2014, now state:

(a) Mistreatment of a dependent adult is knowingly committing one or more of the following acts:

... 

(2) taking the personal property or financial resources of a dependent adult for the benefit of the defendant or another person by taking control, title, use or management of the personal property or financial resources of a dependent adult through:

(A) undue influence, coercion, harassment, duress, deception, false representation, false pretense or without adequate consideration to such dependent adult;

(B) a violation of the Kansas Power of Attorney Act, K.S.A. 58-650 et seq., and amendments thereto; or

(C) a violation of the Kansas Uniform Trust Code, K.S.A. 58a-101 et seq., and amendments thereto.8

Although other changes are evident, it is a significant addition that violations of the Kansas Power of Attorney Act or the Kansas Uniform Trust Code may give rise to criminal liability. Attorneys who prosecute those crimes or represent the victims of the crimes well know that powers of attorney and trust agreements are often used by perpetrators to excuse their financial exploitation. Despite that, cases involving powers of attorney and trusts have been successfully prosecuted even absent such provisions. But the statute’s scope now expressly encompasses violations relating to the use of those instruments, such as the trustee who takes distributions from the trust to pay his own living expenses, rather than the trustor’s nursing home bill.

Victim Class

Also, as noted above, the amendment expanded the scope of the statute to include “elder persons,” defined as a person 70 years of age or older.9 Mistreatment of an elder person mirrors mistreatment of a dependent adult in nearly every way but for two exceptions. First, the amendment does not include physical abuse of an elder person, only neglect.10 Second, to constitute a felony, the aggregate amount of property or resources taken from an elder person must be at least $5,000.11 The threshold is notably lower for mistreatment of a dependent adult: $1,000 or more constitutes a felony.12

Potential Defenses

The statute now codifies certain affirmative defenses within subsection (e). In summary, establishment of a pattern of giving between the alleged victim and the alleged perpetrator, or court approval of the transaction in question may provide a defense to charges of financial mistreatment. But just because a transaction is called a gift does not make it so. The pattern must have existed prior to the time the dependent adult or elder person became vulnerable, as defined by the statute.13

More Changes on the Horizon

Additional legislation seeking to protect those who grant powers of attorney will be introduced in the 2015 legislative session.14 Sadly, those entrusted to oversee an elder’s finances are often the perpetrators of financial exploitation. The proposed legislation will seek to amend provisions in the Kansas Power of Attorney Act. Among other changes, the proposed legislation includes the addition of a warning statement within the instrument to both the grantor of the power of attorney and the attorney in fact to clarify what responsibilities the instrument confers. Whether the recent changes to the mistreatment statute and other proposed legislation will prove effective remains to be seen. But these strides provide hope that the issue of financial abuse of the state’s vulnerable citizens will not be ignored.

About the Author

Stefani Hepford has served as an assistant attorney general in the Medicaid Fraud and Abuse Division of the Kansas Attorney General’s Office since 2008. Also appointed as a special assistant U.S. attorney, she prosecutes complex cases of federal health care fraud and related crimes in the U.S. District Court for the District of Kansas. Hepford received her bachelor’s degree in accounting from the University of Kansas in 1998 and her law degree from KU School of Law in 2003.

ENDNOTES


6. See L. 2014, Ch. 90, Sec. 1.


8. Id. 21-5417.

9. Id. 21-5417(f)(3).

10. Cf. id. 21-5417(a) and (b).

11. Id. 21-5417(d)(1)(F).

12. Id. 21-5417(c)(2)(F).

13. Id. 21-5417(e).

Bed, Bank & Beyond: Streambed Regulation in Kansas

By Tom Adrian and Dave Stucky
I. Introduction

A Kansas farmer wishes to modify a streambed to enhance his ability to farm his land. He desires to widen the banks to improve drainage and to construct a retention pond within the stream to water livestock and to irrigate crops. The question arises regarding what types of permits the farmer may need to conduct his activities. Does he need federal, state, or local permits? Any attempt to expand federal regulation of our nation’s waters has always served as a galvanizing topic met with momentous resistance. Although there is significant attention given to federal regulation in this area, the majority of oversight of waterways in Kansas actually occurs at the state and local level.

To explain Kansas laws germane to streams, this article will first briefly provide a summary of the basic classifications of watercourses for the purpose of determining which types of regulations apply. Next, it will offer a detailed discussion of the definition of a stream in Kansas. The final section will present an overview of Kansas regulations applicable to alterations of streams.

II. Classifications of Rivers and Streams in Kansas

There are three major categories of watercourses: navigable streams, nonnavigable streams, and diffused surface water. The focus of this article will be on nonnavigable streams. However, a brief overview of each classification is warranted.

A. Navigable streams

The first category of consequence is navigable streams. The state owns the beds of navigable streams. The public can freely access the water in navigable streams and the beds up to the high water mark. To determine the navigability of a stream, Kansas courts have adopted a “navigable in fact” test. Currently, in Kansas, three rivers have been deemed navigable under this test: the Kansas, the Arkansas, and the Missouri.

Distinct from the state test for navigability is the question of whether major watercourses are subject to federal regulation under the Commerce Clause of the U.S. Constitution. Extensive jurisprudence exists in this area. Currently, the test for navigability for federal purposes is the significant nexus test. A variety of federal laws apply to navigable waterways. Meaningful discussion of federal regulation in this area is beyond the scope of this article.

B. Nonnavigable streams

The next major classification of waterways deals with nonnavigable streams. The definition of streams in Kansas will be discussed in detail later in this article. As a general rule, a landowner who owns the property through which a nonnavigable stream flows has the exclusive right to access the water. The landowner also owns the bed and thus may alter, obstruct, or dam the stream.

The riparian landowner’s rights to access to the water and ownership of the bed are far from unfettered property rights and are subject to expansive state regulation. In Kansas, rules governing nonnavigable streams are primarily administered by the Kansas Department of Agriculture, Division of Water Resources (DWR). Additionally, because the rules governing federal and state regulation are often blurred in application, many stream situations should be viewed as subject to both state and federal regulation.

C. Diffused surface water

The final category is diffused surface water. Diffused surface water deals with unwanted water and is commonly thought of as runoff. It encompasses all water flowing in depressions not otherwise classified as streams or rivers. Since that is water not generally thought to be subject to state or federal regulation, Kansas courts have adopted distinct rules to deal with situations where a landowner alters his land in a fashion that increases the volume and velocity of water that flows onto his neighbor’s property. A discussion of this topic is also beyond the focus of this article.

III. The Definition of a Stream in Kansas

It is important first to examine the definition of a stream. Common dictionary definitions of “stream” include “a body of running water (as a river or brook) flowing on the earth” or “a small, narrow river.” The term “watercourse” seems to be broader and is defined variously in dictionaries as “a natural or artificial channel through which water
flows” or “a stream of water (as a river, brook, or underground stream)” or “a brook, stream, or artificially constructed water channel” or “the bed along which a watercourse flows.”

Interestingly, while Kansas has regulated stream obstructions since 1929, the statutes contained no definition of stream until 2013, as discussed below. The chief engineer of DWR, however, first defined “stream” in regulations in the year 1987. At the heart of this discussion on definitions is the recent pivotal case of Frank v. Kansas Department of Agriculture. This section will conclude with a look at post-Frank statutory changes to the definition of a stream.


#### 1. Facts

Acting on a permit obtained from DWR, Frank dug a groundwater pit on his land. As a condition to approval of the permit, DWR required Frank to construct an embankment around the pit to avoid untreated surface-water runoff from entering into the pit and contaminating the groundwater supply. Frank built the pit in compliance with his permit along a depression in his land that intermittently drained water from the surrounding watershed.

The location of the pit, and surrounding berm, caused water to back up onto his neighbor’s property. Upon receiving complaints from Frank’s neighbor, the chief engineer of DWR concluded that Frank had obstructed a stream and needed an additional permit. Frank appealed that decision, arguing that no stream existed.

#### 2. Statutes and regulations at issue in Frank

Central to the Frank case was the stream obstruction statute. Contained in K.S.A. 82a-301, the language in effect at the time broadly prohibited the building of any obstruction within a stream or changing the course of a stream. When Frank was decided in 2008, this statute contained no definition of a stream. The stream obstruction statute will be discussed in much greater detail later in this article.

Despite the fact that K.S.A. 82a-301 failed to define a stream, DWR had adopted a regulation defining a stream. At the time of the decision, the relevant regulation was K.A.R. 5-40-1(k), which defined a stream as “any watercourse that has a well-defined bed and banks” that exists within a watershed meeting the requisite acreage requirement above the geographic point in question. Under that regulation, the acreage threshold for the watershed depended on the county in Kansas where the alleged stream was located, with the state being divided into three geographic zones with the following acreage requirements: 240 acres in eastern Kansas, 320 acres in central Kansas and 640 acres (a full square mile) in western Kansas.

The definition further stated that the “stream need not flow continuously and may flow only briefly after a rain in the watershed.” Finally, the definition provided that even if no discernible bed and banks existed, yet the requisite watershed size was met, then a presumption existed in favor of the existence of a stream. That presumption could only be overcome by the landowner providing “conclusive” evidence to the contrary.

#### 3. Holding in Frank

Frank argued that the location in question did not contain a stream because there was no evidence of a bed or banks in the immediate years prior to his construction efforts. DWR, on the other hand, reasoned that Frank must show that no stream existed at any time since 1929, the year the stream obstruction statute was adopted. To support its conclusion that a stream existed, DWR produced a 1955 U.S. Geological Survey map showing a stream and proof that the Kansas Department of Transportation (KDOT) had built a large culvert under a bridge near Frank’s property.

The court upheld the agency’s interpretation of the definition of a stream. It adopted the approach that the landowner has the burden of proving that since 1929 no stream existed and that a stream can exist even when water only flows occasionally. Underlying the court’s decision was the law affording deference to agency interpretations of statutes. The court noted, “Defeance to an administrative agency is of course greatest when the agency must apply special training or expertise in administering a statute.”

#### 4. Implications of Frank

Because of the sweeping definition adopted in Frank, a heavy burden is placed on a landowner who attempts to avoid state regulation when a potential watercourse exists. Because that burden is difficult to overcome, even when a landowner escapes the tentacles of federal oversight, state regulations will likely apply. Thus, a thorough discussion of state statutes and agency rules will be presented later in this article.

The court attached significance to the fact that Frank’s actions flooded his neighbor’s property. Although perhaps not attempting to limit its opinion to the narrow facts of the case, the court wrote, “When the construction of a barrier to waterflow causes changes to the amount of water flowing onto other properties, application of the chief engineer’s presumption is quite rational.” The court left the door open to the possibility that a case may arise in which “applying the chief engineer’s presumption would be so unreasonable that a court would reverse the administrative decision.”

### B. The new definition of a stream in Kansas

In the 2013 legislative session, undoubtedly in response to the Frank case, the Kansas legislature adopted a new definition of a stream that is now part of revised K.S.A. 82a-301. The statute defines a “designated stream” as “a natural or man-made channel that conveys drainage or runoff from a watershed” meeting the requisite acreage requirements. Significantly, the definition incorporates watershed thresholds different from DWR’s definition.
In addition to different acreage requirements, other facets of the definition are noteworthy. Unlike the agency definition, the statutory definition encompasses “man-made channels.” The definition is also conceivably broader than the regulation because it abandons the concept of “a well-defined bed and banks.” The definition contained in K.S.A. 82a-301 also appears limited only to situations where a potential dam or stream obstruction exists. The DWR definition, which has remained unaltered since the Frank case, arguably applies under all other circumstances.

### IV. Overview and Recent Changes to Dam and Stream Obstruction Regulations in Kansas

#### A. Brief overview and background

As mentioned above, K.S.A. 82a-301 mandates that before constructing, modifying, or adding to any dam or stream obstruction, or altering the course of a designated stream, a landowner must first obtain approval from the chief engineer of DWR. K.S.A. 82a-301a empowers DWR to oversee “exclusive regulation” of the “construction, operation and maintenance of all dams or other water obstructions” in the state of Kansas to ensure the “protection of public safety.” The chief engineer may adopt rules and regulations to enforce and administer any rules relating to dams and other water obstructions. Consequently, both statutes and agency regulations will be discussed below. Unlike other areas of law governing surface water, the following requirements have roughly equal application in both rural and urban areas, with only a few exceptions.

A number of enforcement mechanisms exist to ensure compliance with the statutes and regulations regarding dams and stream obstructions. If the chief engineer finds a dam or water obstruction has been constructed in violation of the applicable rules, the chief engineer may order the landowner to correct the violation or even may order the removal of the dam or stream obstruction. If the landowner still fails to comply, the chief engineer may then file a civil lawsuit and seek a mandatory injunction. A landowner can also face criminal prosecution for ignoring an order of the chief engineer.

### B. Rules governing dams

With House Bill 2363 in the 2013 session, the Kansas legislature revised the rules governing dams. A “dam” is defined as any “artificial barrier” with the ability to impound water with a structure height of at least 25 feet or a height of 6 feet where the structure impounds more than 50 acre feet of water. Any landowner desiring to construct, modify, or repair a dam must first obtain a permit. An owner of a dam is further responsible for periodic inspections, repairs, and liability concerns associated with the dam.

According to K.S.A. 82a-302, when applying for a permit, a landowner must provide maps, plans, a design report, and specifications along with the completed application form. A fee of $200 must also accompany the application. The legislature revised K.S.A. 82a-302 to eliminate the presumption in favor of approval by the chief engineer in cases in which the application has first been reviewed by an approved licensed engineer. Depending on the project, exceptions to the dam permitting process may exist.

#### C. Rules regarding stream obstructions

K.A.R. 5-40-1(aaa) defines a “stream obstruction” as “any project or structure that is wholly or partially placed or constructed in a stream and that does not meet the definition of a dam.” Pursuant to that broad definition, virtually any activity impacting a stream could constitute a stream obstruction. In situations similar to those involving dam regulations, before constructing, modifying, or adding to a stream obstruction, a landowner must first submit an application along with a fee. The fee depends on the size of the watershed impacted by the project. As with a dam, an application to obstruct a stream must include a variety of plans, maps, and specifications.

House Bill 2363 carved out a number of exceptions to the above permitting rules. The first is the minor project exemption. That exemption applies when the activity (1) impacts less than 25 feet of the stream length, (2) obstructs less than five percent of the channel cross section, and (3) the floodplain fill outside the channel does not exceed one foot in depth. Another exemption of great significance to farmers and other landowners living in unincorporated areas is the rural stream obstruction exemption. That exemption applies if the obstruction (1) is not a dam, (2) is located in a rural area, (3) has a watershed of five square miles or less, and (4) every part of the obstruction, including impounded water, exists at least 300 feet from neighboring property boundaries. Two other new exemptions of lesser applicability are the low hazard dam exemption and the feedlot structure exemption. A final exception, adopted by DWR in a regulation, exists in cases in which the landowner can show that the structure is temporary in nature.

#### D. Changes to fee section

House Bill 2363 changed virtually the entire fee structure for dams, stream obstructions, and alterations of streams. Overall, the new fee requirements are greatly simplified. One significant change in the fee requirements is the elimination of the “after-the-fact” permit fees that applied in the event a landowner had already begun construction on the dam, stream obstruction, channel change, or aggregate removal project.

#### E. Other permit requirements

In addition to the permits outlined above, a host of other federal, state, and local permits may be required for any given project impacting waterways. Virtually the same require-
ments that exist for stream obstructions apply when a landowner wishes “to change or diminish the course, current, or cross section of a stream.” Additionally, when the legislature amended K.S.A. 82a-302, it added the concept of a general permit. Neither the legislature nor DWR has yet fully defined the applicability of a general permit.

Regulated in a wholly different statutory section, a separate type of permit is required to construct, modify, or repair a levee or place fill within a floodplain of a designated stream. The nature of the operations on the stream may necessitate a landowner to obtain a separate permit for the appropriation of water. When water quality is potentially impacted, KDHE may require its own series of permits. Finally, a given project may involve the need to seek federal or local permits.

V. Conclusion

Before interfering with a streambed, a landowner must consider many things, including the legal ramifications. The rules governing streams in Kansas have shifted and expanded dramatically in the last several years. With a growing Kansas population, water will increasingly become both a valuable commodity and a detriment, and, just as a watercourse changes, regulations governing streams will continue to evolve.

ABOUT THE AUTHORS

Tom Adrian is a partner at Adrian & Pankratz P.A. and has served as lead counsel for Equus Beds Groundwater Management District since its inception in 1975. He completed both his undergraduate and law degrees at Washburn University.

Dave Stucky is a partner at Adrian & Pankratz P.A. and completed his undergraduate degree, summa cum laude, at Bethel College, and his law degree, magna cum laude, at Washburn University School of Law, where he served on moot court and as comments editor for the law review.

REFERENCES


2. Opinion to the Honorable Tim Tedder, State Representative, 101st District, Att’y Gen. No. 2000-51, 2000 Kan. AG LEXIS 64 (Oct. 4, 2000) (opining that “the bed and banks, up to the line to which water rises in time of ordinary high water, are public property that can be used by the public for lawful or non-destructive recreational purposes”).

3. Navigability in fact can be simply defined as whether a river had the capacity for commercial navigability at the time of statehood. See Webb v. Neosho Cnty. Comm’n, 124 Kan. 38, 257 P. 966 (1927) (holding the Neosho River nonnavigable). The Webb Court adopted the following more detailed definition: “Navigability in fact is the test of navigability in law, and that whether a river is navigable in fact is to be determined by inquiring whether it is used, or is susceptible of being used, in its natural and ordinary condition as a highway of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.” 124 Kan. at 40 (quoting Oklahoma v. Texas, 258 U.S. 574, 586, 66 L. Ed. 771, 42 S. Ct. 406 (1922)). For a helpful overview of the state test of navigability see James B. Wadley, Recreational Use of Nonnavigable Watersways, 56 J. Kan. Bar Ass’n 9, 28-29 (1987).

4. State ex rel. v. Akers, 92 Kan. 169, 140 P. 637 (1914); Dana v. Hurst, 86 Kan. 947, 964, 122 P. 1041 (1912); Wood, 26 Kan. at 682; see also K.A.R. 5-40-1(kk).

5. See, e.g., Gibbons v. Ogden, 22 U.S. 1, 6 L. Ed. 23 (1824); The Daniel Ball, 77 U.S. 557, 19 L. Ed. 999 (1870); see also U.S. Const. art. I, § 8, cl. 3.


7. Perhaps the most common federal statute applying to navigable waterways deals with section 404 permits under the Clean Water Act. See 40 C.F.R. 230.1 (2014) et seq. The purpose of those permits is to control the discharge of dredge or fill materials into waters of the United States. See id. Another federal law pertains to obstructions and structures in navigable waters under the Rivers & Harbors Act of 1899, which gives the Army Corps of Engineers authority to require Section 10 permits to place structures or conduct other operations below the ordinary high water elevation of navigable waters. See 33 U.S.C. 401 (2014) et seq.


9. State ex rel. Meek v. Hay, 246 Kan. 99, 785 P.2d 1356 (1990). When the stream serves as the border between two properties, the riparian owner of the property on each respective side owns the bed up to the middle of the stream. See id. Hay was a case involving a canoeing business operating on the Shoal Creek in Cherokee County. Id. at 100, 108-09. Canoeists complained after a landowner constructed barbed wire across the stream, which prevented them from further canoeing downstream. Id. at 100. The court utilized the navigability-in-fact test and determined that the stream was nonnavigable. Id. at 101-03. Significantly, however, the court left open the possibility of the legislature adopting the public trust doctrine which could conceivably allow the legislature to designate nonnavigable streams for public recreational use. Id. at 111; accord Wadley, supra note 3, at 30 (noting that the state could open up navigable waters to recreational use). In addition to the Neosho River and Shoal Creek, the Kansas Supreme Court has declared the Delaware and Smoky Hill Rivers to be nonnavigable. Piazzek v. Drainage Dist., 119 Kan. 119, Syl. § 2, 237 P. 1059 (1925); Kregor v. Fogarty, 78 Kan. 541, Syl. § 3, 96 P. 845 (1908).

10. See Meek, 246 Kan. at 111.

11. For the purposes of this article, “riparian” shall refer to the interface between land and a stream. See Dawson v. Akers, 92 Kan. 169, 140 P. 637 (1914).


15. See Dougan v. Rouville Drainage Dist., 243 Kan. 315, 757 P.2d 272 (1988); Clason v. Garrison, 3 Kan. App. 2d 188, 592 P.2d 117 (1979). The definition of diffused surface water is actually quite broad and may include “water from rain, melting snow, springs or seepage, or detached from subsiding floods, that lies or flows on the surface of the earth but does not form a part of a watercourse or lake.” RESTATEMENT (SECOND) OF TORTS § 846 (2011).
16. Cf. K.S.A. 82a-702 ("All water within the state of Kansas is hereby dedicated to the use of the people of the state, subject to the control and regulation of the state in the manner herein provided.").

17. Different rules apply depending on whether the watercourse is located in a rural or an urban area. In cities, the so-called "common enemy" rule applies where landowners can freely cast unwanted water onto their neighbor's property so long as such actions do not alter the natural drainage pattern. Williams v. City of Hays, 275 Kan. 300, 64 P.3d 364 (2003); Baldwin v. The City of Overland Park, 205 Kan. 1, 468 P.2d 168 (1970). For agricultural land and highways located outside of incorporated cities the so-called "civil law" rule has been adopted where landowners "may not divert their surface waters by artificial means onto the lands of lower proprietors nor accelerate by means of ditches or increase the drainage of their lands to the injury of lower owners." Clawson, 3 Kan. App. 2d at 203; see also K.S.A. 24-105.


26. Id. at 1026.

27. Id.

28. Id.

29. Id.

30. Id. In addition to notifying the agency, a neighboring landowner harmed by the obstruction of a stream could potentially have filed a lawsuit under a number of common law theories including negligence, nuisance, trespass, inverse condemnation, and actions for injunctive relief. See Coykendall, supra note 18 (providing a discussion of those more common causes of action).

31. Id.

32. Id. at 1028.

33. See id.

34. Id. at 1029. The court indicated that because the statute did not define a stream, it could look to a regulation. Id. As noted by the court, the agency was free to adopt regulations to "administer and enforce" the stream obstruction statute, as provided in K.S.A. 82a-303a. Id. at 1028-29.

35. Id. at 1029. Note that this definition is now K.A.R. 5-40-1(zz). DWR defines a "watershed" as "the area draining toward a selected point on a stream." K.A.R. 5-40-1(ddd).

36. K.A.R. 5-40-1(zz) (2008). There was no dispute among the parties that the watershed requirement was clearly met in the case. 40 Kan. App. 2d at 1029.


38. Id.

39. Id.

40. 40 Kan. App. 2d at 1034. The DWR even conceded that "because of human activity . . . no distinct stream channel was visible" on Frank's land or a mile upstream "since at least 1991." Id. at 1030.

41. Id. at 1029. Frank contended that the caveat forcing a landowner to prove the absence of a stream "all the way back to 1929" was a "phantom requirement." Id. The court countered that inserting a temporal limitation actually benefited a landowner. Id. at 1030.

42. Id. at 1033. The chief engineer also produced calculations that showed that the watercourse drained an area of 4,165 acres and that peak flow in a 100-year storm would be 1,600 cubic-feet-per-second, which was all consistent with the design capacity of the bridge constructed by Kansas Department of Transportation. Id. at 1030.

43. Id. at 1032.

44. Id. at 1032-33. The court noted that the chief engineer's definition of a watercourse roughly paralleled the early Kansas case of Wood v. Brown, 98 Kan. 597, 599, 159 P. 396 (1916), which had indicated that a watercourse required "an eroded channel with clearly distinguishable bed and banks." Id. at 1032. The court further concluded that the broad definition was consistent with the statutory purpose of protecting public safety. Id. at 1033. Finally, the court noted that the "legislature prohibited stream obstructions from 1929 onward" and that the presumption only applied to "watersheds of substantial acreage." Id. at 1033.

45. Id. at 1033. Other recent cases involving the DWR, however, have created a reason to question the extent to which deference will be afforded to the agency's decisions. See, e.g., Clawson v. State, 49 Kan. App. 2d 789, 315 P.3d 896 (2013); Wheatland Elec. Coop. Inc. v. Polansky, 46 Kan. App. 2d 746, 265 P.3d 1194 (2011).

46. Id. at 1031; see also K.S.A. 77-621. The court concluded that the agency employed special knowledge and training in reaching its conclusion and also noted that K.S.A. 74-506d cloaked the agency with the power to use its expertise in arriving at such decisions. Id.

47. It remains to be seen, for example, whether routine farming activities under the right circumstances could constitute a water obstruction.

48. See id. at 1033-34.

49. Id. at 1033 (emphasis added). The opinion at least invites the question of whether the presumption applies where no neighboring landowner is harmed. Indeed, a central tenet of water and property law is that "thou shalt not anger thy neighbor." See Tyler A. Darnell, Attention Kansas Water Right Holders: Be Nice to Your Neighbors, They're Policing Your Water Rights, 46 Washburn L.J. 429 (Winter 2007).

50. Frank, 40 Kan. App. 2d at 1033.

51. K.S.A. 82a-301.

52. Id.

53. Id.

54. Id. This approach is likely in response to a Kansas Supreme Court case that held that a man-made structure can become part of the natural watercourse over time. See Johnson v. Bd. of Cnty. Comm’rs, 21 Kan. App. 2d 76, 897 P.2d 169 (1995) (determining that after 62 years, configuration of a stream, as altered by construction of a bridge, would be considered a natural watercourse). Additionally, there is no definition of a "channel" contained either in the statute or in the agency regulations.

55. Id.

56. See K.A.R. 5-40-1(zz). The DWR definitions also define a "perennial stream" as "a stream, or part of a stream, that flows continuously during all the common calendar year, except during an extreme drought." Id. at 5-40-1(m). The definition of a perennial stream has significance in regulations that deal with channel changes, stream obstructions, levees, and the disposal of waste. See K.A.R. 5-41-1, 5-42-1, 5-45-1, 5-45-2, 28-29-1602, 28-29-1604.

57. K.S.A. 82a-301.

58. Id. The statute goes on to indicate that its purpose serves to protect "life and property." Id.

59. K.S.A. 82a-303a. The immense discretion of the chief engineer in administering and adopting regulations is exemplified by K.A.R. 5-40-6 which allows the chief engineer both to waive the requirements of the streambed regulations and to impose stricter requirements than the promulgated regulations. K.A.R. 5-40-6; accord K.S.A. 82a-303 (allowing the chief engineer to withhold consent or to attach conditions and restrictions to permits); but see Clawson, 49 Kan. App. 2d at 789 (limiting the restrictions the chief engineer can impose when approving a water right).

60. See, e.g., notes 14-17 and accompanying text, supra.

61. An example of a statute that may have unequal import in a rural versus an urban area is a county's ability to clean out debris from a stream upon the petition of at least 50 taxpayers of the county. K.S.A. 82a-307 with K.S.A. 2012 Supp. 82a-307. The legislature significantly revised that section to restrict a county from entering onto private land without written permission from the landowner. Compare K.S.A. 82a-307 (2013) with K.S.A. 2012 Supp. 82a-307.

62. K.S.A. 82a-303c.

63. K.S.A. 82a-305a(b).

64. This is a class C misdemeanor. Id. at 82a-305a(a).

65. The changes went into effect July 1, 2013.

66. This is measured as the "vertical distance . . . from the bed of the stream . . . to the lowest elevation on the top of the dam or barrier." K.A.R. 5-40-5a.

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Streambed Regulation

K.S.A. 82a-301(b)(1); see also K.A.R. 5-40-5a (defining height of dam). Although there are subtle changes, overall the new definition of a dam is more concise and straightforward than the old definition. Compare K.S.A. 82a-301(b)(1) (2013) with K.S.A. 2012 Supp. 82a-301(b)(1). See also K.S.A. 82a-303b; K.A.R. 5-40-76, 5-40-93. An exception to this rule exists in cases in which an easement authorizes another person or entity to construct or maintain the dam. K.A.R. 5-40-1(mm).

K.S.A. 82a-302(a). For a more detailed explanation of the maps and documentation that must accompany an application to construct a dam, see K.A.R. 5-40-2; K.A.R. 5-40-2a; K.A.R. 5-40-2b; K.A.R. 5-40-3; see also K.A.R. 5-40-8 (detailing the requirements of an acceptable application). The type of application form depends on the nature of the project; for example, Form 2-100 applies if the project relates solely to a dam or stream obstruction, and Form 6-102 is a joint application for a stream obstruction and the appropriation of water. K.S.A. 82a-302(b)(1).

K.S.A. 82a-301(a). The old statute allowed the applicant to pick from a list of licensed engineers approved by the chief engineer. Compare K.S.A. 82a-301 (2013) with K.S.A. 2012 Supp. 82a-301. If an approved engineer determined that the application met established standards a presumption was created in favor of approval by the chief engineer. Compare K.S.A. 82a-301 (2013) with K.S.A. 2012 Supp. 82a-301. Despite that modification, “a licensed professional engineer who is competent in the design and construction of dams” must still design the dam. K.A.R. 5-40-3. Even if the regulations did not make the use of a licensed engineer a necessary condition for construction of a dam, the design requirements are highly technical and highlight the importance of involving a competent engineer in the project. See, e.g., K.A.R. 5-40-22 (explaining the design requirements); 5-40-23 (involving detention storage); 5-40-24 (mandating a dam breach analysis); K.A.R. 5-40-40 (requiring a geotechnical investigation); 5-40-44 (specifications for embankment); 5-40-50 (rules governing pipes through an embankment); and 5-40-51 (requiring a trash rack for the primary spillway). The project engineer must also coordinate the construction closely with the chief engineer of DWR. See K.A.R. 5-40-70.

See notes 77-80 and accompanying text, infra. Another example of an exception concerns “prejudicial damages.” Prejudicial damages constructed before the adoption of the statutes or regulations are not retroactively subject to the design requirements; however, upon repair or modification, prejudicial damages may also be subject to those rules. See K.A.R. 5-40-1(rr) (defining a prejudicial dam); 5-40-76 (requiring compliance upon repair or modification unless “not feasible or . . . unduly burdensome” or chief engineer determines that the lack of compliance does not impact public safety). Another exception exists where the landowner obtains approval to comply with the requirements of the federal agricultural conservation program and not the provisions of K.S.A. 82a-301 through 305. See K.S.A. 82a-312. K.A.R. 5-40-1(aaa).

K.S.A. 82a-302(b)(2). The applicable fees are as follows: $100 for watersheds of less than 5 square miles, $200 for watersheds between 5 and 50 square miles and $500 for watersheds greater than 50 square miles. Id. This requirement is spelled out in K.A.R. 5-42-1. The applicant must provide maps detailing the nature of the obstruction, a detailed plan, topographical information, an elevation view, a permanent benchmark, proposed easements, or right-of-ways if other land is impacted, and many other details. K.S.A. 82a-301(c)(1)(A). Examples of obstructions that may fall under the exemption are a pipeline or a low water crossing, a mere one square mile. Compare K.S.A. 82a-301 (2013) with K.S.A. 2012 Supp. 82a-301. Free of charge, a landowner can ask for a determination by the DWR regarding whether a sizable enough watershed exists to require a permit. Federal floodplain and other permits may also be required as discussed in notes 87-91 and accompanying text, infra.

The low hazard dam exemption applies to the construction or modification of a Hazard Class A dam that has a height of 30 feet or less and a storage volume of less than 125 acre-feet. K.S.A. 82a-301(d)(1). The feedlot structure exemption applies when a landowner modifies or constructs a Hazard Class A dam used for wastewater storage in a confined animal feeding operation approved by the Kansas Department of Health and Environment (KDHE). K.S.A. 82a-301(d)(2). The hazard classification of a dam refers to the extent to which the failure of the dam would result in damage to property or pose a danger to people. K.A.R. 5-40-1(k). The failure of a Hazard Class C dam represents the highest level of hazard whereas the malfunction of a Hazard Class A dam would impact only uninhabited buildings and agricultural or undeveloped land. See K.A.R. 5-40-20; see also K.A.R. 5-40-1 (defining class sizes of dams).

K.A.R. 5-42-4. Among other requirements, to qualify as “temporary” the regulation dictates that the landowner must use “temporary materials” (such as straw or plywood) to construct the structure and must only perform minor and necessary alterations to the stream. See id. In addition, the water backed up by the obstruction must be contained upon the landowner’s property and must be for a temporary beneficial use. See id. Notably, the regulation does not define what constitutes a “temporary beneficial use.” See id.

K.S.A. 82a-301.

Compare K.S.A. 82a-301 with K.S.A. 2012 Supp. 82a-301.

Id. “After-the-fact” fees remain in place for levee and floodplain fill projects commenced prior to approval of a permit. Id.

K.S.A. 82a-301. For a review of the regulations specifically applicable to channel changes, see K.A.R. 5-41-1 through 5-41-6. The permitting process under section 301 must also be followed if a landowner desires to remove sand or gravel from the bed or banks of a designated stream. K.S.A. 82a-301. For the regulations specific to sand dredging and removal see K.A.R. 5-43-1 through 5-43-5, and 5-46-3; see also K.S.A. 82a-309 (applicable if the activity concerns beds owned by the state) K.S.A. 82a-302(3).

K.S.A. 24-126. A floodplain may also be designated by a federal flood insurance rate map. Id. The appropriate permit is Form 3-100.

For example, Frank originally obtained an appropriation permit to construct a pond. Frank, 40 Kan. App. 2d at 1025. An appropriation permit is required if the water is being impounded for a consumptive or a nonconsumptive use such as for irrigation or recreational purposes. See K.S.A. 82a-707 (2013); K.S.A. 82a-705 (2013); K.S.A. 82a-708a (2013). A discussion of the prior appropriation doctrine is beyond the scope of this article. For an excellent overview of the prior appropriation doctrine in Kansas, see John C. Peck, The Kansas Water Appropriation Act: A Fifty-Year Perspective, 43 U. Kan. L. Rev. 735 (1995).

K.S.A. 28-16-28c (2014). The Kansas Department of Wildlife and Tourism may also require an Endangered Species Permit. See K.S.A. 82a-326. During the permitting process under K.S.A. 82a-301, a variety of additional agencies may be notified by the chief engineer to consider the “environmental effects” of the project. See id.; K.S.A. 82a-327. The chief engineer then “shall consider their comments in determining whether to approve or issue a permit for such project.” K.S.A. 82a-327.

As noted above, the rules governing what constitutes a navigable stream subject to federal regulation are difficult to apply conclusively. See notes 5-8 and accompanying text, supra. Consequently, a gray area exists between state and federal regulation. Where such jurisdiction potentially overlaps, a landowner may be wise to obtain both state and federal permits. Any landowner wishing to alter a stream should contact the local branch of the Natural Resources Conservation Service (NRCS). The NRCS can aid in determining the types of permits required for a given project. Additionally, the failure to involve the NRCS in a project could jeopardize payments stemming from federal crop insurance or federal farm subsidies. In certain instances there may even be subsidies available for the project—for example, if the landowner enhances a nature area. The NRCS can aid in that determination as well.

Examples of local permits include zoning and construction permits issued by county authorities. Although the NRCS has local county branches, as noted above, the NRCS makes broad initial determinations of the types of permits required, including whether Army Corps of Engineers jurisdiction may apply.

Perspective


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In the Supreme Court of the State of Kansas
Rules Relating to the Admission of Attorneys

New Rule 709A is hereby adopted, effective April 2, 2015.

BY ORDER OF THE COURT, this 29th day of January, 2015.

Lawton R. Nuss
Chief Justice

RULE 709A
ADMISSION TO THE BAR BY UNIFORM BAR EXAMINATION SCORE

(a) Any applicant for admission to the bar in Kansas who has taken the Uniform Bar Examination (UBE) in another jurisdiction may be admitted to practice in this state by acceptance of a UBE score, upon showing that the applicant:

(1) has achieved a minimum UBE score of 266 on a 400 point scale from an examination that occurred within 36 months of the date the application for admission to the bar of Kansas is filed;

(2) has requested transfer of the score from the jurisdiction where the score was achieved or from the National Conference of Bar Examiners directly to the Kansas Board of Law Examiners;

(3) has completed the Multistate Professional Responsibility Examination, caused his or her score to be reported to the Clerk of the Appellate Courts, and received a passing score as determined by the Board;

(4) has never failed a written Kansas bar examination;

(5) presently meets the requirements of Rules 706 and 707 to take the Kansas bar examination;

(6) has never received professional discipline of suspension, disbarment, or loss of license in any other jurisdiction;

(7) is not currently the subject of pending disciplinary investigation in any other jurisdiction;

(8) is a person of good moral character and mentally and emotionally fit to engage in the active and continuous practice of law; and

(9) has not previously engaged in the unauthorized practice of law in Kansas or any other jurisdiction.

(b) Each applicant to the bar by transfer of UBE score shall pay an application fee as provided by Rule 704 and shall file in duplicate on forms approved by the Supreme Court and procured from the Clerk of the Appellate Courts:

(1) a verified application for admission; and

(2) such other and further information as the office of the Disciplinary Administrator, the Review Committee, or the Board may require in the consideration of his or her application.

(c) The provisions of Rules 715, 716, 717, 718, and 721 apply to applicants under this rule.

(d) Any application returned to the applicant due to deficiencies, pursuant to Rule 713, will not be considered as timely filed.

(e) When an application under this rule has been considered and approved by the office of the Disciplinary Administrator, the Review Committee, or the Board, the applicant, after providing proof of education as required by Rule 706, will be permitted to take the oath before the Clerk of the Appellate Courts and sign the roll of attorneys. The Clerk shall thereafter issue applicant a certificate of authority to practice law in this State.
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ATTORNEY DISCIPLINE

DISBARMENT
IN THE MATTER OF BART A. CHAVEZ
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 14,646 – DECEMBER 16, 2014

FACTS: In a letter signed on December 15, 2014, addressed to the clerk of the appellate courts, respondent Chavez, an attorney admitted to the practice of law in the state of Kansas, voluntarily surrendered his license to practice law in Kansas. At the time the respondent surrendered his license, complaints had been docketed by the disciplinary administrator’s office in accordance with Supreme Court Rule 217. The complaints alleged that the respondent violated Kansas Rules of Professional Conduct 8.1(b) (2014 Kan. Ct. R. Annot. 670) (bar admission and disciplinary matters), 8.3(a) (2014 Kan. Ct. R. Annot. 678) (reporting professional misconduct), 8.4(a), (d), and (g) (2014 Kan. Ct. R. Annot. 680) (misconduct), Supreme Court Rule 207(a) (2014 Kan. Ct. R. Annot. 342) (cooperating with disciplinary administrator), and Supreme Court Rule 208(c) (2014 Kan. Ct. R. Annot. 356) (registration of attorneys).

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

CIVIL

ADOPTION, TERMINATION OF PARENTAL RIGHTS, AND ATTORNEY FEES
IN RE F.
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 111,253 – JANUARY 23, 2015

FACTS: With the approval of the birth mother, John and Anne sought to adopt a baby girl born in Wichita on December 31, 2012. The girl’s natural father, Lonnie, did not agree to relinquish his parental rights, but the district court terminated his parental rights and granted John and Anne’s adoption petition after a contested, one-day trial. The court concluded that Lonnie had failed without reasonable cause to provide support for the birth mother during the six-month period before the child’s birth, that he was unfit as a parent, that he had abandoned the mother after learning of the pregnancy, and that he had made no reasonable efforts to support the child after her birth. Before trial, the court had found that Lonnie was partially indigent and had ordered that he pay $500 toward his attorney’s fees. Lonnie paid $100. Lonnie’s attorney, Eric Hartenstein, presented a total bill to the court of $5,622.77. That amount reflected Lonnie’s $100 payment; it also included expenses of $262.77 ($105 for serving court papers and $157.77 for a deposition transcript). The rest of the bill reflected Hartenstein’s time spent on the case at $150 per hour.

John and Anne argued in the district court that Hartenstein should be limited to $80 per hour based on the fee paid in criminal cases. The district court concluded that it had the discretion to award that or a higher amount, and awarded $5,360 in fees and $262.77 in expenses.

ISSUES: (1) Adoption, (2) termination of parent rights, and (3) attorney fees

HELD: Court held fee award in this case was authorized by K.S.A. 59-2134, which has no language limiting the court’s discretion in determining the proper amount of the attorney fees. Court stated that K.S.A. 22-4507, which applies only to attorneys appointed to represent indigent criminal defendants, does not set a limit on fees in other type of cases. Court similarly awarded attorney fees and expenses against John and Anne for the work performed on appeal in the amount of $3,853.02.

STATUTES: K.S.A. 22-4507; and K.S.A. 59-2134

CHILD CUSTODY
CHENEY V. POORE
RAWLINS DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
COURT OF APPEALS – REVERSED
NO. 110,007 – DECEMBER 19, 2014

FACTS: Jeanna Cheney and Zachary Poore had two children – one was from a prior relationship Cheney had with another man. After the parties separated, the district court found that Zachary was the natural biological father of the younger sister, that both parents dearly loved the children, and that both were fit to be awarded the joint legal custody of the younger sister. The decision also noted that Zachary was the only father the older sister had ever known but that he had no standing to request parenting time with her because he was not the biological father or stepparent. The court held, however, that it could divide custody of the children in an exceptional case and that this was an exceptional case. The court held that to have both sisters principally reside with Jeanna with only the younger sister allowed to singly leave the home to exercise visitation with Zachary who is the only father both
ISSUE: Child custody

HELD: Court agreed with the Court of Appeals that the district court erred in applying K.S.A. 2013 Supp. 23-3207(b) (dividing the residency of full siblings between their parents) to the residential custody determination before it. However, Court disagreed with the Court of Appeals, and would not overlook this error and held that the district court’s memorandum decision showed that the error led to the district court’s decision to award residential custody of the younger sister to Zachary. Court reversed the district court’s residential custody award and remanded the case back to the district court so it could make findings of fact and conclusions of law consistent with the correct legal standards.


DIVORCE IN RE MARRIAGE OF TRASTER
SEDGWICK DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART AND REMANDED
COURT OF APPEALS – REVERSED IN PART AND AFFIRMED IN PART
NO. 106,092 – DECEMBER 19, 2014

FACTS: Husband, an attorney drafted 2004 postnuptial agreement for distribution of property upon dissolution of marriage, with attorney fees to be paid by party challenging the agreement. Husband initiated divorce proceedings in 2007 and claimed agreement was void because it gave wife a significantly lopsided distribution of property and assets. District court agreed, found the agreement was a separation agreement under K.S.A. 60-1610(b)(3), voided the agreement on public policy grounds because it encouraged husband to divorce to protect future assets, allocated couple’s property and assets for just and reasonable outcome under K.S.A. 60-1610(b)(1), and denied wife’s claim for attorney fees. Wife appealed, arguing the postmarital agreement was not governed by statute. Court of Appeals reversed, holding the agreement should be upheld and its provisions enforced. 48 Kan. App. 2d 356 (2012). Panel recognized two types of postnuptial agreements: (a) those governed by K.S.A. 60-1610(b)(3), and (b) all others to be governed by common-law rule with six factor test adopted by the panel based on whether spouses intended to remain married when entering into the agreement. Because agreement in this case was entered into before parties intended to divorce, K.S.A. 60-1610(b)(3) not applicable. Panel also reversed district court’s denial of wife’s attorney fee claim, and remanded for calculation of appropriate fee under the agreement’s indemnity provision. Husband’s petition for review granted.

ISSUES: (1) “Separation agreement” in K.S.A. 60-1610(b) (3) and (2) statutory requirement for valid, just, and equitable agreement

HELD: Issue of first impression in Kansas whether K.S.A. 60-1610(b)(3) governs marital agreements entered after marriage when parties intend to stay married. Common-law and statutory background is reviewed. Absent legislative clarification, court holds the term “separation agreement” in K.S.A. 60-1610(b)(3) includes all agreements, entered during marriage, that provide for a spouse’s property rights in the event of divorce or separation, regardless of whether the parties intend to remain married at time of agreement’s execution. District court’s ruling that the 2004 agreement is a separation agreement under K.S.A. 60-1610(b)(3) is affirmed. Court of Appeals decision to the contrary is reversed.

District court’s ruling that the agreement is void as against public policy is reversed. Common-law analysis of whether property division in a separation agreement tends to “invite and encourage” divorce was abrogated when legislature adopted “just and equitable” requirement in K.S.A. 60-1610(b)(3). That public policy inquiry in Ranney v. Ranney, 219 Kan. 428 (1976), is disavowed in context of separation agreements governed by K.S.A. 60-1610(b)(3)’s “just and equitable” prong. Case remanded to district court for more detailed review into whether the agreement is just and equitable under K.S.A. 60-1610(b)
1610(b)(3) under the circumstances, and whether the indemnity provision requires assessment of attorney fees.

CONCURRENCE AND DISSENT (Rosen, J., joined by Johnson, J.): Agrees with majority but for its decision that remand is necessary to determine whether the agreement is just and equitable. Would find the agreement and indemnity provision contemplating attorney fees valid and enforceable against husband as scrivener and legal expert in the formation of the agreement.

STATUTES: K.S.A. 2013 Supp. 23-2712, -2802; K.S.A. 20-3018(b); K.S.A. 23-201, -801 et seq., -802, -807; K.S.A. 60-1610, -1610(b)(1), -1610(b)(3), -2101(b); K.S.A. 77-109; and K.S.A. 60-1610, -1610(b), -1610(d) (Corrick 1964)

JURISDICTION AND FINAL DECISION
KAELTER V. SOKOL ET AL.
JOHNSON DISTRICT COURT – APPEAL DISMISSED
COURT OF APPEALS – VACATED
NO. 107,401 – JANUARY 23, 2015

FACTS: In 2007, Kaelter sued her long-time boyfriend, Sokol, seeking determinations of paternity, custody, and support; and an equitable division of the parties’ jointly acquired assets. The parties have hotly contested these issues and others at every turn. After Kaelter filed suit, the district court referred the matter to a special master, who made findings of fact and conclusions of law without conducting formal hearings. Over Sokol’s objection, the district court adopted those findings and conclusions and entered judgment on the master’s report without hearing evidence. The judgment included an order that Sokol pay Kaelter a sum representing the minor child’s unreimbursed medical expenses. On the parties’ motions for reconsideration, the district court entered additional orders, including its decision to make its own determination regarding the unreimbursed medical expenses. Sokol appealed, arguing about the district court’s refusal to hold an evidentiary hearing; the master’s failure to conduct proceedings in accordance with K.S.A. 60-253 (setting out procedure for trial by special masters); and whether Sokol timely appealed based on whether various motions for reconsideration filed with the district court after each of its rulings tolled the time to appeal. The Court of Appeals held that Sokol failed to timely appeal portions of the judgment but could pursue one issue relating to the failure of the master to take an oath. The panel then affirmed the district court’s order, ruling that Sokol failed to exercise reasonable diligence to object when he first learned the master did not take an oath while the master was still working on the case. Kaelter, 2013 WL 1876444, at *8. After the panel filed its opinion, it granted Kaelter’s request for appellate costs and attorney fees.

ISSUES: (1) Jurisdiction and (2) final decision
HELD: Court stated that the jurisdictional issue arises because the district court’s written journal entry memorializing the additional orders, filed October 27, 2010, indicated that the district court could not at that time “determine an appropriate division of past medical expenses” due to a lack of sufficient documentation. The journal entry further stated that the district court anticipated the filing of a future motion for those unreimbursed medical expenses and an exchange of information between the parties in the hope that a resolution could be reached. Court found the record on appeal did not show the
issue was ever resolved before Sokol initiated the appeal. Court held the district court did not enter a final decision, having left unresolved the unreimbursed medical expenses issue. Therefore, the Court of Appeals lacked jurisdiction. For that reason, the judgment of the Court of Appeals affirming the district court was vacated. Court applied the same rationale and vacated the panel’s order awarding costs and attorney fees to Kaelter, which Sokol challenged in his briefing as an abuse of discretion.

STATUTES: K.S.A. 20-3018; K.S.A. 23-2216; and K.S.A. 60-253, -2102

KANSAS TORT CLAIMS ACT, NOTICE, AND MUNICIPAL EMPLOYEES
WHALEY V. SHARP
CLARK DISTRICT COURT – REVERSED AND REMANDED
COURT OF APPEALS – REVERSED NO. 107,776 – DECEMBER 24, 2014

FACTS: Krier died after treatment at Ashland Health Center. Whaley, Krier’s adult daughter, submitted a notice of claim to Ashland asserting claims against the hospital for the alleged negligence of its employees, including nursing staff, Sharp and Bigler. Four days after submitting the notice of claim to the hospital, Whaley commenced two lawsuits, each naming Sharp and Bigler as defendants, but the hospital was not a defendant in either case. The district court granted summary judgment to Sharp in both suits, ruling that Whaley was required to comply with the statutory notice requirements of the Tort Claims Act and the 120-day waiting period mandated by K.S.A. 12-105b(d). The Court of Appeals affirmed the district court and the conclusion that the statutory notice is still required when the lawsuit is filed only against a municipal employee.

ISSUES: (1) Kansas Tort Claims Act, (2) notice, and (3) municipal employees

HELD: Court held the statutory notice requirement in K.S.A. 12-105b(d) refers only to claims against a municipality and does not apply to claims made against a municipal employee. Consequently, failure to comply with the statute does not deprive a district court of jurisdiction over a lawsuit against a municipal employee. Court stated its decision necessarily overrules King v. Pimentel, 20 Kan. App. 2d 579, 890 P.2d 1217 (1995). Court remanded to the trial court for further proceedings.

STATUTES: K.S.A. 12-105a, -105b(d); K.S.A. 40-3401, -3403; K.S.A. 60-256, -513, -2102; and K.S.A. 75-6101

CRIMINAL

STATE V. CASTLEBERRY
LYON DISTRICT COURT – AFFIRMED
COURT OF APPEALS AFFIRMED NO. 106,600 – DECEMBER 24, 2014

FACTS: Castleberry sought review of the Court of Appeals’ decision affirming his jury trial convictions and sentence for obstruction of official duty, distribution of methamphetamine, unlawful use of a communication facility to arrange a drug sale, failure to affix a drug tax stamp, and fleeing or attempting to elude a police officer. State v. Castleberry, 48 Kan. App. 2d 469, 293 P.3d 757 (2013). Castleberry arranged to sell methamphetamine to a police informant in a telephone conversation and then, after effecting the sale in a park, led police on a high-speed chase before being subdued and arrested. On petition for review from the Court of Appeals, Castleberry argued: (1) The state failed to establish that Castleberry used a communication facility in Lyon County so as to establish venue on that charge; (2) the district court’s failure to instruct the jury on the definition of a moving violation for purposes of fleeing and eluding was clearly erroneous; (3) the district court’s failure to give a unanimity instruction on the obstruction of official duty charge was clearly erroneous; (4) the state presented insufficient evidence on all of the instructed alternative means of committing distribution of methamphetamine; and (5) the district court violated his rights under the Sixth and 14th amendments to the U.S. Constitution when it sentenced him to an increased sentence based upon his criminal history without requiring the state to prove it to a jury beyond a reasonable doubt.

ISSUES: (1) Venue for unlawful use of a communication facility, (2) jury instructions, (3) sufficient evidence, and (4) criminal history

HELD: Court affirmed Castleberry’s convictions. Court held venue to prosecute an alleged drug dealer for the crime of unlawful use of a communication facility is proper in the county where a potential drug purchaser initiates a telephone call to the dealer when the dealer knows the location of the caller and intentionally uses that telephone communication to facilitate the sale of drugs. Court held that engaging in reckless driving or committing five or more moving violations are “options within means,” rather than alternative means. Accordingly, the state was not required to prove both reckless driving and the commission of five or more moving violations. Therefore, it was not clearly erroneous to fail to instruct upon the definition of a moving violation in this case because ample evidence supported one of the options within a means—reckless driving—upon which the jury was instructed. Court held because Castleberry’s actions were all part of one continuous act, unbroken by a fresh impulse, this was not a multiple acts case. Consequently, the district court did not err in failing to give a unanimity instruction. Court held Castleberry conceded that the state presented sufficient evidence that he actually and/or constructively transferred methamphetamine to Foltz. Because the state was not required to also present evidence that he attempted to transfer methamphetamine, Castleberry’s conviction was supported by sufficient evidence and was affirmed. Court denied Castleberry’s criminal history issues based on State v. Ivory, 273 Kan. 44.

STATUTES: K.S.A. 8-1568; K.S.A. 21-36a01, -36a05, -36a07; and K.S.A. 22-2602, -2603, -3414

STATE V. HOBBS
LYON DISTRICT COURT – AFFIRMED

FACTS: In fight outside a bar, Hobbs punched victim, who sustained serious injury when he hit his head on car bumper as he fell. Hobbs was convicted of aggravated battery. On appeal he argued that insufficient evidence supported the conviction. Court of Appeals affirmed in unpublished opinion. Supreme Court accepted Hobbs’ petition to review appellate panel’s conclusion that aggravated battery under K.S.A. 2011
Supp. 21-5413(b)(1)(A) requires state to prove only that the defendant’s act that caused great bodily harm or disfigurement was intentional, not that the result of the act was intentional.

ISSUE: Aggravated battery statute

HELD: History and construction of aggravated battery statute examined. K.S.A. 2011 Supp. 21-4513(b)(1)(A) requires state to prove that aggravated battery defendant acted while knowing that some type of great bodily harm or disfigurement of another person was reasonably certain to result. State not required to prove that the defendant intended the precise harm the victim suffered. On record in this case, state presented sufficient evidence for jury to reasonably infer that Hobbs acted while knowing some type of great bodily harm or disfigurement was reasonably certain to result from the punch, even if Hobbs did not anticipate the victim’s precise injury.

STATUTES: K.S.A. 21-3201, -3414; K.S.A. 2011 Supp. 21-5202, -5202(f), -5202(g), -5202(i), -5413, -5413(b), -5413(b)(1)(A); and K.S.A. 1993 Supp. 21-3414a(c)

STATE V. MECKS

WYANDOTTE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED

FACTS: Meeks, claiming battered woman syndrome from years of abusive and manipulative mistreatment, was convicted of second-degree intentional murder in shooting death of former partner. She appealed, claiming that district court erred in (1) refusing her request to establish self-defense claim based on battered woman syndrome, and (2) granting state’s motion in limine barring evidence of specific instances of victim’s abusive and violent acts. Court of Appeals affirmed in unpublished opinion, finding Meeks had not asserted self-defense claim at trial, and alternatively, trial evidence would not have supported that claim. Meeks’ petition for review was granted to consider panel’s holding that State v. Stewart, 243 Kan. 639 (1988), precluded any claim of self-defense regardless of whether Meeks suffered from battered wife syndrome.

ISSUES: (1) Right to present a defense and (2) evidence supporting claim of self-defense

HELD: Meeks did not assert claim of self-defense or give any indication to district court that she was attempting to assert self-defense claim at trial. Meeks had no claim on appeal that she was denied right to present evidence on that unasserted – and disclaimed – theory of defense. Court of Appeals affirmed on that basis. Claim regarding admissibility of evidence of past abuse if new trial was ordered was moot. Disapproved Court of Appeals treatment of holding in Stewart, but a complete analysis of that issue is for another day.

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

STATE V. KILLINGS

SHAWNEE DISTRICT COURT – CONVICTION
AFFIRMED, SENTENCE VACATED, AND CASE REMANDED WITH DIRECTIONS

FACTS: A jury found Killings guilty of premeditated first-degree murder for what was a retaliatory murder for a prior robbery committed against Killings. He received a sentence of life in prison without the possibility of parole for 50 years (hard 50 life sentence). On direct appeal, Killings argued: (1) The district court erred by failing to instruct the jury on second-degree intentional murder and second-degree reckless murder as lesser included offenses of premeditated first-degree murder; (2) the prosecutor committed misconduct during his closing arguments; (3) the district court erred by answering a juror’s question when Killings was not present; (4) the cumulative effect of those alleged trial errors denied him a fair trial; (5) the district court, for multiple reasons, erred when it imposed a hard 50 life sentence; and (6) the district court erred by imposing lifetime post-release supervision instead of lifetime parole.

ISSUES: (1) Lesser included jury instructions, (2) prosecutorial misconduct, (3) jury questions, (4) cumulative error, (5) sentencing, and (6) lifetime post-release supervision

HELD: Court concluded that district court applied the wrong legal standard when it denied Killings’ request for a jury instruction on second-degree intentional murder. But the error was harmless considering the overwhelming amount of evidence establishing that the victim’s death resulted from a premeditated killing. Court also concluded that prosecutor’s comment during closing argument stating that Killings failed to take responsibility for the murder was improper, but found the comment did not constitute reversible error. Court found that the other alleged trial errors raised had no merit. Court vacated Killings’ hard 50 life sentence as required by Alleyne v. United States, 133 S. Ct. 2151 (2013), and State v. Soto, 299 Kan. 102, 124, 322 P.3d 334 (2014), and remanded to the trial court for resentencing.

STATUTES: K.S.A. 21-3107, -3401, -3402, -4635, -4636, -6620; K.S.A. 22-3405, -3414, -3420; and K.S.A. 60-261

STATE V. SMITH-PARKER

SALINE DISTRICT COURT – REVERSED AND REMANDED
NO. 105,918 – DECEMBER 24, 2014

FACTS: In a consolidated trial, jury convicted Smith-Parker of first-degree murder of one victim, second-degree intentional murder six days later of second victim, and aggravated assault. On appeal Smith-Parker claimed in part: (1) insufficient evidence of premeditation supported the first-degree murder conviction; (2) aiding and abetting is an alternative means crime; (3) district court erroneously consolidated the two cases for trial; (4) district court abused its discretion by excluding statement by second victim as hearsay, and as violating Confrontation Clause; (5) district court erred by instructing jury that it will enter guilty verdict if jury did not have a reasonable doubt that the state has proven murder in first-degree; (6) district court erred by failing to tell jurors to begin deliberations anew when alternate juror was substituted; (7) district court abused its discretion by failing to recall jury when the removed juror alleged his removal was sought by other jurors because of disagreement over voting position, and that version differed from the presiding juror’s representation; and (8) cumulative error denied Smith-Parker a fair trial.

ISSUES: (1) Sufficiency of evidence on premeditated first-degree murder, (2) aiding and abetting, (3) consolidation, (4) victim’s out-of-court statement, (5) jury instruction, (6) failure to instruct jury to begin deliberations anew, (7) motion to recall jury, and (8) cumulative error

HELD: Under interlocking evidence in the consolidated cases, jury could draw a reasonable inference that Smith-
Parker was guilty of first-degree premeditated murder, at least as an aider and abettor.


The third statutory condition in K.S.A. 22-3203 for consolidation is satisfied, and there was no abuse of district court’s discretion in consolidating the two cases.

District court erred by excluding victim’s out-of-court statement. State has no right to challenge hearsay statements based on Confrontation Clause under *Crawford v. Washington*, 541 U.S. 36 (2004), and the out-of-court statement was not hearsay because it was not offered for literal truth of the matter.

District court erred by instructing jury in a manner that essentially forbade jury from exercising its power of nullification. Although a criminal jury should not be instructed on its inherent power of nullification, an instruction telling the jury it “must” or “will” enter a verdict is too close to directing a verdict for the state. Contrary holding in *State v. Lovelace*, 227 Kan. 348 (1980), is overruled.

District court erred by directing jury to continue their deliberations with the replaced juror, rather than to begin deliberations anew.

District court erred by failing to recall at least the removed juror and the presiding juror to investigate the allegation of jury misconduct.

Smith-Parker’s convictions were reversed under cumulative error doctrine. Case was remanded for further proceedings.

STATUTES: K.S.A. 21-3205; K.S.A. 22-3201(1), -3202(1), -3203, -3414(3); and K.S.A. 60-455, -460
COURT OF APPEALS

CIVIL

ATTORNEYS FEES AND PREVAILING PARTY
CURO ENTERPRISES LLC V.
DUNES RESIDENTIAL SERVICES INC.
JOHNSON DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 111,191 – JANUARY 2, 2015

FACTS: This dispute involved the efforts of the asset manager for the owner of an apartment complex to terminate the services of the property manager for the apartment complex. Curo Enterprises LLC (Curo), the asset manager, brought an action in Johnson County District Court to remove Dunes Residential Services Inc. (Dunes) as the property manager. Dune Point West Associates LLC (DPW) owned the apartment complex. The parties ultimately settled the case, but Curo appealed from the district court’s order denying its request for attorney fees pursuant to a fee-shifting provision in the management agreement between DPW and Dunes. Curo argued the district court erred by finding Curo was not the owner’s agent under the terms of the management agreement and was neither a “party” nor a “prevailing party” under the fee-shifting provision. Curo argued it filed suit as the owner’s agent when it sought consent from the managing member of DPW. Given that the management agreement expressly gave Curo the authority to act on behalf of DPW in terminating the management agreement, Curo had the right to enforce the agreement on behalf of DPW without requiring any action or consent from the managing member of DPW. Given that the management agreement expressly gave Curo the authority to act on behalf of DPW in terminating the management agreement, Court held that Curo, as DPW’s agent, fell within the “either party” limitation in the management agreement’s language to allow collection of attorney fees. Court held that the district court’s order specifically ordered and authorized tasks which required it to maintain supervision of the transition between the property management companies, all of which were predicated on Dunes’ voluntary resignation as the property manager, and it provided continuing jurisdiction over the case despite the fact the trial date became moot. The district court’s order was more than a mere recognition of the parties’ settlement and dismissal of the case. Therefore, the court found the order was a consent decree qualifying Curo as a prevailing party. Because the court agreed that Curo was acting as the owner’s agent when it sought to terminate Dunes as the apartment complex property manager under the terms of the management agreement and because court found Curo qualified as both a party and a prevailing party under the fee-shifting provisions of the management agreement, court reversed the district court and remanded to determine attorney fees and costs to which Curo is entitled under the management agreement as the prevailing party.

ISSUES: (1) Attorney fees and (2) prevailing party

HELD: Court held that under the clear language of the management agreement, Curo had the right to enforce the agreement “on behalf of” DPW without requiring any action or consent from the managing member of DPW. Given that the management agreement expressly gave Curo the authority to act on behalf of DPW in terminating the management agreement, Court held that Curo, as DPW’s agent, fell within the “either party” limitation in the management agreement’s language to allow collection of attorney fees. Court held that the district court’s order specifically ordered and authorized tasks which required it to maintain supervision of the transition between the property management companies, all of which were predicated on Dunes’ voluntary resignation as the property manager, and it provided continuing jurisdiction over the case despite the fact the trial date became moot. The district court’s order was more than a mere recognition of the parties’ settlement and dismissal of the case. Therefore, the court found the order was a consent decree qualifying Curo as a prevailing party. Because the court agreed that Curo was acting as the owner’s agent when it sought to terminate Dunes as the apartment complex property manager under the terms of the management agreement and because court found Curo qualified as both a party and a prevailing party under the fee-shifting provisions of the management agreement, court reversed the district court and remanded to determine attorney fees and costs to which Curo is entitled under the management agreement as the prevailing party.

STATUTE: K.S.A. 60-217

OIL AND GAS AND PLUGGING WELLS
JOHN M. DENMAN OIL CO. INC. ET AL. V.
STATE CORPORATION COMMISSION ET AL.
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 110,861 – JANUARY 9, 2015

FACTS: John M. Denman Oil Co. appealed a Kansas Corporation Commission (KCC) order that Denman Oil must plug 41 abandoned oil wells. Denman Oil contended that only one party may be held legally responsible for the wells under K.S.A. 55-179 and that since another party (Bridwells) took over the mineral lease from Denman Oil, it is no longer responsible. The district court granted partial relief to the Bridwells, ordering that they were only responsible for plugging the three wells they had produced from. The district court affirmed the KCC’s order that Denman Oil plug the remaining 41 wells, and Denman Oil appealed. The Bridwells did not appeal, and the KCC did not appeal the district court’s limitations of the agency’s original order to the Bridwells.

ISSUES: (1) Oil and gas and (2) plugging wells

HELD: Court stated that K.S.A. 55-179(b) provides that “a person who is legally responsible shall include, but is not limited to, one or more” of several parties defined in that statute. One of those who may be held responsible is “the original operator who . . . abandoned such well.” Court held that there was no dispute that Denman Oil was the original operator who abandoned those wells, so the KCC’s order requiring Denman Oil to plug them was proper.

STATUTES: K.S.A. 55-155, -156, -179; and K.S.A. 77-201 Third, -601, -621

PARENT AND CHILD
IN RE X.D.
SALINE DISTRICT COURT – REVERSED AND REMANDED
NO. 111,294 – DECEMBER 24, 2014

FACTS: District court terminated father’s rights to five children after finding that state had presented a sufficient evidentiary basis for presuming the father was an unfit parent, and that termination of father’s rights was in best interests of the children. Father appealed, claiming district court violated his due-process rights by applying presumption of unfitness without first hearing evidence that father wanted to present on that presumption.

ISSUE: Presumption of unfitness

HELD: District court’s procedure violated father’s due-process rights. When considering whether to apply a presumption of unfitness as a basis for terminating parental rights, the district court must allow both parties to present evidence relevant to the presumption before deciding whether to apply it. Here, district court decided to apply the presumption before deciding whether to apply it. Case was remanded for further proceedings.

STATUTES: K.S.A. 2013 Supp. 38-2271(a), -2271(a)(1)-(13), -2271(a)(5), -2271(b); and K.S.A. 60-414
PUBLIC EMPLOYER-EMPLOYEE RELATIONS ACT AND INJUNCTION
WING ET AL. V. CITY OF EDWARDSVILLE
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 111,392 – DECEMBER 19, 2014

FACTS: The City of Edwardsville opted into the Public Employer-Employee Relations Act in 1999. Doing so gave the city’s employees a specific right to negotiate with their employers over conditions of employment. In August 2013, the city voted to opt out of the Act, which is allowed under K.S.A. 75-4321(c). The statute provides that a public employer covered by the Act may vote to opt out but that the vote will not take effect until “the termination of the next complete budget year following such vote.” The city considered its vote effective at the end of the 2013 budget year and in January 2014 unilaterally imposed new employment conditions on local fire-department employees. The union-member employees obtained a temporary injunction ordering the city to comply with its obligations under the Act, and the city has appealed the order granting the injunction.

ISSUES: (1) Public Employer-Employee Relations Act and (2) injunction

HELD: Court held the employees’ claim met all of the standard tests for granting a temporary injunction. The employees were likely to succeed on the merits of their claim under the clear language of K.S.A 75-4321(c), which says the city could not stop following the Act until the next complete budget year following the vote—the 2014 budget year—had ended. In addition, the court had substantial evidence that the employees would suffer irreparable injury if the city stopped following the Act, that the threatened injury outweighed whatever damage the proposed injunction might cause, and that the injunction would not be adverse to the public interest. An injunction was also the appropriate remedy in this case because damages would have been speculative and inadequate compensation for the continued loss of bargaining rights. Court affirmed the district court’s grant of a temporary injunction.

STATUTES: K.S.A. 60-901, -905, -906; and K.S.A. 75-4321

CRIMINAL
STATE V. MCGILL
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 110,736 – JANUARY 9, 2015

FACTS: In 2009, McGill received a suspended sentence for felony convictions. After five revocations, the revocation proceeding at issue alleged May 2013 violations. District court revoked probation on July 24, 2013, finding McGill had committed a new crime by giving false paychecks to the probation officer. McGill appealed, arguing district court failed to make findings required under K.S.A. 2013 Supp. 22-3716(c) before revoking probation and thus should have imposed an intermediate sanction provided by that statute. He also claimed that “commits a new crime” language in K.S.A. 2013 Supp. 22-3716(c)(8) is vague, that he is entitled to rule of lenity, and that district court violated due process and lacked subject matter jurisdiction to revoke probation because revocation warrant did not allege McGill had committed a new crime.

ISSUES: (1) Application of K.S.A. 2013 Supp. 22-3716(c), (2) vagueness and rule of lenity, and (3) subject matter jurisdiction and due process

HELD: In 2014, the legislature amended K.S.A. 2013 Supp. 22-3716(c) to make clear that graduated sanctions created therein apply to any violation of conditions of release or assignment or nonprison sanction occurring on or after July 1, 2013. McGill’s argument for application of the graduated sanctions failed because date of his violations occurred prior to July 1, 2013.

McGill’s vagueness and lenity claims were not considered because the challenged language is not in K.S.A. 2012 Supp. 22-3716, the applicable statute in this case.

Evidence supported district court’s finding that McGill violated his probation. District court had subject matter jurisdiction to proceed, McGill received minimum due process rights required under K.S.A. 2012 Supp. 22-3716, and there was no abuse of discretion in district court’s revocation of McGill’s probation.

STATUTES: K.S.A. 2013 Supp. 22-3716, -3716(c), -3716(c)(1)(A)-(D), -3716(c)(4), -3716(c)(8); K.S.A. 2012 Supp. 22-3716; and K.S.A. 22-3716

STATE v. PEARCE
MIAMI DISTRICT COURT – APPEAL SUSTAINED
NO. 110,435 – JANUARY 23, 2015

FACTS: Pearce, with four previous burglary convictions that included one person-felony conviction for residential-burglary, entered a guilty plea to a fifth burglary. Sentencing court accepted Pearce’s argument that K.S.A. 2013 Supp. 21-6810(d)(9) and rule of lenity prevented the court from counting the prior residential burglary when calculating Pearce’s criminal-history score. State appealed on question reserved.

ISSUE: State’s appeal of criminal history score of recidivist burglar

HELD: Statutes controlling this case are K.S.A. 2013 Supp. 21-6804(l) (the recidivist-burglar provision) and K.S.A. 2013 Supp. 21-6810(d)(9) (the exclusion of some convictions when scoring a defendant’s criminal history). District court erred when it excluded one of Pearce’s burglary convictions in determining the criminal-history score because none of the conditions for exclusion were met in this case. State v. Zabrinas, 271 Kan. 422 (2001), is distinguished as applying K.S.A. 21-6804(l) before the legislature eliminated the “applicable penalties” language in 2010. Answer in this case is of statewide importance. No appellate decisions discuss the elimination of the “applicable penalties” language in K.S.A. 21-6804(l), and this opinion alerts bench and bar that these cases – decided based on statutory language no longer in place – may no longer be good law. State’s appeal was sustained.

DISSENT (Atcheson, J.): Dissented from majority’s decision to entertain the matter at all because state’s appeal failed to present a legal question of statewide interest or importance. Parties in this case argue the question reserved as if K.S.A. 2013 Supp. 21-6810(d)(9) had never been amended, and seek a ruling on how to construe language the legislature repealed in 2010. Would dismiss the appeal for lack of jurisdiction.

STATE V. REED
BUTLER DISTRICT COURT – AFFIRMED
NO. 110,766 – JANUARY 16, 2015

FACTS: Reed entered a no contest plea to one count of attempted aggrieved indecent liberties with a child, a sexually violent crime under K.S.A. 2009 Supp. 22-3717(d)(2)(C) and subject to mandatory lifetime post-release supervision. Overruling Reed’s claim of cruel and unusual punishment to sentence to lifetime post-release supervision for first time offender who only attempted but did not touch a child, sentencing court imposed prison term with lifetime post-release supervision. Reed appealed.

ISSUE: Eighth Amendment challenge to lifetime supervision

HELD: Reed’s sentence was not categorically disproportionate in violation of Eighth Amendment. The “attempt” nature of a conviction does not remove it from general category of sexually violent crimes subject to lifetime post-release supervision. Lifetime post-release supervision as applied to first time offenders serves legitimate penological goals because supervised release meets same rehabilitative and deterrent objectives as it does for repeat offenders. Offenders guilty of attempting to commit a crime still have the intent required to commit it, so penological objectives for lifetime post-release supervision are the same for those offenders who completed the crime. Goals of rehabilitation and incapacitation, in particular, are served by imposition of lifetime post-release supervision, given propensity of sex offenders to reoffend.

CONCURRING (Atcheson, J.): Concurs in the result affirming the sentence imposed.

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