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The Journal Board of Editors is responsible for the selection and editing of all substantive legal articles that appear in The Journal of the Kansas Bar Association. The board reviews all article submissions during its quarterly meetings (January, April, July, and October). If an attorney would like to submit an article for consideration, please send a draft or outline to Beth Warrington, communication services director, at bwarrington@ksbar.org.
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Our designated charities for 2015 are:
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- Metropolitan Organization to Counter Sexual Assault (MOCSA)
- Kansas Bar Foundation
- Midwest Foster Care and Adoption Association
- In addition, we will fund Ethics for Good Scholarships to each of the KU, Washburn and UMKC Law Schools and the Johnson County Community College paralegal program.

Who Are these Intrepid Presenters?
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Jim Griffin, Scharnhorst Ast Kennard Griffin, P.C.
Mark Hinders, Stinson Leonard Street L.L.P.
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June 5, 2015, 2:30 – 4:10 p.m.*
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June 15, 2015, is the 800th anniversary of Magna Carta. Much has and will be written concerning this historic English document, as the anniversary date approaches. I don’t profess to be either a scholar or historian; a fact those who know me best can readily attest to (though I do admit to being a history major in college and had then at least a passing knowledge of Magna Carta’s importance). Others, far more qualified than I, have written about Magna Carta, such as University of Kansas School of Law professor, Mike Heflick, in April’s Journal. The American Bar Association is featuring Magna Carta for law day this year. And as the anniversary date draws closer, I expect we will hear more and more about it. In light of what has been said and will be said, I want to take this opportunity to reflect for just a moment upon my observations regarding the significance Magna Carta has had on our present day legal system. It is a significance I have come to appreciate far more than from my early introduction to it in my Western Civilization class over well, let’s just say, considerable years ago. It is an appreciation that has developed far beyond just theoretical concepts, but from the practical, day to day practice and application of the law. 

Regarding Magna Carta and its significance almost 800 years later, its importance is often phrased in terms of the foundation of democracy and the cornerstone for the rule of law. President Franklin D. Roosevelt, in his 1941 inaugural address, stated, “The democratic aspiration is no mere recent phase in human history. It is written in Magna Carta.” It was the first legally binding document to limit the power of the king over his subjects. Its influence is found today in our Declaration of Independence, our Constitution, and our Bill of Rights.

The importance of the rule of law in this country cannot be overstated, and for that matter, in many other countries as well. As U.S. Supreme Court Justice Steven Breyer observed in an address to the 2014 American College of Trial Lawyers Annual Meeting in London, of the many differences and divisions that exist among the sovereign states that make up the many nations of this world, the real divisions are “between those who believe in a rule of law and those who don’t.” Justice Breyer, in that same address, reflected upon the rule of law and the fact that despite sometimes controversial decisions by our highest court – decisions that many feel strongly were wrong, and even in fact may have been wrong (as an example, Justice Breyer cited to Bush v. Gore) – there has been a lack of a resulting insurrection or rioting in the streets. That reality goes to the very core of the rule of law. As a country, it is the citizens that have to ultimately accept the rule of law, and the fact, as Justice Breyer observed, how it is worth it to accept an important decision that affects their lives, even though they may think it is wrong. Succinctly put, “That is what the rule of law is about.”

I can’t help but think about the importance of the rule of law as I have observed the debate over how Kansas Supreme Court justices are selected. The Kansas Bar Association has consistently supported the existing method of selecting our Supreme Court justices. The KBA supported merit selection for the Court of Appeals, but statutorily, that process was changed two years ago. I testified during the 2015 legislative session on two occasions before the house judiciary committee, in support of merit selection. While I don’t agree with some of our legislators on this issue, I have the utmost respect for their service to the state of Kansas. I am fully cognizant there are those legislators and citizens alike, who have disagreed with one or more of our Supreme Court’s decisions – decisions they genuinely feel are wrong. But the real test for the rule of law is how we, collectively as a state and as individual citizens, respond to those decisions we may think are wrong.

As an attorney, having appeared before both our trial and appellate courts, like all attorneys before me and those that will come after, I have won some cases and lost some cases. Some decisions I have agreed with, and some I have disagreed with. Some even strongly disagreed with. But as attorneys, the rule of law demands that we accept those decisions, even those with which we disagree. And that principle holds true not just for attorneys, but for our clients, the citizens of this state and country, and those who help draft and pass our laws. Dissatisfaction with some decisions is inevitable. But the framers of both our federal and state constitutions envisioned just such a scenario, in creating three branches of government and appropriate checks and balances. But dissatisfaction with individual decisions, when that dissatisfaction results in efforts to change laws regarding how we select our appellate judges, the age at which judges must retire, the necessary vote to retain a justice in a retention election, or similar matters, then we are not honoring the rule of law or spirit of Magna Carta. It is not honoring the very foundation upon which our democracy is based.

As we prepare to celebrate the 800th anniversary of Magna Carta, I urge all of us to embrace the rule of law, even when we don’t really want to. The rule of law is what distinguishes us as a country and state from those who don’t believe in or support it. It is what I am most proud of as an attorney and as a citizen of the United States and of Kansas.

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.
ggreen@ksbar.org
(620) 662-0537

*Magna Carta being signed by King John, 1215;* by John Leech, 1875. The image shows caricatures of King John and the barons in an informal setting. Source: Wikimedia Commons.
Never Too Late to Get Involved

By the time this column prints, my term as president of the Young Lawyers Section will be just over a month from its end. I will be awkwardly attempting to reintroduce myself to the other members of our firm. (“Hi. I’m Sarah. I work here. No, really ...”) A new board and executive committee will have been selected, with those lawyer-leaders preparing to assume their new positions July 1. The structure will be in place for a year even brighter and more successful than this one.

If you’re one of these future leaders of the 1,400+ young lawyers in our section, congratulations! But if you are not (perhaps you didn’t get your application in by the May 1 deadline—it happens—or you didn’t quite make the cut to obtain a board position this year), our section provides myriad opportunities for involvement, networking, and engagement. Thus, I thought I’d use this month’s column to highlight some of the incredible things our members have been doing over the past few months to give a taste of how you, too, can become more connected with the other young lawyers across the state.

Kansas Mock Trial Championship

In February and March, we hosted the Kansas Mock Trial Tournament and Championship. For the third year in a row, the regional tournaments were cut one round short due to Snowmageddon (in both Wichita and Olathe), but the teams did a spectacular job despite the weather. Powerful openings and closings were given. Objections were sustained and overruled. A ridiculous number of bagels and pizzas were devoured by hungry high school students.

The teams that advanced to the state championship in Topeka were incredibly well-matched. I love that the level of competition at state improves with each passing year. And I also love that four of the six teams that competed at the state tournament were coached (either formally or informally) by attorneys. (Apparently we know what we’re doing!) The state championship round on Saturday was fabulous, featuring three celebrity judges—Justice Marla Luckert, Judge Christel Marquardt, and Judge Kathryn Gardner. After winning on a split ballot, The Independent School, of Wichita, went to nationals in May.

Our Mock Trial Committee (Shawn Yancy, Lauren Mann, and Samantha Woods, as well as Mitch Biebighauser who was recruited to help out at state) put on a fantastic tournament, and Anne Woods at the KBA really made the whole thing happen. Special thanks go out to all the attorneys and judges who volunteered for either weekend; the Johnson, Sedgwick, and Shawnee County Courts for allowing us to invade their courtrooms for a weekend; the Shawnee County judges for loaning us their robes for the state tournament; and the Kansas Bar Foundation and ABA Young Lawyers Division, whose grants make the mock trial program possible.

The Judicial Externship Program

Now entering its third year, the Kansas Judicial Externship Program is in full swing! The creation of this program was spurred by YLS’s recognition of two challenges facing our legal profession: First, fewer 1Ls and 2Ls are finding gainful law-related employment during summer break. Second, our district courts are overworked, understaffed, and underfunded. The Judicial Externship Program pairs talented law students with district court judges during the summer months to assist with legal research, observe hearings and trials, and develop a relationship with the judge and other attorneys.

Anne Smith is serving as our program coordinator this year (which is a huge task) and has done an outstanding job keeping the program moving in the right direction. As the program continues to grow, one thing the YLS is looking into is whether the program could be expanded to add a modest living stipend to make it financially feasible for students to accept unpaid externships in more rural areas (instead of concentrating around the locations of the law schools). Our work is never done!

Education and Networking

On April 17, the Young Lawyers Section hosted a CLE and social event in Salina at the Blue Skye Brewery. The program, which was co-sponsored by the Salina Bar Association and Clark Mize & Linville, featured three local district judges discussing practice tips with about 15 young lawyers from around the area. Jake Peterson, one of our YLS CLE chairs who lives and practices in Salina, and Leslie Garwood, on the KBA staff, did a great job putting this event together. We hope to provide several other similar, informal skills workshops paired with networking opportunities throughout the state.

On May 29, the Young Lawyers hosted a CLE and networking event at the Legends in Kansas City, Kansas, followed by a Sporting KC match. The program included 2.5 hours of CLE: 1.0 of ethics from Deborah Hughes in the Disciplinary Administrator’s Office, and a 1.5-hour panel presentation by the counsel from three professional sports teams in Kansas City (Chiefs, Royals, and Sporting KC), moderated by Judge Dan Crabtree. Registration, which was limited to KBA YLS members, also included a Budweiser Corner ticket (food and drinks included) to the Sporting KC match that evening against FC Dallas. Our CLE and social chairs put together a fantastic event!

... And So Much More!

That is just the tip of the iceberg. Our legislative chairs, Nathan Eberline and John Kanaga, have kept us well-informed as to the happenings in our state capital. Our co-editors of The YLS Forum, Sarah Morse and Natalie Yoya, are well on their way to producing our fourth issue this year, covering important topics from financial planning to professional development. Young lawyers are serving in their communities and on various committees and task forces with the KBA. Our social media presence is growing (like us on Facebook!).

In short, there is something for everyone in our section. We’re a big tent, and we welcome your ideas, involvement, and engagement. Drop me an email or give me a call; I’d love to talk with you (or a young lawyer you know) about how we can grow as a section and as a profession with your talents. After all, as I’ve said countless times before, 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.

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Diversity from a Legal Aid Perspective

Why care about diversity? From a legal aid perspective, not communicating, not understanding, and not educating ourselves in diversity means not meeting our client’s needs.

Kansas Legal Services provides legal services to those who are legally in the United States and a limited group of non-citizen victims of domestic violence. Still, of the 37,000 families who sought legal assistance last year, 2 percent primarily spoke a language other than English.

While most attorneys do not expect to communicate with a client in a language other than English, KLS offices must maintain a “language list,” allowing office visitors to point to the language they are most comfortable using. This list of the phrase “I speak this language” in multiple languages can help staff know what non-English language the “interpreter” must speak. You can see a resource like that online, among a list of other resources that the U.S. Department of Justice makes available. Courts and KLS offices aren’t the only professionals dealing with this issue. Hospitals and health care providers also encounter patients with urgent needs who don’t speak English. Of course, the need to maintain confidentiality makes it even more important for lawyers to use a translator, rather than a family member of the client, to assist with the communication.

Because the services we provide to clients extend beyond direct legal services, we share a significant amount of legal education material via our website. Meeting the needs of a language-diverse population makes this a challenge. Google Translate is a widget that can be added to any website. The user can select a language from a drop-down menu and the website is immediately displayed for the user in translation. For written material, we use Microsoft Translate, and have the translation reviewed by someone familiar with the language. Microsoft Translate for a variety of languages can be downloaded free by Word users. It provides a fairly accurate, free translation of common languages. For us, it means that anyone can do a rough draft of a letter, with translation. The folks who are fluent in Spanish then can review and edit, rather than complete a full translation of the letter into Spanish.

A diverse client base also has cultural implications. Some who access the legal system have a cultural background that tells them that judges are not to be trusted or that the judgment will be decided in favor of the party who pays the biggest bribe. The legal system of their country of origin may operate that way, so they think that all legal systems function in this manner. Educating those clients about U.S. law and urging them to trust the U.S. legal system is part of doing our job well. Consider the task of persuading a young female truant, born in Mexico, that her “quinceañera” (celebrated at age 15 as a passage to adulthood) does not excuse her from school attendance in the United States.

Additionally, that two-thirds of our applicants are women is a reflection of an economic and cultural system that puts women in lower paid jobs and expects them to miss work to care for sick children or parents. There can only be “legal aid” for one side of the case. Often, the woman is the lower paid of a divorcing couple or is the tenant who didn’t pay rent because her sick child forced her to miss work and a paycheck.

A very diverse client base requires us to maintain a diverse staff as well. We work at understanding the diversity of our clients and their situations, so we can do a better job of providing them with legal services. Staff diversity gives us a number of valuable internal resources. Phon, an attorney in the Manhattan office, was born in Laos to parents who came to the US as refugees. She helps us understand the immigrant experience and the dynamics of integrating into a new society, when going home is not a possibility. James, a paralegal in Kansas City, has maintained a personal interest in studying immigrant populations in the Midwest and he also speaks seven languages. He is always prepared with an explanation of the impact on Kansas of a new group of refugees from Africa or other turbulent parts of the world. Rebecca, a paralegal in Dodge City, recently helped staff understand that “certified mail” is not a service provided by the Mexican postal authority, which complicates some casework. Each of these people adds greatly to the services we provide at KLS and to the stimulating work environment we experience. They allow us to understand some of the diversity of our state and our clients as they educate all of us on the diverse environment in which we live.

We work to provide these services to clients with limited English proficiency because we are required to do so by federal law that attaches to federal funding we receive. We also do it because it is the right thing to do. What good is providing high quality services in a manner that the client doesn’t understand? I share these tips because they may be the right thing for you to do in your practice, as well.

About the Author

Marilyn Harp is the executive director of Kansas Legal Services. Under her leadership, KLS received the KBA Diversity Award in 2012. Harp currently serves on the KBA Diversity Committee.

Footnotes

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A Tisket, A Tasket
A basket full of Foundation news updates

May seems like a good time to highlight some of the upcoming events and activities of the KBF.

The KBF Golf Tournament will be Wednesday, June 17 at the Ironhorse Golf Club in Leawood. The tournament is a chance for members to enjoy a day of golf and raise some money for the foundation at the same time. If you don’t golf but would like to offer your support by sponsoring a golf hole or other item, contact me at (785) 861-8838. You can register online at for the golf tournament at http://www.ksbar.org/am15.

The KBF Fellows will have their annual Foundation dinner on Wednesday, June 17 in the Atlanta Ballroom at the DoubleTree Hotel in Overland Park. This is a semi-formal/formal dinner that recognizes current Fellows for their giving during the past year. Those who would like to learn more about the Foundation and possibly pledge to become a Fellow, are welcome to attend. One of the main highlights of the evening will be the presentation of the Robert K. Weary Award, which will be given this year to Kansas City attorney J. Eugene “Gene” Balloun. The Robert K. Weary Award recognizes “lawyers or law firms for their exemplary service and commitment to the goals of the Kansas Bar Foundation.” This award was given for the first time in 2000 by the KBF Board of Trustees.

Despite Weary’s objection, the Board of Trustees selected him as the initial recipient in recognition of his decades of service to his community, the Foundation, and the legal profession in Kansas.

The Foundation Dinner will feature a cocktail reception and music by Crosscurrent, one of Kansas City’s finest jazz bands. To learn more about this dining and to register, please call me at (785) 861-8838.

Another activity that is provided in cooperation with the KBF is Ethics for Good. This popular CLE will take place on Friday, June 5 at the Polesky Theatre at Johnson County Community College and Thursday, June 25 at The Nelson-Atkins Museum of Art. This event features:

- Stan Davis, Legal humorist, consultant and gadfly
- Jim Griffin, Scharnhorst Ast Kennard Griffin P.C.
- Mark Hinders, Stinson Leonard Street LLP
- Todd LaSala, Stinson Leonard Street LLP
- Hon. Steve Leben, Kansas Court of Appeals
- Jacy Moneymaker, Swope Health Services
- Todd Ruskamp, Shook, Hardy & Bacon LLP
- Hon. Melissa Standridge, Kansas Court of Appeals

Now in its 16th year, this event has provided thousands of dollars for numerous charities. This year, the designated charities are:

- CASA (Johnson/Wyandotte Counties)
- Safehome and Hope House (domestic violence programs)
- Metropolitan Organization to Counter Sexual Assault
- Kansas Bar Foundation
- Midwest Foster Care and Adoption Association
- Ethics for Good Scholarships will also be provided for each of the KU, Washburn, and UMKC Law Schools and the Johnson County Community College paralegal program.

Finally, one additional activity that will take place prior to this publication is one that is happy and sad. On April 24, Joyce Neiswender had her last day at the KBA. I have worked with Joyce extensively as she has provided all of the processing of IOLTA bank reports, IOLTA applications, and Fellow donations. She has also coordinated the distribution of public service pamphlets and the processing of Lawyer Referral Service applications. This will be her second retirement. After 25 years as a secretary, she retired in 1994 from the Colmery-O’Neil VA Medical Center in Topeka. In 2002 she decided to look for part-time work and joined the KBA staff. She is a joy to be around and all of us at the KBA will miss having her here. We look forward to hearing about her camping trips, painting, and the first day when it snows and she realizes she does not need to get up and come to work! Thank you Joyce for all you have done for the KBA and the KBF!

About the Author

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

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Take It Easy: 5 Lazy Grammar Rules

“Whenever there is a hard job to be done, I assign it to a lazy man; he is sure to find an easy way of doing it.”

— Walter Chrysler

There are so few things we can be truly lazy about in life – lazy romance can lead to loneliness, lazy parenting can lead to unruly kids, and lazy lawyering can lead to unhappy clients and disciplinary complaints. Legal writing requires thoughtful precision and careful word choice. In other words, legal writing requires considerable effort. But sometimes we make things harder on ourselves than we need to. There are a few grammar rules where we have the opportunity to be lazy and choose the easy option. Five are listed below.

**RULE 1.** Complicated version: Use a comma to set off introductory material (the phrase before you get to the subject) in a sentence, but you can omit the comma when the phrase has five or fewer words. For example,

*Because there is a material factual dispute, Defendant is not entitled to summary judgment.*

but

*In June plaintiff employed twelve people.*

Lazy version: **Always use a comma to set off introductory material in a sentence.**

*In June, plaintiff employed twelve people.*

Many of us went to law school to avoid having to do math. I know I have better things to do than count the number of words before the main clause.

**RULE 2.** Complicated version: Use a comma to separate items in a series of three or more, but the last comma, the serial or Oxford comma, is optional if the meaning is unambiguous. For example,

*I dedicate this book to my parents, God, and the Virgin Mary.*

but

*The seller must comply with all federal, state and local laws.*

Lazy version: **Always use the Oxford or serial comma.**

*The seller must comply with all federal, state, and local laws.*

I confess I used to fight using the serial comma but now fully embrace its lazy use. It seems like a lot of unnecessary effort to determine if the meaning is ambiguous without it when it is never wrong to include it.

**RULE 3.** Complicated version: When a singular name or word ends in the letter *s*, add an apostrophe alone to indicate the possessive when you would not add an extra *es* syllable when speaking. If you would add the extra *es* syllable when speaking, add an ‘s. For example,

*Mr. Rogers’ Neighborhood*

but

*Mrs. Lucas’s tree.*

Lazy version: **To form the possessive of any singular noun, add an ‘s.**

*Mr. Rogers’s Neighborhood*

Some people object to this simple and valid rule because they think it looks odd when the noun already ends in the letter *s*. But I think it looks odd even when it is grammatically necessary. Besides, if we all start doing it, it will no longer look odd.

**RULE 4.** Complicated version: If the material following a colon is a complete sentence, it can begin with either a lowercase or capital letter. For example,

*The defendant essentially admitted his guilt: he testified he had been drinking.*

or

*The defendant essentially admitted his guilt: He testified he had been drinking.*

Lazy version: **Avoid using a colon to combine two complete sentences.**

*The defendant essentially admitted his guilt because he testified he had been drinking.*

A colon can be used to convey that two sentences are related by indicating that what follows the colon explains or clarifies what precedes it. In legal writing, where we want to precisely convey our meaning in a clear way, I would argue we should not be relying on a punctuation mark to convey the relationship between two ideas. Instead, we should explain that relationship with clear and precise words. The rule has the added bonus of allowing you to avoid figuring out whether the two ideas should be joined by a colon or a semicolon, which can also be used to connect two related ideas.

**FOOTNOTES**

1. It is not clear if Walter Chrysler, who started the Chrysler car company, ever actually said this. A similar quote has also been attributed to Bill Gates. See Quote Investigators: Exploring the Origins of Quotations (April 6, 2015), http://quoteinvestigator.com/2014/02/26/lazy-job/.

2. If the last comma is omitted, it implies the author is Jesus Christ.


4. The Walter Chrysler quote above includes a semicolon between the two independent clauses. A colon, however, would also be correct. . . . I think. . . . Now my brain is starting to hurt. If it were up to me, I would either join them in one sentence with a “because” or make them two separate sentences.
RULE 5. Complicated version: Only place a comma or period inside the quotation marks if the punctuation is part of the quotation. If it is not part of the quotation, place the comma or period outside the quotation mark. For example,

“The decision of the lower court is reversed,” stated Judge Leben, “and the case is remanded.”

but

“The decision of the lower court is reversed”, stated Judge Leben.

Lazy version: Commas and periods always go inside the quotation marks.

“The decision of the lower court is reversed,” stated Judge Leben.

The complicated version of this rule is actually wrong unless you are writing in British English. The American rule is the lazy version. In addition, in American English semicolons and colons always go on the outside of the quotation marks. The only punctuation marks we have to analyze using the more complicated rule are exclamation points and question marks. Sometimes it is just great to be a lazy American.

About the Author

Betsy Brand Six, a native Kansan, practiced environmental law for 13 years before she left private practice for the less hectic, some might say lazier, life of academia in 2004. A graduate of Stanford Law School, she is a Clinical Associate Professor and the Director of Academic Resources at the University of Kansas School of Law.

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5. I suspect people often think the British version of the rule is the correct one because we read so much British English. I also suspect people just assume grammar is always complicated.

Competence and Diligence on Appeal

Why do people hire lawyers? One very good reason is that there are lots of technical hurdles a person must navigate just to get a claim heard on its merits. A lawyer is trained to handle them; a layperson is not.

So one of the most basic concepts of lawyer competence is making sure that your client’s claims are not lost by your procedural error. When that happens, it’s hard to argue that the lawyer has shown the competence and diligence required of attorneys in the ethics rules: Rule 1.1 on competence requires that the lawyer have “the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.” Rule 1.3 on diligence requires that the lawyer “act with reasonable diligence and promptness in representing a client.”

I’ve spent my last eight years doing appellate work, so I’m going to focus in this column on situations in which lawyers have lost appellate cases or claims solely based on a lawyer’s procedural error. Although these examples come from the appellate world, there are lessons for most every lawyer.

Let’s start with a potential $40 million mistake.1 A federal jury in Texas ruled against AT&T in a patent-infringement suit, and the total of damages, interest, and court costs totaled about $40 million. But AT&T lost its right to appeal when 18 different lawyers or legal assistants failed to open and read the district court’s order that denied AT&T’s four post-trial motions for a judgment as a matter of law.

How could 18 different folks—most with the respected law firm Sidley Austin LLP—fail to read those orders? Part of the reason was that some (but not all) of the email notices they received from the court had a misleading heading. AT&T’s attorneys had filed three of the motions for judgment as a matter of law under seal because they contained confidential information. The subject line of the misleading notices indicated that the attached orders merely granted the motions to file under seal. In fact, the attached orders had granted the motions to file under seal and denied substantive relief, thus ending the litigation and starting the clock on AT&T’s 30-day window to appeal.

Another part of the reason surely was that no one person had clear responsibility for reading whatever orders the judge entered. With so many attorneys on the case, no one took the initiative to read the orders.

We all get more emails than we want, and many of us get more than we can deal with. But when AT&T’s attorneys tried to tell a federal judge that no one took the time to read his orders because the subject line of the notifications suggested his orders weren’t important, he didn’t find that a good excuse. Judges assume that attorneys will read their orders; if you’ve got 18 attorneys or legal assistants getting the orders, it’s impossible to convince the judge that not reading them was a reasonable mistake.

Ultimately, the federal district court concluded that AT&T could not show excusable neglect; that precluded granting a motion to extend the time for appealing under Federal Rule of Appellate Procedure 4(a). Nor could AT&T claim that it did not receive notice so as to allow reopening the time to appeal under Federal Rule of Appellate Procedure 4(b). The Federal Court of Appeals upheld the district court's ruling on both points, and AT&T lost its right to appeal.

There may be more to this story with respect to any legal-ethics questions. The appellate court’s decision doesn’t explain how responsibilities had been delineated between the 18 recipients of the district court’s order. But there’s obviously a potential ethics issue under Rules 1.1 and 1.3: Can an attorney who doesn’t read a court order—conveniently placed in the attorney’s email inbox—be competent and diligent?

Let’s turn next to some Kansas appellate rules that—if not carefully followed—can prevent your client’s claims from being heard on the merits. My perception, for what it’s worth, is that the Kansas appellate courts are starting to take some of these rules more seriously. So one of the purposes of this column is to help spread that message.

In my first month or two as an appellate judge, back in 2007, I sat on a panel that heard a criminal appeal in which one of the major issues was whether the search warrant to enter the defendant’s home had been properly entered.2 The defendant’s attorney failed to include either the warrant or the affidavit upon which it had been issued in the appellate record. We could have denied much of the appeal simply because those materials hadn’t been provided to us, but we went ahead and spent six

Footnotes
1. For background about the case, see Ryan Davis, Sidley’s Blown Deadline in $40M Case Provides Stark Lesson, Law360.com (March 19, 2015); Two-Way Media LLC v. AT&T Inc., 782 F.3d 1311 (Fed. Cir. 2015).
enforced in most, though not all, cases. Since an issue is properly before the appellate court if it was not raised below. Since Williams, the rule appears to have been enforced in most, though not all, cases.

Second, an issue not adequately briefed by a party is deemed waived. But how much argument is enough to make sure that doesn’t happen? There may be room for disagreement on that, but parties have lost claims when they did not cite case law to support an argument or totally failed to respond to contrary authority.

So what’s a competent, diligent attorney to do?

• Make sure that all court orders you receive are read.
• If the next document the court might file would trigger the time for filing an appeal, periodically check the court’s docket to see what it has filed. The Federal Circuit decision in the AT&T case noted lots of federal cases saying that attorneys must periodically check the docket even if notice of the judgment is not sent by the clerk.
• Cite some case law to support each significant argument. If you can’t find a Kansas case that supports your argument, cite a case from another jurisdiction or cite a case that can be argued by analogy (or do both).
• Read the rules carefully. If you’re handling appeals in the Kansas state courts, all of the appellate rules take up less than 30 pages in the book published by Thomson Reuters. Can you claim competence and diligence if you haven’t read them? (Remember: That’s a trick question. It’s only important if you miss something. And in that case, hindsight bias rears its ugly head. You’ll need to convince someone you were competent even though you didn’t read a rule that clearly applied, like Rule 6.02(a)(5). That’s a tall order.)

We all make mistakes; I’ve made my share too. But our legal system depends upon everyone having their day in court, where claims are decided on the merits. Without that, people rightly have no faith in that system. We all must be diligent to protect that faith.

About the Author

Steve Leben is a judge on the Kansas Court of Appeals. He has been a co-presenter of the Ethics for Good CLE program, held each June in the Kansas City area, for 16 years.
Tesla’s Powerwall

Kansas has a long history with alternative energy. Early settlers used natural heating and cooling in dugout homes and root cellars, we erected windmills in yards and fields to pump water and generate electricity, and water mills once dotted our streams. Even our agricultural pursuits are “solar-powered” turning sunlight into grain and cattle. These alternative energy sources were always relatively easy to tap even for a single-family dwelling. A root cellar took advantage of the ground’s natural insulation and erecting a simple windmill could power the pump at the well. Energy self-reliance was not a political affectation; it was a necessity of prairie life in Kansas.

That sort of self-reliance in power generation for single-family use is starting to generate interest anew. Highly efficient solar panels tailor-made for our state’s endless horizons and open skies are dropping in price. Home wind power is visible in back yards here and there with scaled-down versions of our giant turbines. Most importantly, highly efficient appliances are now commonplace making the energy capacity of alternative sources an appealing fit to consumption. The main barrier – power storage – is now making news and, hopefully, clearing the final hurdle for self-reliant types.

Specifications

Tesla Motors recently introduced its consumer-ready Powerwall battery at a press event in California. The launch event and theory of use are at teslamotors.com/powerwall. The hope for the Powerwall (and a commercial version dubbed the Powerpack) is that it increases the lifespan, reliability, and economy of battery storage for power gleaned from the grid and alternative energy sources. The device can also smooth out power supply to homes and businesses and normalize power use across the entire grid, thereby reducing brownouts and increasing the resiliency of our troubled infrastructure.

The sleek, lithium-ion battery packs (3’ wide by 4’ tall and 6” deep) may be installed inside or outside the home, can be “piggy-backed” in series to supply as much power as needed, and yield about 7 kWh each in daily capacity (a refrigerator uses about 4.8 kWh per day). A backup model is also available with a capacity of 10 kWh for weekly cycle application. The cost to installers will be $3,000 for the daily model (7 kWh) and $3,500 for the backup version (10 kWh) but both come with a rather incredible 10-year warranty with a 10-year extension option. (Actual cost will be somewhat higher as a licensed electrician is required for installation and a DC to AC converter is necessary for most homes.)

The Powerwall has been tested over the past year in about 300 homes in California with tests of the business-grade Powerpack conducted in a dozen Walmart stores and a Cargill animal processing plant. The data from those tests indicate that the batteries fall shy of beating grid-supplied power in price. Analysts suggest that the current cost over the 10-year warranty could be around $0.23 per kWh while the average U.S. cost is closer to $0.12 per kWh. The Powerwall is still just an opening salvo in an attack on those costs, however. As technology improves and supply increases, experts predict such storage options will flip the advantage from the grid.

Use and Value

If the Powerwall is still more expensive than grid-provided power, where does it fit in the market currently? Aside from the early adopters hoping and helping to fuel exploration of alternative, small-scale power generation, the technology presents at least two other benefits. First, the utility-supplied grid can still be unreliable or unpredictable in certain areas and at certain times. Sitting in my office in Topeka shows me that the supply to my building can fluctuate. We currently use uninterruptable power supplies (UPS) and surge protection to normalize that and clean it up so our servers do not feel the constant shock of the fluctuations. Second, this is Kansas and we are locked in constant battle with the weather (and squirrels) for power. Wind, rain, ice, and cable-munching rodents all conspire to knock us out a few times a year either at home or the office. The Powerwall and Powerpack offer alternatives to UPS and generators in those scenarios – alternatives with some notable advantages. To wit:

• UPS batteries have a far shorter lifespan than Powerwall;
• UPS batteries at similar cost usually supply less power for shorter periods;
• Generators are noisier, smellier, outdoors solutions requiring security to protect;
• Generators consume fuel and require monitoring and maintenance while operating; and
• Generators require maintenance during standby.

The Powerwall may not yet be the iPod of power that drives a mass of consumers to change the landscape overnight. It is a significant leap forward in generating interest and proving the concept that localized power generation and storage is not a pipe dream. Tesla’s experience with cars has established its battery-making credentials and its ability to proselytize for alternative power is largely unmatched elsewhere in the market. A Kansan could install a Powerwall coupled with a few solar panels, maybe a small wind turbine, and efficient appliances to tap into the same sort of prairie-bred self-reliance our forebears demonstrated. The horizon is endless and the skies are open for alternative energy.

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.

kslpm@larryzimmerman.com
The Prairie Band Potawatomi Nation Judicial Council: An Experience in True Advocacy

The most common advice I’ve received as a law student is to challenge myself: to experiment outside my comfort zone and, if need be, fail and fail hard while I have a support system available. I’ve taken that advice to heart in my three years at Washburn. Enter, here, my decision as a clinic student to join a criminal case before the Judicial Council of the Prairie Band Potawatomi Nation (PBPN). The Judicial Council is similar in many ways to state and local practice, but with a few very important differences. Those differences afford law students an invaluable opportunity for hands-on, unfiltered advocacy. In addition, given the changing landscape of tribal systems across the United States, there is a need for legal assistance, and law students should play a role.

When I enrolled in the Washburn Law Clinic, I had no criminal law experience, no courtroom exposure, and absolutely no knowledge of tribal law. With hesitation, I volunteered last fall to serve as criminal defense co-counsel before the Judicial Council. In one case alone, I was able to conduct a full criminal trial, from motions hearings through sentencing, as a third-year certified intern.

It may sound intimidating to tackle a wholly separate legal system with unfamiliar laws and customs. And yes, initially it is. But that truly shouldn’t dissuade students from taking the opportunity to practice in tribal court. In fact, the skills I gained in my clinical experience are undoubtedly applicable in any U.S. jurisdiction, but with additional skills that could be obtained only in tribal court. In terms of similarities:

- Indian nations retain an inherent sovereignty to self-govern, including the ability to prosecute crimes committed in Indian country by Indian people. At the same time, Kansas is unique in that PBPN shares criminal jurisdiction with Kansas and federal courts.
- Written tribal law often adopts state and federal principles, with key adaptations for local custom and tradition. PBPN has a written Constitution, the U.S. Code applies most guarantees enumerated in the Bill of Rights to tribes, and the Nation has a Law & Order Code codifying a large variety of substantive and procedural law.
- Disputes not settled through alternative means, such as Peacemaking, become adversarial proceedings that follow rules of evidence very similar to the Federal Rules.

These similarities allow students to gain transferable skills, but the differences in tribal court practice are where the experiment in true advocacy is achieved.

First, PBPN places an emphasis on custom, tradition, and restorative justice. As a result, courts do not rely heavily on stare decisis, and internal case law is not always readily accessible. These factors might seem like a law student’s worst nightmare, but in practice, the student is free to argue for the restorative needs of the community while advocating the fairest outcome for the client. Persuasion is key. Oral argument serves an increasingly important role, and thus students gain skill both in oral advocacy and policy reasoning.

Moreover, students gain new perspectives on state and federal practice. For example, in tribal court, the emphasis on rehabilitation often better repairs the damage to the victim, perpetrator, and community. The Nation’s legal system also allows the court to seek advice from tribal elders, ensuring cases do not violate custom and judicial policies remain consistent. In doing so, the tribe can adapt more quickly to the pace of social change while maintaining traditional values.

In addition to gaining valuable skills, students also have the opportunity to make a difference in an important, legally underserved community. For example, the Office of Justice Programs reports that crime rates are much higher for American Indians compared to the national average. Similarly, the Bureau of Justice Statistics indicates that Native American women are at least twice as likely to experience sexual assault. The Violence Against Women Reauthorization Act of 2013 at long last recognizes the inherent tribal sovereignty to exercise “special domestic violence criminal jurisdiction” to prosecute non-Indian offenders for domestic and dating violence. The law took effect March 7, 2015, and is currently in a pilot phase. With this groundbreaking expansion of tribal sovereignty and criminal jurisdiction over non-Indians, the opportunities to provide legal assistance are likely to rise.

So allow me to offer a little unsolicited advice to young attorneys and law students: take on cases before the PBPN Judicial Council! The rising need for assistance and the benefits afforded to students make it a no-brainer. Tribal nations are important local communities and we, as public servants, should support underrepresented groups. Besides, advocacy is the cornerstone of our profession and there’s no better way to experience it as a law student.

About the Author

Tabitha Chapman is a 3L at Washburn University School of Law. She currently serves as the executive lieutenant governor of the ABA 8th Circuit Law Student Division and is the 2014 Washburn Student Bar Association president. She has worked for the U.S. Court of Appeals for the Armed Forces and plans to return to Washington, D.C., after graduation.

Footnotes
1. The Prairie Band Potawatomi Nation website is available at http://www.pbpindiantribe.com/
8. The Act does not allow prosecution of crimes committed by a person who lacks sufficient ties to the tribe, crimes between two non-Indians, or crimes between two strangers. 25 U.S.C. 1304 § 1304 (b).
Members in the News

Changing Positions

Andrea M. Anderson has joined Spencer Fane Britt & Brown LLP, Kansas City, Missouri.

Shannon K. Barks has joined Bryan Cave, Kansas City, Missouri.

Derek S. Casey and Paula Langworthy have been named members of Triplett, Woolf & Garretson LLC, Wichita.

Travis L. Cook has joined McDonald, Tinker, Skaer, Quinn & Herrington P.A., Wichita.

Tracy M. Hayes has become partner at Sanders Warren & Russell LLP, Overland Park.

Harold A. Houck has joined TMX Finance, Savannah, Georgia, as general counsel.

Michelle E. Jakobe has joined Young Jakobe & Kuhl LLC, Leawood.

Allen R. Jones II has joined Polsinelli P.C., Kansas City, Missouri.

Andrew S. LeRoy has joined Smith Mohlman LeRoy LLC, Kansas City, Missouri.

Lucinda H. Luetkemeyer has joined Graves Garrett LLC, Kansas City, Missouri.

Mary M. McSheaters has joined Spirit AeroSystems Inc., Wichita.

Cavanaugh, Biggs & Lemon P.A. has moved to 6240 W. 135th St., Ste. 200, Overland Park, KS 66223.

Cavanaugh, Biggs & Lemon P.A. has moved to 2942A S.W. Wanamaker Dr., Ste. 100, Topeka, KS 66614.

Jeffrey W. Heil has moved to 833 South East Ave., Columbus, KS 66725.

Myles D. Jennings has opened Myles D. Jennings Law LLC, 430 N. Main St., Garden Plain, KS 67050.

Steven J. Koprince has started Koprince Law LLC, 3210 Mesa Way, Ste. C, Lawrence, KS 66049.


Michael S. McDowell has moved to 120 E. Court, PO Box 68, Smith Center, KS 66967.


Changing Places

Connie J. Boysen has moved to 1100 Main St., Ste. 200, Overland Park, KS 66213.

Amanda K. Rhodes has moved to 1100 Main St., Ste. 2001, Kansas City, MO 64105.

Shaffer Lombardo Shurin P.C. has moved to 2001 Wyandotte, Kansas City, MO 64108.

Zuspann & Zuspann Law Office has moved to 1015 Center, PO Box 968, Goodland, KS 67735.

Miscellaneous

The Douglas County Bar Association has selected its new officers for 2015: Sarah E. Warner, president; Brenden L. Smith, vice president; Anne B. Hall, secretary; Terrance E. Leibold, treasurer; and board of directors include Richard W. Hird, Cheryl L. Denton, Jody M. Meyer, and Curtis G. Barnhill.

Shawn P. Yancy, Topeka, has been elected to the National High School Mock Trial board of directors.

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

The Relevance of Civil Rights Encompassing the Daily Practice of Law

The First Amendment, Social Media, and the NLRB
Alan Rupe, Lewis Brisbois Bisgaard & Smith LLP, Wichita
Jeremy Schrag, Lewis Brisbois Bisgaard & Smith LLP, Wichita

David Cooper, Fisher Patterson Sayler & Smith LLP, Topeka

Ethical Traps for Employment Lawyers and General Counsel
Alan Rupe, Lewis Brisbois Bisgaard & Smith LLP, Wichita
Jeremy Schrag, Lewis Brisbois Bisgaard & Smith LLP, Wichita

June 12, 22, 24, 29: Kansas Law Center, Topeka
Obituaries

Edward Roger Horsky

Edward Roger Horsky, 75, died March 28 in Leavenworth. He was born in Chicago and went on to graduate from the University of Illinois in 1961 with a bachelor's degree in business management. He then went on to John Marshall Law School and graduated in 1964. Early in Horsky's career, he served as assistant state's attorney for the Cook County Prosecutor's Office. He moved to Leavenworth in 1970 and began his law practice.

Horsky participated in the organization, development, and establishment of the Court Appointed Special Advocate Program for Leavenworth County, where he served on its board of directors. In addition, he was an active member of the Kansas, and American and Kansas Trial Lawyer associations; and past president of the Leavenworth County Bar Association and Kansas Association of Defense Lawyers.

He was preceded in death by his parents and brother, Brian. Horsky is survived by his wife, Janet; daughter, Robyn Arthur; stepsons, Garrett and Aaron Mumma; sisters, Penny Russell and Diana Schwarze; brother, Bruce Horsky; six grandchildren; and several nieces and nephews.

Randel LaVerne “Randy” Messner

Randel LaVerne “Randy” Messner, 56, died April 10 at the University of Kansas Medical Center in Kansas City, Kansas, following a short illness. He was born December 25, 1958, in Jackson County, Missouri, the son of Leland and Carol Sue (Slagle) Messner. He attended schools in Shawnee Mission, Johnson County Community College, and was a 1984 graduate of the University of Kansas School of Law.

He worked as an assistant county attorney for Crawford County. He started his career in Medicine Lodge, where he practiced law for 13 years before moving to Pittsburg in 1988. Messner was a member of the Crawford County Juvenile Justice Advisory Board, a member of the Crawford County and Kansas bar associations, and a member of the Kansas County and District Attorney Association. He was also active in the Boy Scouts of America, where he was an assistant leader for troop 151 of Pittsburg.

Survivors include his wife, Jude, of the home; two sons, Nix Glen White, of San Diego, and Ashley Zane, of Pittsburg; daughter, Anita Paige-Lefebvre, of Carl Junction, Missouri; parents, Leland and Carol Sue Messner, of Gardner; brother, Brian Messner, Ronda Messner-Kuenzi, of San Marcos, Texas; nine grandchildren; and three great-grandchildren.

Edgar White

Edgar White, 91, died April 10 in Elkhart. He was born September 7, 1923, in Pretty Prairie to Earl and Fay (McCowan) White. White attended school in Pretty Prairie through fifth grade before moving to Manter and then Elkhart. He graduated Elkhart High School in 1939 and then attended Sterling College for two years before joining the Navy V-12 Program in 1942. Upon honorable discharge, he entered law school at the University of Colorado.

White began his private law practice in 1953 in Elkhart. He purchased Farmers & Lawyers Title Co. in 1954, and he later received his real estate broker’s license and established White Real Estate.

White was a member of many organizations, committees, school board, both on the local level and state offices. He was the first charter member and president of the Morton County Historical Society Museum.

White is survived by his wife, Doris, of the home; two children, Lana Willimon, of Stinnett, Texas, and Kevin White, of Elkhart; two brothers, Floyd White and Gene White; two sisters, Elva Johnson and JoAnn Fowler; four grandchildren; and 10 great-grandchildren. He was preceded in death by his parents; brother, Ray White; and sister, Helen Swagerty.
Probable Cause Affidavits
Open in Kansas

By Max Kautsch and Mike Kautsch
For 35 years, Kansas law enforcement officers made arrests and conducted searches on the basis of probable cause affidavits that generally were closed to public view. In 2014, however, the Kansas Legislature opted for openness and made the affidavits a matter of public record. The Legislature accomplished the change by amending K.S.A. 22-2302 and K.S.A. 22-2502, which relate to arrests and searches, respectively. The amendments established a presumption that the probable cause information contained in affidavits executed after July 1, 2014, is accessible to members of the public upon request.

The Legislature imposed on courts a somewhat complicated process for responding to requests for affidavits—a process that was destined to result in controversy and litigation. Neverthe-less, when the amendments were enacted, the news media hailed them as a major victory for open government. Indeed, the Legislature’s action brought Kansas law generally into line with a presumption in other states that probable cause affidavits should not be secret. The purpose of opening such records is to increase accountability of officials and public confidence in government.

However, the change in Kansas law came as something of a surprise. For many years, Kansas media had called upon the Legislature to allow public inspection of probable cause affidavits. Still the call for openness had little impact until 2012, when a Leawood couple publicly disputed how and why Johnson County sheriff’s deputies searched their home for illegal drugs in 2012. The couple made headlines when they complained that the search was groundless, fruitless, and alarmingly aggressive, as in “some sort of police state.” They further complained that, under Kansas law, they could not gain access to the probable cause affidavit filed in support of the search. They wanted the warrant to learn why they had been targeted and, after litigating, eventually gained access to it. A state legislator took interest in their cause and introduced a bill to open probable cause affidavits. It was examined at legislative hearings before the House and Senate Judiciary committees and was opposed by prosecutors, criminal defense attorneys and members of law enforcement. The bill nearly died in committee but, following 11th hour negotiations, the Legislature passed it by a vote of 123-1 in the House and 40-0 in the Senate.

The resulting amendments to K.S.A. 22-2302 and 22-2502 reverse statutory language that had been in effect since 1979 and that presumed closure of probable cause information. The 1979 language required a court order for anyone to obtain an affidavit, other than the defendant in the criminal case to which the arrest or search was related. The purpose of this article is to analyze the intent behind the newly amended statutes and their provisions, as well as to shed light on the reasons for controversy over their implementation. It is hoped that the analysis will be helpful to prosecutors, defense counsel, and judges when notified that members of the public, including journalists, seek access to affidavits. The analysis will focus on considerations that, under the statutes, must be taken into account when a member of the public requests access to an affidavit.

I. The Presumption of Openness

Under K.S.A. 22-2302 and 22-2502 as amended, when a member of the public requests an affidavit, prosecution and defense attorneys may oppose the request. However, they bear the burden to show a judge why the affidavit should be withheld altogether or released only with redactions. The presumption that an affidavit is open can be overcome, and probable cause information can be either sealed or redacted before disclosure, but only if the defense or prosecution provides “reasons” for sealing or redaction, and if the judge finds it “necessary to prevent public disclosure of information that would” cause at least one of nine harms enumerated in the statutes as amended. The enumerated harms include, for example, disclosure of an affidavit that would “interfere with any prospective law enforcement action, criminal investigation or prosecution.” Thus, under the newly amended statutes, disclosure of affidavits will occur, unless opponents meet the statutory requirement to submit reasons for no-disclosure and if the judge finds that disclosure “would” cause a harm listed in the statutes and that sealing or redaction is “necessary” to prevent the harm. Proper application of the newly
Keynote Speakers

I’m Not Bitter, But I Am Better

Darryl Burton, Thursday Keynote Speaker
• a St. Louis native
• innocent man who spent 28 years in prison for a crime he did not commit. On August 29, 2008 he was exonerated.
• travels nationally and internationally sharing with the world his message of hope and forgiveness.
• currently pursuing Masters of Divinity degree at the Saint Paul School of Theology
• works as a Pastor Intern at the United Methodist Church of the Resurrection in Leawood, Kansas.

Well-Being and the Practice of Law: The Choices Happy Lawyers Make

Daniel Bowling, Friday Keynote Speaker
• Senior Lecturing fellow at the Duke Univ. School of Law
• focus is at the intersection of law, work, and psychology
• teaches labor and employment law
• has designed and taught courses on lawyers and personal well-being
• leads seminar courses exploring the connection between happiness, legal professionalism, and work satisfaction
• A lecturer at the University of Pennsylvania; assists in teaching graduate level courses on positive psychology, positive humanities, and character strengths and virtues

Conference Location

DoubleTree by Hilton
Overland Park, Kansas
10100 College Blvd
Overland Park, KS 66210

Three Ways to Register  ($295 All-Inclusive* )

1. Register online at (LOG IN FIRST) http://www.ksbar.org/event/AM15
2. Fax registration to KBA at (785) 234-3813.
3. Mail the PDF registration (found at http://www.ksbar.org/am15) with payment or credit card information to:
   Kansas Bar Association
   Meg Wickham / Annual Meeting Director
   1200 SW Harrison St.
   Topeka, KS 66612-1806

Full registration includes 2 days of CLE, program materials.

*Foundation Dinner and golf fees are NOT included.

Refund Policy: Full refunds for registration will only be issued before Wednesday, June 10.
### Conference Location

**Three Ways to Register**

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**Well-Being and the Practice of Law: The Choices Happy Lawyers Make**

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**I'm Not Bitter, But I Am Better**

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Innocent man who spent 28 years in prison for a crime he did not commit. On August 29, 2008 he was exonerated.

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**Night at Prairiefire**

**Date/Time**

**Thursday, June 18**

- 5 – 6 pm Reception/Mixer at Museum
- 6 – 9 pm Food, Drink, Bowling & Bocce, Museum Tours, and more. No charge for these events

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**KBF Golf Tournament**

**Date/Time & Location**

**Wednesday, June 17**

10 a.m. — 4 p.m.

Ironhorse Golf Club

15400 Mission Rd

Leawood, KS 66224

**Price**

$100 per person

- $25 KBF donation (online) for mulligans & strings ($50 at event)

**Other Details**

- Driving range & putting greens open for practice
- 9 a.m. registration, 10 a.m. start
- Boxed lunch with burger or brat, chips, fruit, cookie, and bottled water
- Prizes awarded!
- 2 drink tickets (soda, Gatorade®, or beer)
- Gary Woodland hole
- Cash beverage carts throughout the course

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amended statutes balances the public’s interest in open government with the interests of others, including the prosecution, defendant, and law enforcement.

The presumption that affidavits are open is in keeping with a long line of U.S. Supreme Court decisions reflecting the widely recognized public right to know about judicial matters. A presumption of openness for court records and proceedings was specifically established in Kansas in Kansas City Star v. Fossey in 1981 and reaffirmed in Wichita Eagle-Beacon Co. v. Owens 20 years later. The Kansas Supreme Court held that “a trial court . . . may seal the record of . . . proceedings. However, such closure is permitted only if the dissemination of information from the pretrial proceeding and its record would create a clear and present danger to the fairness of the trial, and the prejudicial effect of such information on trial fairness cannot be avoided by any reasonable alternative means.” Moreover, “[t]he burden of proof is on the party making the motion” to seal.

II. Legislative History

In 2014, the Legislature’s enactment of a presumption of openness for affidavits reversed a limit on access that had lasted for 35 years. During that period, because the public’s access to affidavits had depended on convincing a judge to order disclosure, affidavits generally remained inaccessible.

A. Thirty-five years of presumed closure

Before 1979, probable cause information was more or less freely available to courthouse reporters for newspapers. However, in that year, the Legislature amended the statutes that governed access to probable cause affidavits. The amended statutes provided that the probable cause information was not “made available for examination without a written order of the court.” As a result, the statutory amendments presumptively precluded anyone from obtaining affidavits other than the defendant in the criminal case to which the arrest or search was related. Their enactment followed a controversy involving a murder case in Douglas County that the Topeka Daily Capital was covering. A reporter for that newspaper “obtained the names of the two persons for whom warrants were issued by going into the office of the clerk of the district court. The criminal appearance docket was on a table in the back of the room. The room was divided by a counter and a swinging gate. It was the general practice for reporters from the news media to go through the gate, proceed to the table where the criminal appearance docket was kept and look through its pages. It is a public document or record which is kept by the clerk of the district court.” The paper published the names of two suspects in the murder case prior to their apprehension on the warrants. Although one was tried and convicted, the other was never apprehended.

For disclosing the arrest warrants, the newspaper suffered a backlash, particularly from the law enforcement community. Stauffer Communications Inc., owner of the Daily Capital, was convicted of violating a statute that prohibited disclosure of warrants before they were executed and returned, and the company successfully appealed the conviction. In the context of the controversy over disclosure of the arrest warrants, a fateful development occurred in the form of a letter from the Sedgwick County District Attorney’s Office to the chairman of the state Senate Judiciary Committee. The letter called the committee’s attention to a ruling in Wilbanks v. State, 224 Kan. 66 (1978), in which the Kansas Supreme Court said that establishing probable cause for an arrest required more than generalizations couched in the language of a criminal statute. Instead, “sufficient factual information must be presented to enable the magistrate to make an independent finding of probable cause before a warrant is issued.” The letter from the Sedgwick County prosecutor expressed disappointment in the ruling because it “of course overrules 100 years of case law whereby, a verified complaint charging an offense which stems from the language of an [sic] statute was sufficient to support a warrant for arrest.” Although the author of the letter said that his office would not “argue” with the new probable cause requirement, he said that he was aware of instances where “names of witnesses and victims have been published in the paper, and are available to friends of the defendant or defendant’s [sic] themselves prior to arrest.”

Like those who had criticized the Daily Capital for publicizing arrest warrants not yet executed, the author voiced concern related to dissemination of information about alleged perpetrators before they were apprehended. However, the author did not simply propose preventing premature disclosure of probable cause affidavits. Instead, he proposed that affidavits not be disclosed at all, except by written court order. The wording of the author’s proposal was essentially the same as the legislative amendments that, later in 1979, established a presumption of closure of affidavits regardless of whether they had been executed or not.

The amendments allowed the presumption of closure to be overcome only if one who requested an affidavit could convince a judge that its disclosure would be in the public interest. Because the 1979 amendments placed the burden on the requester to hire counsel and go before a judge to even have a chance to obtain it, probable cause affidavits were effectively sealed from public view for 35 years.

B. Catalyst for change

However, the presumption of closure came under intense scrutiny in 2012 when the Johnson County Sheriff’s Department officers executed a search warrant at the home of a Leawood couple. The warrant “turned out to be based on faulty information contained in the probable cause affidavit supporting the warrant . . . . The search failed to yield any . . . evidence of a crime, and the [couple] was never charged with any crime.” The couple asked for the information supporting the warrant, but had to wait a year before obtaining a copy, and only after the couple hired a lawyer and incurred over $25,000 in expenses in litigation.

The couple’s circumstances caught the attention of Kansas House Rep. John Rubin. He worked with them, like-minded legislators, and other open-government advocates to lobby the Legislature, seeking amendment of the statutes governing the accessibility of the probable cause information. Those efforts were opposed by Kansas law enforcement agencies, the Kansas County and District Attorneys Association (KCDAA), and the Kansas Association of Criminal Defense Lawyers (KACDL). At hearings on the proposed amendment before the House and Senate judiciary committees in February and March 2014, those opponents raised concerns related to harm
they believed the disclosure of probable cause affidavits could cause. They argued that release of probable cause information, even if redacted, could compromise a defendant’s right to a fair trial, tip off criminals regarding the status of an investigation or confidential investigative techniques, and discourage witnesses from testifying.\(^41\) They also suggested that the time spent on redacting information would be overly burdensome for both prosecutors and judges. Finally, the KCDA also argued that disclosure of probable cause information could cause prosecutors to violate Kansas Rules of Professional Conduct 3.6 and 3.8.\(^42\)

Rubin countered those arguments in part with research showing that other states presume openness of affidavits, whereas “Kansas has some of the country’s most restrictive laws regarding public release of criminal records, including in particular probable cause affidavits and sworn statements. Of the 40 other states whose laws in this area were reviewed by research staff, 39 presumptively make probable cause affidavits supporting search and/or arrest warrants available to the public at some point, usually after execution, or execution and return, of the warrant. Most if not all of these jurisdictions make provision for the continued sealing or confidentiality by redaction of the warrant or supporting affidavit by court order for good cause shown, such as protection of a confidential informant, an ongoing investigation, or personal identifying information regarding innocent third parties.”\(^43\)

Rubin also noted that his experience as a federal agency attorney informed him that the federal system also presumes openness of affidavits.\(^44\) He had a “fundamental belief that, as a matter of good public policy, all governmental entities and instrumentalities in Kansas . . . should provide full transparency and accountability to the public in all their actions and function, except to the extent that confidentiality is required for legitimate law enforcement purposes.”\(^45\)

Supporters of Rubin’s bill to open affidavits questioned whether opposition by the KCDA and others was well founded. For example, the written testimony by opponents cited no legal authority in support of the proposition that disclosure of probable cause information actually causes such harms as juror prejudice.\(^46\) Also, although opponents suggested that the time spent on redacting sensitive information from affidavits would be overly burdensome for both prosecutors and judges, a Fiscal Note dated February 12, 2014, found that no additional funds would be allotted for implementing the procedure set forth in the statute in the next fiscal year because it is “not possible to predict how complex and time consuming” the process would be.\(^47\) In addition, although the KCDA argued that disclosure of probable cause information would put prosecutors at risk of violating ethics rules designed to prevent prejudicial pretrial publicity, the rules limit extrajudicial statements made by attorneys, not the release of court documents.\(^48\) In addition, proponents said that, for many years, probable cause affidavits related to arrests were open under a long-standing court order in the 5th Judicial District, comprising Lyon and Chase counties. Openness in that district, according to the proponents, had not been problematic.\(^49\)

Ultimately, the efforts of Rubin and others resulted in the passage of the 2014 amendments to K.S.A. 22-2302 and K.S.A. 22-2502 that went into effect on July 1, 2014.

### III. The Amendments to K.S.A. 22-2302 and K.S.A. 22-2502

The amendments prescribe a procedure that allows “any person” to request that the clerk provide the probable cause affidavit to that person.\(^50\) Once that request is made, the clerk is required to promptly notify the defendant or the defendant’s counsel, the prosecutor, and the judge.\(^51\) Within five days of receiving the notification, the counsel for the defendant and the state may propose redactions or make a motion to seal, along with “reasons” supporting any proposed redactions or seal.\(^52\)

Then the judge who issued the warrant is required to review the affidavit in support of that warrant, and the proposed redactions or motions to seal, and make redactions or order the sealing of the affidavit “as necessary to prevent public disclosure of information that would: (A) jeopardize the safety or well-being of a victim, witness, confidential source or undercover agent, or cause the destruction of evidence; (B) reveal information obtained from a court-ordered wiretap or from a search warrant for a tracking device that has not expired; (C) interfere with any prospective law enforcement action, criminal investigation or prosecution; (D) reveal the identity of any confidential source or undercover agent; (E) reveal confidential investigative techniques or procedures not known to the general public; (F) endanger the life or physical safety of any person; (G) reveal the name, address, telephone number or any other information which specifically and individually identifies the victim of any sexual offense . . . . (H) reveal the name of any minor; or (I) reveal any date of birth” or other personal identifying information.\(^53\)

It should be noted that the rules of statutory construction indicate that the only available bases to seal are those set forth in this enumerated list.\(^54\) Accordingly, the only “reasons” that may be considered for redacting or sealing an affidavit are the nine that are specifically enumerated in K.S.A. 22-2302(c)(4)(A) through (I) and K.S.A. 22-2502(e)(4)(A) through (I).\(^55\)

Finally, the judge who issued the warrant is required to make appropriate redactions and disclose a redacted version of the affidavit or order the affidavit sealed within five business days after receiving the proposed redactions or within 10 days after receiving notice of the request for disclosure, whichever is earlier.\(^56\)

Although the statutes do not expressly state that the same judge who issued the warrant must be the one to review the

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request for disclosure, other provisions of the Code of Criminal Procedure suggest that when the Legislature means any magistrate (as opposed to a specific magistrate) it uses the term “a magistrate.” In contrast, when the legislature intends to refer to the specific magistrate who signed the warrant, it referred to the magistrate as “the magistrate.” Thus, when the Legislature refers to “the magistrate” in the amended statutes on affidavits, it means the magistrate who issued the original warrant, not just any magistrate. Any other reading would lead to the unreasonable conclusion that the prosecution or defense could shop for a judge who would be inclined to grant the motions to seal or redact.

IV. Magistrate Review to Determine Whether Disclosure “Would” Cause the Harms Outlined in the Statutes

The statutes provide that the “magistrate shall review the requested affidavits or sworn testimony and any proposed redactions or motion to seal submitted by the defendant, the defendant’s counsel or the prosecutor.” They further provide that the magistrate “shall make appropriate redactions, or seal the affidavits or sworn testimony, as necessary to prevent public disclosure of information that would constitute a specified harm.”

The statutes are in line with the large body of case law that recognizes court records as being open to the public. In general, when a member of the media or the public requests a court record, a presumption of access applies, and courts must make specific, on the record findings if they opt for closure.

Moreover, the Kansas Supreme Court has stated: “In making a decision of either closure or nonclosure, the trial judge should make findings and state for the record the evidence upon which the court relied and the factors which the court considered in arriving at its decision.” Requiring the trial judge to state the findings and a basis for them “will protect both the right of the defendant to a fair trial and the right of the public and news media to have access to court proceedings.” Blanket restrictions are unconstitutional “unless proper inquiry and findings are made by the trial judge in advance of entering the order.” The district court’s findings must be “supported by substantial competent evidence and . . . sufficient to support the district court’s conclusions of law. Substantial competent evidence is such legal and relevant evidence as a reasonable person might regard as sufficient to support a conclusion.”

When the Legislature amended the statutes to presume openness of affidavits, it was in alignment with overwhelming precedent in favor of open court records. As amended, the statutes promote the “fundamental and widespread principle favoring public disclosure, accountability and transparency regarding probable cause affidavits, with appropriate confidentiality safeguards.” A principal reason given for now presuming openness, as documented in legislative hearings, was to enable citizens, including the media, to monitor law enforcement’s exercise of the police power in making arrests and conducting searches.

Because of the legislative intent to establish a presumption of openness for affidavits, and because affidavits may be withheld only if disclosure “would” cause one or more harms listed, movants who oppose disclosure must not submit “reasons” for sealing or redaction that are speculative. The reasons for non-disclosure are insufficient to justify redaction or sealing unless they demonstrate that disclosure “would” result in adverse effects listed in the statute. The Legislature’s use of the term “would”—as opposed to “could”—signifies an intent to require more than just mere conjecture. With the passage of the 2014 amendments, the Legislature adopted the approach in case law that, before court records can be closed, the judge must find that disclosure “would” be harmful. Moreover, even if movants for sealing are in agreement, as can be the case, judges are not relieved of their obligation to consider whether closure is legally justified.

Thus, in considering “reasons” to seal under the statutes, judges ideally are cognizant of First Amendment-based precedent requiring them to make specific findings when seeking to close court records or proceedings. The precedent makes clear that an order to seal records must be supported by specific findings based on evidence that no reasonable alternative would be effective in preventing a harm. Judges are to “make findings and state for the record the evidence upon which the court relied and the factors which the court considered in arriving at its decision.” The trial judge may close a record only if harm “cannot be avoided by any reasonable alternative means.” Under the statutes on access to affidavits, the alternative to sealing is redaction. Thus, a judge who is acting in accordance with the statutes and relevant precedent first determines whether full disclosure of a requested affidavit “would” cause an enumerated harm. If the harm “would” result from full disclosure, the judge next considers whether the alternative to non-disclosure, namely, release of a redacted affidavit, also “would” cause an enumerated harm. Only if redaction would not prevent the harm, does the judge consider sealing the affidavit and withholding it entirely from public view.

V. “Reasons” for Redaction or Sealing

Although the affidavits are presumed available for disclosure upon request, the statutes as amended include a framework within which prosecution and defense may propose reasons for redaction or sealing if they deem it necessary, or in some instances, if they are legally required to do so.

A. Interfering with a prospective law enforcement action or criminal investigation

One “reason” the prosecution likely would offer for sealing is that disclosure of an affidavit would “interfere with any prospective law enforcement action [or] criminal investigation.” However, construing the word “prospective” may be problematic. The prosecution may argue that sealing or redaction is necessary because the affidavit relates to an investigation that is “continuing” or “ongoing,” and is thus “prospective.” However, the term “prospective” may be distinguished from “continuing” or “ongoing.” As ordinarily defined, a “prospective” condition is in the future, not one rooted in the present.

A continuing or ongoing investigation into a charged offense is not one of the specifically enumerated reasons for sealing or redacting an affidavit. The statute stipulates that to be eligible for sealing or redaction, the affidavit must relate to a “prospective” investigation. One might argue that affidavits generally only relate to a continuing or ongoing investigation,
not any future investigation. If “prospective” is construed only to mean “future,” affidavits generally will never be eligible for sealing or redaction, an absurd result that the Legislature could not have intended.

Still, redacting or sealing an affidavit to protect a continuing or ongoing investigation, rather than a future one, does not necessarily make sense in the context of the statute. It authorizes the defendant to obtain a copy of the affidavit, and the defendant is the one most likely to have an interest in interfering with an investigation. If the defendant with a copy of the affidavit can use it to interfere with the investigation, withholding the affidavit from the public does not accomplish the purpose of protecting the investigation.

Even if a “prospective” investigation can be considered a continuing investigation into the case in which the request for disclosure was made, the mere fact that an investigation is ongoing does not relieve the movants to seal of the burden to show the court that a disclosed or reasonably redacted affidavit necessarily would—not merely could—interfere with that investigation.

B. Interfering with a prospective prosecution

A “reason” for a motion to seal or redact that could be made by either the prosecution or defense is that disclosure of the information would “interfere” with the prosecution, or in other words, disclosure would result in a biased jury and impinge on the defendant’s right to a fair trial. However, the idea that disclosure of the affidavit would interfere with the fairness of a criminal trial is unsupported by applicable case law. There is no Kansas Supreme Court case where the Court found that the defendant failed to receive a fair trial because of pretrial publicity alone, even though the contention has been frequently advanced.

The precedent indicates that the Kansas Supreme Court has been extremely consistent in finding that pre-trial publicity did not prevent fair trials. Not only that, the Court thoroughly re-examined its approach to the issue in a very recent case, State v. Carr. Although no appellate court at the time of this publication has interpreted whether or to what extent disclosure of probable cause affidavits would interfere with the fairness of the trial, certain factors reviewed in Carr could be helpful in determining whether disclosure of an affidavit would interfere with the prosecution as contemplated in the governing statutory provisions.

Carr involved heinous crimes committed in Wichita in December 2000 that included rape, robbery, and execution-style killings on a local soccer field. The case is well known for the Kansas Supreme Court’s reversal due to the trial judge’s failure to sever the defendants’ sentencing phases. However, the Carr Court also conducted a lengthy analysis of whether pretrial publicity deprived the defendants of a fair trial. The Court did so at least in part because it believed it had “not previously been precise about how analysis of presumed prejudice differs from analysis of actual prejudice, how the two theories are supported by and applied under the federal and state constitutions and in concert with our state venue change statute, or about how our standard of review on appeal may be affected.” The Court’s ultimate finding that the trials were fair involved a “discussion of the defendants’ venue challenge by tearing apart and then reassembling these concepts.”

As actual prejudice only takes place once the jury has been impaneled, the relevant inquiry in an early stage of proceedings appears to be whether the defendant suffers presumed prejudice that would prevent a fair trial. The Court’s thorough approach to presumed prejudice in Carr provides a possible framework for analyzing whether disclosure of an affidavit would “interfere with any prospective law enforcement action, criminal investigation or prosecution.”

Presumed prejudice occurs “where the pretrial publicity is so pervasive and prejudicial that we cannot expect to find an unbiased jury pool in the community. We ‘presume prejudice’ before trial in these cases, and a venue change is necessary.” Federal courts since then “have refined the parameters of presumed prejudice claims, setting an extremely high standard for relief.” “A court must find that the publicity in essence displaced the judicial process, thereby denying the defendant his constitutional right to a fair trial. Reversal of a conviction will occur only ‘where publicity “created either a circus atmosphere in the courtroom or a lynch mob mentality such that it would be impossible to receive a fair trial.”’

In Carr, the Court identified factors based on Skilling v. United State that a judge should take into account in deciding whether a change of venue is warranted because of publicity. The Skilling factors are: “media interference with courtroom proceedings,” “the magnitude and tone of the coverage,” “the size and characteristics of the community in which the crime occurred,” “the amount of time that elapsed between the crime and the trial,” the jury’s verdict,” “the impact of the crime on the community,” and “the effect, if any, of a codefendant’s publicized decision to plead guilty.”

Factors involving the verdict or the guilty plea of any co-defendant are typically irrelevant at the early stage of the proceedings when the affidavit is most likely to be requested, although those factors could be considered if circumstances dictate doing so. The factors that generally could apply to a request for an affidavit are: (1) media interference with courtroom proceedings; (2) the magnitude and tone of the coverage; (3) the amount of time that elapsed between the crime and the trial; (4) the size and characteristics of the community in which the crime occurred; and (5) the impact of the crime on the community. A magistrate who receives a request for an affidavit could apply those factors if a movant claims disclosure would interfere with the case as provided in the statute and ultimately prevent trial fairness.

1. Media interference with courtroom proceedings

In Carr, there was “no suggestion . . . that any media representative interfered with courtroom administration in this case at any time . . . . In each of the cases in which the United States Supreme Court has presumed prejudice and overturned a conviction, it did so in part because the prosecution’s atmosphere . . . was utterly corrupted by press coverage.” Unless a media outlet behaves in an unquestionably unprofessional manner, this factor should ordinarily weigh in favor of disclosure of the requested affidavit.

2. The magnitude and tone of the coverage

Carr sets a very high standard for when the magnitude and tone of pretrial publicity can prejudice a trial. In Carr, when the Court considered the “magnitude and tone” of the media coverage in the context of presumed prejudice, it found they
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were “extremely high.”93 However, the Court’s “review of at least the mainstream press coverage likely to reach a wide audience leads us to the conclusion that it was more factual than gratuitously lurid.”94 Negative news about the defendants included “especially intense” coverage “immediately after . . . the defendants’ arrests” and later, a local television campaign advertisement supporting Phill Kline for attorney general that identified the defendant by name and “labeled him a murderer.”95 Regardless, the trial judge cited the “factual tone of the press coverage” as a reason the Court found the “factor did not weigh in favor of presumed prejudice.”96

In a 2014 case, State v. Roeder,97 the Court endorsed the presumed-prejudice analysis in Carr, although the Court declined to apply the analysis. The reason was that the defendant, who had been convicted of killing Wichita doctor George Tiller in 2009, did not “make a constitutional presumed prejudice challenge.”98 Nevertheless, in endorsing the presumed-prejudice analysis, the Roeder Court commented instructively about the relationship between publicity and trial fairness. Tiller had survived at least two serious attempts on his person when his medical clinic was bombed in 1986 and when he was shot in both arms in 1993.99 On June 1, 2009, the day after the defendant shot and killed the victim while the victim was acting as an usher during a church service, seven articles in the Wichita Eagle regarding the murder appeared on that day alone, including three on the front page.100 Moreover, “[s]everal articles identified Roeder as the suspect in Dr. Tiller’s murder.”101 The case generated much additional publicity, which included an interview with the Kansas City Star “where Roeder admitted killing Dr. Tiller and discussed his trial strategy.”102 In response, the defendant filed a pretrial “motion for change of venue based on the long history of public conflict and controversy surrounding the abortion portion of Dr. Tiller’s medical practice and, more particularly this homicide case.”103

Even given the extensive media coverage in Roeder, the Court found that the defendant had “not met his burden simply by establishing the existence of a large amount of pretrial publicity. This court has opined that media publicity alone never establishes prejudice.”104

Thus, as long as a mainstream media outlet is publishing factual articles that do not create either a “circus atmosphere in the court room” or a “lynch mob mentality” as contemplated in Carr, this factor should ordinarily weigh in favor of disclosure of a request for an affidavit.

3. The time that elapsed between the crime and the trial

In Carr, there was a 17-month lapse between when the crimes were committed and when the motion to change venue was filed.105 “In the ordinary case, one might expect these time frames to mean that public interest in the crimes and defendants had begun to wane and that it would continue to do so.”106 Indeed, “[t]he substantial lapse of time between peak publicity and the trial also weighs against a finding of prejudice. Specifically, the Kansas Supreme Court has held that a three-month time lapse between when information is disseminated and trial "would ordinarily be sufficient to dissipate any pretrial publicity arising at the preliminary hearing."107

A request for an affidavit made at the outset of the case, well before trial, ordinarily would weigh in favor of disclosure.
4. The size and characteristics of the community in which the crime occurred

The prosecution, defense, or the court could have a greater concern that media publicity will prejudice the trial if the community in which the trial is taking place has a small population from which to draw a jury pool. But even in small jurisdictions, a change of venue has not been necessary because of pretrial publicity. For example, a relatively recent murder conviction in Labette County was not overturned even though “there was widespread publicity regarding the victim’s murder throughout the community.”108 There, the Court considered “the severity of the offense and the relatively small size of the community,” and “firmly conclude[d] the district court did not abuse its discretion in denying the defendant’s motion for change of venue.”109

Kansas communities generally would seem to be within the range of population where courts have found publicity was not prejudicial. In light of the Kansas precedents, an argument that the outright sealing of the requested affidavit is necessary to protect the purity of the jury pool risks overestimating the effect of pretrial publicity and underestimating the ability of the citizens of Kansas to be fair. This factor ordinarily would weigh in favor of disclosure of the requested affidavit.

5. The impact of the crime on the community

In Carr, the defense presented evidence of “strongly hostile statements by members of the public in response to press coverage of the crimes and prosecution.”110 Taking into account specific pretrial news reports about “widespread public reaction to the crimes,” the Court found that the impact factor favored a change in venue, but did not weigh heavily enough for it to find the trial court erred in denying the motion.111 At the same time, the Court noted that judges “have properly denied” requests for a change of venue in “cases involving substantial pretrial publicity and community impact, for example, the prosecutions resulting from the 1993 World Trade Center bombing . . . and the prosecution of John Walker Lindh, referred to in the press as the American Taliban.”112

Even in Carr, that animosity was insufficient to find that the defendants had been denied a fair trial. Absent evidence of hostility beyond what took place in Carr, this factor ordinarily would weigh in favor of disclosure of the requested affidavit.

With reference to those five foregoing factors adapted from the presumed prejudice analysis in Carr, courts could assess whether disclosure of the requested affidavit “would interfere with the proceedings as contemplated in the statutes.”113 As indicated supra, the factors are likely to weigh in favor of disclosure. If the movants for sealing fail to meet their burden to show otherwise, courts could be comfortable in not finding that disclosure “would” cause a specific harm listed in the statute and that sealing is necessary.

C. Jeopardizing the safety or well-being of a victim, witness, confidential source or undercover agent, causing the destruction of evidence, or endangering the life or physical safety of any person

Further, both statutes on arrests and searches allow movants for sealing or redaction to cite these above “reasons” in support of their motions.114 Indeed, in order for arrests and searches to be supported by sufficient probable cause, affidavits often include the statements of victims and witnesses. The safety of those individuals and ensuring that they are able to testify at trial if necessary is an integral component of the rule of law in our society. However, the mere fact the names of those individuals appear in the probable cause information does not relieve the movants for sealing of the burden to show the court that even a reasonably redacted affidavit would necessarily jeopardize the safety or well-being of any of those individuals. In the absence of a showing to the contrary, a magistrate would be obligated under the statutes to find that disclosure of the affidavit with redactions of all relevant names would be sufficiently protective.

At the same time, weighing in favor of disclosure, is the fact that the defendant represents the greatest likely threat to the safety of persons related to the case and has statutory authorization to receive a copy of the probable cause information. Thus, redacting or sealing information already in possession of the defendant would not necessarily prevent harm to those listed in the affidavit.

D. Revealing information from a search warrant or wiretap that has not expired

The statutes on arrests and searches both provide for redaction or sealing of information that would reveal a wiretap that has not been executed.115 Further, both statutes also provide that probable cause information is available to the public upon request, but only “after the warrant or summons has been executed.”116 Thus, if any movant can show that the reason for redaction or sealing is based on the fact that a search warrant or wiretap has yet to be executed, preventing that information from being disclosed to the public ordinarily would be justifiable.

E. Revealing the identity of any confidential source or undercover agent

Maintaining the confidential identity of a source or undercover agent can be a necessity depending on the circumstances of a given case. In such instances, references to such individuals are likely to be made in a probable cause affidavit. The statutes provide for redaction or sealing of information that would reveal such references.117 In the absence of a showing to the contrary, a magistrate comfortably could find that redaction of those individuals’ names and other identifying information is sufficient to protect those identities in the vast majority of instances.

F. Revealing confidential investigative techniques or procedures not known to the general public

The statutes on arrests and searches appropriately are protective of information about confidential investigative techniques. If any movant who opposes full disclosure of an affidavit can show that a confidential technique would be revealed, a magistrate is authorized by the statutes to consider either redaction or sealing the information. If the movant fails to show that sealing of the entire affidavit is necessary, the magistrate is free to order disclosure with redaction of the portions that identify confidential investigative techniques.

G. Revealing the name or contact information of a victim of a sexual assault; revealing the name of any minor; and revealing personal identifiers, such as date of birth and Social Security number

Movants who oppose full disclosure of an affidavit are authorized to cite the need to protect a sexual assault victim...
or minor or to protect the privacy of personally identifiable information.\textsuperscript{119} This provision essentially expands the burden placed on attorneys and parties pursuant to the Kansas Supreme Court’s requirement\textsuperscript{120} that personal identifiers be redacted from court filings, including Social Security number, birth date, and bank account number. If any movant can show that an affidavit contains statutorily protected identifying information, a magistrate would be justified in ordering redaction of the information before release of the affidavit to the public.

Because the statutes regarding arrest- and search-related affidavits presume that they are open court records, those who request access to an affidavit reasonably may anticipate that it will be disclosed either fully or with redactions, rather than withheld altogether under seal.

\textbf{VI. Conclusion}

The presumption of openness that has existed in Kansas since the Kansas Supreme Court’s 1981 ruling in \textit{Fossey} has now been applied to the statutes governing arrest and search warrants. The amendments reverse the longstanding statutory presumption that affidavits in support of those warrants are closed, and bring the law governing the disclosure of these documents into alignment with the long established presumption at both the state and federal levels that court records are open. In considering “reasons” for redaction or seal offered by the prosecution or defense, judges should order redaction or seal only if the movant or movants for redaction or seal can demonstrate that one of the nine enumerated statutory harms “would” occur. Proper application of the amendments should allow for the disclosure of affidavits with reasonable redactions in the vast majority of instances, thereby achieving an equilibrium between the interests of the public, the defendant, and law enforcement.

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\end{itemize}
ENDNOTES
3. K.S.A. 22-2302(c)(4); K.S.A. 22-2502(e)(4).
4. See, e.g., The World Company, d/b/a the Lawrence Journal-World v. The Honorable B. Kay Huff, Kansas Supreme Court Case No. 14-113027-S.
6. See Kansas City Star v. Fossey, 230 Kan. 240, 247 (1981) (establishing a presumption of openness for court proceedings and records, stating, “It has been said that the reason for requiring all court proceedings to be open, except where extraordinary reasons for closure are present, is to enhance the public trust and confidence in the judicial process and to insulate the process against attempts to use the courts as tools for persecution.” See also State ex rel. Stephen v. Harder, 230 Kan. 573, 581, 641 P.2d 366 (1982) (holding that records of public funds used for abortions were open and saying, “Sunshine is the strongest antiseptic—it’s rays may penetrate areas previously closed.”).
11. Id.
14. Id.
19. Id.
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Leavenworth County Dist. Ct., Case No. 2014 CR 1136.

become something specified in the future”). Retrieved from http://www.whom it was issued . . . .”).

attorney any unexecuted warrant shall be returned to the magistrate by

magistrate . . . .); K.S.A. 22-2305(5) (“At the request of the prosecuting

arresting officer] shall without unnecessary delay take the person arrested

ing the officer to arrest the person named or described in the warrant.”);

made by a magistrate directed to any law enforcement officer command-

avitt, 271 Kan. 516 (1996); State v. Jackson

47 (1996); State


851 (1992); State v. Tyler, 251 Kan. 616 (1992); State v. Mayberry, 248


(1987); State v. McKibben, 239 Kan. 574 (1986); State v. McNaught,


(1985); State v. Boan, 235 Kan. 800 (1984); State v. Crispin, 234


229 Kan. 73 (1981); State v. May, 227 Kan. 393 (1980); State v. Soles,

224 Kan. 698 (1978); State v. Filder, 223 Kan. 220 (1977); State v. Black,

221 Kan. 248 (1977); Green v. State, 221 Kan. 75 (1976); State v. Ayers,


827 (1966); State v. Furbeck, 29 Kan. 532 (1883); State v. Arcules, 29


Kan. 802 (1982); State v. Allen, 4 Kan. App. 2d 534, rev. denied, 228

Kan. 807 (1980). These citations previously appeared in a Memorandum in

Support of Motion to Intervene and for Release of Sealed Documents filed

by Fleeson, Goosing, Couplin & Kitch LLC in State v. Rader, Sedgwick

County Dist. Ct., Case No. 2005 CR 498.

80. 300 Kan. 1 (2014). On March 30, 2015, the U.S. Su-

preme Court accepted the Kansas Attorney General’s petition for Cer-

toriari on issues unrelated to the discussion here. See State v. Carr,

Petition for Cerrtoriari. Retrieved from http://ag.ks.gov/docs/default-

source/documents/carr-jonathan-petition-96282829.pdf?status=Temp

&sfvrsn=0.26841902571327114; U.S. Supreme Court Order List

courtorders/033015zor_5iek.pdf.

81. K.S.A. 22-2302(c)(4)(C) and K.S.A. 22-2502(e)(4)(C)

82. See Carr, 300 Kan. at 48-84; Syl. ¶¶ 1-11.

83. Id., 300 Kan. at 58.

84. Id.

85. Carr, 300 Kan. at 58, citing Gross v. Nelson, 439 F.3d 621, 628

(10th Cir. 2006) (citing Rideau v. Louisiana, 373 U.S. 773 (1963)).

86. Carr, 300 Kan. at 62.

87. Id. (citations omitted).


89. Carr, 300 Kan. at 62.

90. Carr, 22-2302(c)(4)(C).


92. Carr, 300 Kan. at 65.

93. Id., 300 Kan. at 66.

94. Id., 300 Kan. at 52.

95. Id., 300 Kan. at 67.

96. Id., 300 Kan. at 67.

97. 336 P.3d 831 (Kan. 2014)

98. Roeder, 336 P.3d at 841.

99. Id. at 838.

100. Id. at 841.

101. Id.

102. Id.

103. Id.

104. Id. at 842 (2014) (emphasis in original), citing State v. Corri

na, 251 Kan. 508 (2001); see also Higgenbotham, supra note 79, at 593 quot-


(“Media publicity alone has never established prejudice per se.”)

105. See Carr, 300 Kan. at 68.

106. Id.


109. Id., at 373, 374.

110. Carr, 300 Kan. at 68.

111. Id. at 69.

112. Id. (citation omitted)

113. See K.S.A. 22-2302(c)(4)(C) and K.S.A. 22-2502(e)(4)(C).

114. See, e.g., K.S.A. 22-2302(c)(4)(A) and (E).
115. See, e.g., K.S.A. 22-2302(c)(4)(B).
116. K.S.A. 22-2302(c)(1); K.S.A. 22-2502(e)(1).
117. See, e.g., K.S.A. 22-2302(c)(4)(D).
118. See K.S.A. 22-2302(c)(4)(E) or K.S.A. 22-2502(e)(4)(E)

119. K.S.A. 22-2302(c)(4)(G)(H) and (I); K.S.A. 22-2502(e)(4)(G)(H) and (I).
FACTS: This is an original proceeding in discipline filed by the office of the disciplinary administrator against the respondent, Clothier, of Leavenworth, an attorney admitted to the practice of law in Kansas in 1981. Clothier's ethical complaints involved his representation in domestic matters, his conduct toward opposing counsel, and also his threatening actions toward a district court judge following an adverse ruling.

PANEL HEARING: On July 10, 2014, the office of the disciplinary administrator filed a formal complaint against the respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC). The respondent filed an answer on July 17, 2014. The parties entered into written stipulations of facts. A hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on August 18, 2014, where the respondent was personally present and was represented by counsel. The hearing panel determined that respondent violated KRPC 1.1 (2014 Kan. Ct. R. Annot. 456) (competence); 1.3 (2014 Kan. Ct. R. Annot. 475) (diligence); 1.4(a) (2014 Kan. Ct. R. Annot. 495) (communication with client); 3.5(c) (2014 Kan. Ct. R. Annot. 626) (communication with a judge without delivering copy in writing to adverse counsel); 3.5(d) (engaging in undignified or discourteous conduct degradation to a tribunal); 8.2(a) (2014 Kan. Ct. R. Annot. 677) (statements about judges and legal officials); 8.4(d) (2014 Kan. Ct. R. Annot. 680) (engaging in conduct prejudicial to the administration of justice); and 8.4(g) (engaging in conduct adversely reflecting on lawyer's fitness to practice law). The hearing panel unanimously recommended that Clothier be granted probation.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator recommended that Clothier be suspended for six months.

HELD: Court held the evidence before the hearing panel established by clear and convincing evidence the charged misconduct. Court found Clothier developed a workable, substantial, and detailed plan of probation. Court concluded that Clothier should receive three years' probation.

90-DAY SUSPENSION AND EDUCATION REQUIREMENT

IN THE MATTER OF TIMOTHY H. HENDERSON, DISTRICT JUDGE
ORIGINAL PROCEEDING RELATING TO JUDICIAL CONDUCT
NO. 112,056 – FEBRUARY 27, 2015

FACTS: This is an original disciplinary proceeding against Henderson, district judge of the 18th Judicial District, sitting in Sedgwick County (respondent). The matter was investigated by Panel A of the Kansas Commission on Judicial Qualifications (Commission), following which that panel docketed a formal complaint against respondent and gave due notice. The complaint alleged three counts of judicial misconduct constituting various violations of Canons 1 and 2 of the Kansas Code of Judicial Conduct (the Code) involving sexual harassment by the respondent of female attorneys and influencing others to obtain employment for his wife.

KANSAS COMMISSION ON JUDICIAL QUALIFICATIONS: After being served with the Notice of Formal Proceedings, respondent timely filed an Answer, in which he denied that his conduct violated the Code. The matter was then set for a public hearing before Panel B of the Commission (the hearing panel). At the hearing, the Commission's investigating attorney presented evidence and argument in support of the formal complaint and respondent's attorney presented evidence and argument on his behalf. Subsequently, the hearing panel found Code violations under all three counts and recommended that respondent be disciplined by public censure. Respondent did not file exceptions to the Panel's findings of facts and conclusions of law.

HELD: Court stated that a judge who sexually harasses female attorneys and staff members, who uses his judicial office to harm the law practice of an attorney with whom the judge disagrees on moral issues, and who uses his judicial office for personal gain by trying to influence whether his wife is offered a job has fallen well short of those highest standards. Such improprieties are precisely the type of misconduct that can undermine the public's confidence in the judiciary. Court held that respondent shall be suspended from his judicial duties for a period of 90 days without pay, commencing within 10 days of the filing of this opinion. Court also ordered that respondent shall, within one year of this opinion, satisfactorily complete a course in sexual harassment, discrimination, and retaliation prevention training and one or more educational programs on the employment law applicable to such conduct and shall file a report with this court within that one-year period, detailing the training and program(s) completed. Last, Court ordered that respondent shall be prohibited from accepting any position in the 18th Judicial District that involves the supervision of any judicial branch employee, other than his chambers staff, for a period of two years following completion of the above-described educational requirement.

THREE-YEAR SUSPENSION, WHICH IS STAYED DURING PROBATIONARY PERIOD OF THREE YEARS
IN THE MATTER OF JAMES E. RUMSEY
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 112,923 – FEBRUARY 27, 2015

FACTS: This is an original proceeding in discipline filed by the office of the disciplinary administrator against the respondent, Rumsey, of Lawrence, an attorney admitted to the practice of law in Kansas in 1972. Rumsey's ethical problems involve his appointment in a felony DUI case and his treatment and offensive comments to
the prosecutors, and also his representation of evidence during his complaint proceeding.

HEARING PANEL: On April 8, 2014, the office of the disciplinary administrator filed a formal complaint against the respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC). On June 17, 2014, the respondent filed a motion to answer out of time, which was granted, and he filed an answer on June 20, 2014. A hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on October 1-2, 2014, where the respondent was personally present and was represented by counsel. The hearing panel determined that respondent violated KRPC 3.5(d) (2014 Kan. Ct. R. Annot. 626) (engaging in undignified or discourteous conduct degrading to a tribunal); 8.1(a) (2014 Kan. Ct. R. Annot. 670) (false statement in connection with disciplinary matter); 8.4(c) (2014 Kan. Ct. R. Annot. 680) (engaging in conduct involving misrepresentation); and 8.4(d) (2014 Kan. Ct. R. Annot. 680) (engaging in conduct prejudicial to the administration of justice). The hearing panel recommended that the respondent should be disciplined by published censure.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator recommended that the respondent be suspended for a period of two years. The disciplinary administrator indicated that the respondent needed a “period of time to reflect upon his conduct.” The disciplinary administrator also argued that the respondent engaged in deceitful conduct. The respondent recommended published censure.

HELD: Court held the hearing panel established by clear and convincing evidence the charged misconduct violations. Court stated that respondent’s undignified and discourteous conduct degrading a tribunal is an echo of previous disciplinary complaint hearings, so Court felt that published censure was not appropriate discipline. Court felt that a simple suspension would not serve the respondent’s best interests in rehabilitation, but decided sua sponte to impose a three-year suspension, and stayed imposition of that discipline and respondent’s indefinite suspension from the Kansas Bar. The respondent argued that a suspension of one year would not sufficiently address the misconduct.

HEARING PANEL: On May 12, 2014, the office of the disciplinary administrator filed a formal complaint against the respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC). The respondent filed an answer on June 9, 2014. A hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on July 1, 2014, where the respondent was personally present. The hearing panel determined that respondent violated KRPC 1.4(a) (2014 Kan. Ct. R. Annot. 495) (communication); 8.4(g) (2014 Kan. Ct. R. Annot. 680) (engaging in conduct adversely reflecting on lawyer’s fitness to practice law); 8.1(b) (2014 Kan. Ct. R. Annot. 670) (failure to respond to lawful demand for information from disciplinary authority); Kansas Supreme Court Rule 207(b) (2014 Kan. Ct. R. Annot. 342) (failure to cooperate in disciplinary investigation); Kansas Supreme Court Rule 208 (2014 Kan. Ct. R. Annot. 356) (registration of attorneys); and Kansas Supreme Court Rule 218 (2014 Kan. Ct. R. Annot. 414) (notification of clients upon suspension). The hearing panel unanimously recommended that the respondent be suspended for a period of one year.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator recommended that the respondent be suspended for a period of one year. The respondent argued that a suspension of one year seemed severe.

HELD: Court held the respondent was given adequate notice of the formal complaint, to which he filed an answer; he filed no exceptions to the hearing panel’s final hearing report. With no exceptions before the Court, the panel’s findings of fact were deemed admitted and Court held the evidence before the hearing panel established the charged misconduct by clear and convincing evidence. Court held respondent should be suspended for one year, comply with annual supervision requirements, and immediately self report any violation of the KRPC.

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registration requirements thereafter, and reimburse the bankruptcy client fees paid by the client to new counsel to complete the bankruptcy case.

**Civil**

**HABEAS CORPUS AND COSTS**

**MERRYFIELD V. QUILENN**

**PAWNEE DISTRICT COURT – AFFIRMED IN PART, VACATED IN PART, AND REMANDED**

**COURT OF APPEALS – AFFIRMED**

**NO. 110,662 – FEBRUARY 27, 2015**


ISSUE: Assessment of costs for habeas actions filed by civilly committed sexually violent predators

HELD: Court of Appeals was affirmed. K.S.A. 2014 Supp. 59-29a23 is the more specific statute, and its plain language provides for assessment of costs to the county. District court’s assessment of costs to petitioners is reversed. Remanded with directions to assess costs to county responsible for the costs as required by K.S.A. 2014 Supp. 59-29a23(c).

STATUTES: K.S.A. 2014 Supp. 59-29a23, -29a23(a), -29a23(c); K.S.A. 2014 Supp. 60-1503(a), -1505(d); and K.S.A. 60-1501

**CRAWFORD DISTRICT COURT – REVERSED AND REMANDED**

**COURT OF APPEALS – REVERSED**

**NO. 107,934 – MARCH 13, 2015**

FACTS: With same certificate of service date, Wahl filed bare motion, a notice of intent to supplement motion at a later date, and motion for evidentiary hearing. Wahl timely filed supporting memorandum within time granted by the court, claiming ineffective assistance of counsel before trial and during plea negotiations. District court summarily denied the 60-1507 motion, finding Wahl’s plea agreement waived right to file a collateral attack. Alternatively district court found the motion was untimely filed within one-year limitation period in 60-1507(f)(1). In unpublished opinion, Court of Appeals panel found no waiver because plea agreement made explicit exception for ineffective assistance claim. Panel also found the initial 60-1507 motion was not time barred, but affirmed the denial of relief because the initial bare motion provided no claim or ground for relief, and the supporting memorandum was an attempted amendment that did not relate back to the timely filed motion. Wahl’s petition for review granted.

ISSUES: (1) Waiver of right to file K.S.A. 60-1507 motion, (2) timely filing under K.S.A. 60-1507(f)(1), and (3) amendment of K.S.A. 60-1507 motion

HELD: District court erred by concluding Wahl waived his right to file a 60-1507 motion alleging ineffective assistance of counsel. Court of Appeals correctly found the plea agreement excepted ineffective assistance of counsel claims.

Under facts in case, which include no challenge to certificate of service date on Wahl’s pleadings, the initial 60-1507 motion was timely filed within the 60-1507(f)(1) limitation period. District court’s ruling on that issue was reversed.

Relation-back test in *Pabst v. State*, 287 Kan. 1 (2008), does not apply under facts in this case because Wahl’s supporting memorandum was not an attempted amendment to his initial motion. District court should have considered the supporting memorandum — whose filing the court allowed — before summarily denying Wahl’s motion. Judgment of Court of Appeals was reversed. Judgment of district court was reversed and case was remanded for district court’s consideration of the supplemented 60-1507 motion.

STATUTES: K.S.A. 20-3018(b), 60-215, -1507, -1507(f)(1), -1507(f)(2), -2101(b); and K.S.A. 2010 Supp. 22-3608(c)

**Criminal**

**STATE V. LONGORIA**

**BARTON DISTRICT COURT – AFFIRMED**

**NO. 108,333 – MARCH 6, 2015**

FACTS: A jury convicted Longoria of capital murder, vehicle burglary, and theft in the death of A.D. whose 14-year-old body was burned and left near an asphalt plant in Great Bend. In this direct appeal, Longoria challenges his convictions, raising eight issues: (1) The trial court erred when it denied him motion for change of venue; (2) the trial court erred in failing to instruct on the lesser included offense of felony murder; (3) the trial court erred in failing to instruct on the lesser included offense of reckless second-degree murder; (4) the trial court erred in admitting a before-death photograph of the victim; (5) the trial court erred in admitting a video of Longoria’s arrest; (6) the prosecutor committed misconduct during closing arguments that denied Longoria a fair trial; (7) the trial court erred in failing to declare a mistrial due to juror misconduct; and (8) the state failed to present sufficient evidence to convict him of capital murder.

ISSUES: (1) Change of venue, (2) lesser included instructions, (3) photographic evidence, (4) video evidence, (5) prosecutorial misconduct, (6) juror misconduct, and (7) capital murder

HELD: Court held after viewing factors in favor and against a change of venue, other reasonable judges might have denied Longoria’s motion to change venue under the statute and therefore the trial court did not abuse its discretion. Court held the trial court did not err in failing to sua sponte instruct the jury on felony murder as a lesser included offense of capital murder because Court has determined the felony murder is not such a lesser offense. Court stated the jury verdict reflected that the jury was convinced beyond a reasonable doubt that Longoria premeditated the killing of A.D. Court held that Longoria failed to firmly convince the Court that the verdict would have been different had the trial court given an instruction on unintentional but reckless second-degree murder as a lesser included offense of capital murder. Court held the before-death photograph of A.D. was material and probative and not unduly prejudicial and the trial court did not abuse its discretion in admitting it into evidence. Court found no abuse by the trial court in admitting the video of Longoria being taken into custody at gunpoint based on relevancy and possible guilt. Court held the prosecutor did not comment on facts not in evidence in conveying, with some sarcasm, the weaknesses of the defense theories. While the prosecutor’s sarcasm came dangerously close to asserting a personal opinion, his effort to tie any statements back to the evidence ameliorated the suggestion that the statements were his personal view. Regarding alleged misconduct by outside juror conversations, Court found the trial court appropriately conducted an investigation into the allegation, received evidence, weighed the evidence, and believed the juror did not discuss the facts of the case with a third party. Court held there was sufficient evidence of an underlying sex crime to support Longoria’s convictions of capital murder.
CONCURRENCE: Justice Johnson concurred, but wrote separately disagreeing with the route to harmlessness constructed by the skip rule for lesser included offenses.

STATUTES: K.S.A. 21-3402, -3439, -3701, -3715, -4624, -5402; K.S.A. 22-2616, -3414, -3423, -3501; and K.S.A. 60-401

STATE V. MONCLA
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 110,549 – MARCH 6, 2015

FACTS: In May 1995, a jury convicted Moncla of first-degree murder and sentenced him to a hard 40 life sentence based on the heinous nature of the killing. Because Moncla had not yet seen receipts supporting a requested restitution amount, the district judge gave the parties 30 days to determine restitution and said that he would hold a hearing if there was a dispute over the restitution amount. By way of a journal entry filed nearly five months later, the district judge set amounts for restitution and court costs. Moncla’s conviction was affirmed. In January 2013, Moncla filed a pro se motion to correct illegal sentence. In the motion, Moncla claimed his sentence was illegal because: (1) insufficient evidence supported the district judge’s finding of an aggravating factor supporting imposition of a hard 40 life sentence; (2) the district judge “intentionally structured defendant’s case through bias, improper and legally unsound rulings, to ensure [Moncla] received a Hard-Forty year sentence in violation of [his] due process rights”; (3) the district judge lacked jurisdiction to sentence defendant because his right to a fair trial and due process rights were violated; and (4) the district judge lacked jurisdiction to impose restitution, court costs, and other fees. Moncla’s motion was summarily denied, and Moncla took a timely appeal.

ISSUES: (1) Aggravating sentencing factors and (2) restitution

HELD: Court held Moncla’s conviction for first-degree murder bestowed jurisdiction to sentence upon the district court, and the judge’s pronounced hard 40 sentence conformed to the statutory requirements, including the existence of sufficient evidence to support the existence of the aggravator that the murder was committed in an especially heinous, atrocious, or cruel manner. Court held Moncla’s sentence was final when the district court judge memorialized the amount of restitution in a journal entry. Court also stated the district judge’s failure to hold a hearing in open court with the defendant present in order to set the amount of restitution did not deprive the district court of jurisdiction or make the sentence illegal under K.S.A. 22-3504.

STATUTES: K.S.A. 21-4636; and K.S.A. 22-3504

STATE V. NOYCE
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 111,660 – FEBRUARY 27, 2015

FACTS: In February 1999, Noyce pled guilty to aggravated arson, premeditated first-degree murder, and capital murder after setting fire to a residence. Dalene and Clifford Noyce died as a result. The first-degree murder conviction stems from Clifford’s death, and the capital murder conviction arises from killing both Dalene and Clifford as part of the same act or transaction. The district court sentenced Noyce pursuant to a plea entered in exchange for the state’s promise not to seek the death penalty -- two consecutive life sentences with mandatory minimums of 40 years’ imprisonment each (hard 40) for the murders, and a consecutive 51-month sentence for arson. In November 2013, Noyce filed a pro se motion under K.S.A. 22-3504 to correct an illegal sentence, arguing his first-degree murder sentence was illegal because the first-degree and capital murder convictions both punished him for the same murder (Clifford’s). The state argued Noyce’s claim was not properly raised as a motion to correct an illegal sentence. The district court summarily dismissed the claim on a different ground, holding the sentence for capital murder would render moot any need to resentence Noyce on the other count.

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www.ksbar.org | May 2015 37
ISSUE: Illegal sentence
HELD: Court stated it previously has held multiplicity cannot be raised in a motion to correct an illegal sentence. See State v. Bradford, 299 Kan. 288, 289, 323 P.3d 168 (2014). Court held Noyce has not demonstrated manifest injustice to the district court in order to properly bring a 1507 motion. Court rejected a recent motion to convert Noyce's pleading to a 1507 motion. Court also rejected Noyce's most recent motion for remand for a hearing under State v. Van Cleave, 239 Kan. 117, 716 P.2d 580 (1986), to remand ineffective assistance of counsel allegations after sufficient showing in a direct appeal as an alternative to the remedy afforded through K.S.A. 60-1507. Court held that although it gave an incorrect basis for its ruling, i.e., that Noyce's capital murder conviction would render moot any resentencing, Court affirmed the district court's summary dismissal of the motion to correct an illegal sentence for the stated different reasons.

STATUTES: K.S.A. 22-3504; K.S.A. 22-3601; and K.S.A. 60-1507

STATE V. PARKER
RILEY DISTRICT COURT – AFFIRMED
NO. 111,044 – MARCH 6, 2015

FACTS: Parker was prosecuted and convicted on charges of felony murder and criminal discharge of a firearm at an occupied building. On appeal he claimed reversible misconduct by prosecutor during closing argument in telling jurors to consider lesser included crimes of second-degree unintentional murder and involuntary manslaughter only if jurors first found Parker not guilty of felony murder.

ISSUE: Prosecutorial misconduct – jurors' consideration of lesser included offenses
HELD: Prosecutor's statement was erroneous because it suggested jury had to unanimously acquit Parker of felony murder before it could consider the lesser included offenses. No reversible misconduct found, however, in light of prosecutor's also reciting the correct legal standard during closing arguments, and overwhelming evidence of Parker's guilt for felony murder. Also, based on K.S.A. 2013 Supp. 21-5402(d) and (e) which applied retroactively in this case, district court should not have instructed on second-degree unintentional murder or involuntary manslaughter as lesser included offenses because felony murder no longer has lesser included offenses.

STATUTES: K.S.A. 2013 Supp. 21-5108(b), -5402(a)(2), -5402(c)(1)(O), -5402(d), -5402(e), -6308(a)(1)(A); K.S.A. 2013 Supp. 22-3414(3); K.S.A. 22-3403, -3421; and K.S.A. 60-261

STATE V. SALARY
WYANDOTTE DISTRICT COURT – CONVICTIONS AFFIRMED, SENTENCE VACATED, AND CASE REMANDED WITH DIRECTIONS
NO. 104,181 – MARCH 13, 2015

FACTS: Salary appeals his convictions of first-degree premeditated murder and arson arising out of the shooting of his uncle and the accompanying house fire. Salary alleges the district court erred in denying his requests to instruct the jury on self-defense and on murder's lesser included offense of voluntary manslaughter based on a theory of imperfect self-defense. He also claimed the court erred in admitting into evidence his recorded confession and in imposing a hard 50 life sentence.

ISSUES: (1) Self-defense, (2) voluntary manslaughter jury instruction, (3) confession, and (4) hard 50 sentencing
HELD: Court stated under the uncontroverted facts – leaving a confrontation with an individual and then returning with a loaded firearm and shooting that same person – Kansas case law declares the defendant typically is ineligible for a self-defense instruction. Court held the trial court did not err in denying Salary's request for self-defense instruction. Court also held because of the strong evidence of premeditation, coupled with scant evidence of Salary's honest belief that his deadly force was justified under the circumstances, rendered harmless any error the district court may have committed in failing to instruct the jury on voluntary manslaughter. Court concluded that Salary made an unambiguous request to be assisted by counsel during the interrogation. That request meant questioning should have stopped as soon as he invoked that right. Court held the district court erred in admitting Salary's recorded confession. However, Court held it was harmless because Salary asked for a lawyer only after he had already given his unrecorded confession during the pre-interview. Also the detective testified at trial that the information Salary gave detectives during his recorded statement was the same as the information he gave them during the pre-interview. Court held there was no reasonable probability that any error affected the outcome of the trial. However, Court held Salary's hard 50 sentence must be vacated and remanded for resentencing per Alleyne v. United States, 133 S. Ct. 2151 (2013), and State v. Soto, 299 Kan. 102 (2014).

STATUTES: K.S.A. 21-3107, -3211, -3212, -3214, -3403, -4635, -4636; and K.S.A. 22-3414, -3601

STATE V. SELLERS
HARVEY DISTRICT COURT – AFFIRMED
COURT OF APPEALS – JUDGMENT DISMISSING APPEAL IS REVERSED AND APPEAL IS REINSTATED
NO. 109,080 – MARCH 6, 2015

FACTS: This is an appeal arising from Sellers’ “Motion to Arrest Judgment Pursuant to K.S.A. 22-3503.” Sellers argued that the charging document in his Jessica’s Law case failed to include the essential element that he was age 18 or older at the time of the alleged crimes, and he relied on language in State v. Portillo, 294 Kan. 242, 256, 274 P.3d 640 (2012), which stated that “K.S.A. 22-3503 allows the trial court to arrest judgment without a motion by defendant and without the time constraints of K.S.A. 22-3502.” The district court judge denied Sellers’ motion. The Court of Appeals dismissed the appeal, relying on State v. Mitchell, 297 Kan. 118, Syl. ¶ 1, 298 P.3d 349 (2013), in which the court rejected a criminal defendant’s attempt to use K.S.A. 60-260(b)(4) as a procedural vehicle for collateral attack on a conviction.

ISSUES: (1) Motion to arrest judgment and (2) collateral attack on conviction
HELD: Court held K.S.A. 22-3503 is not a procedural vehicle that supports a defense motion for arrest of judgment long after a direct appeal has been pursued and decided. It is meant to permit a district judge to arrest judgment sua sponte before a direct appeal is taken.

STATUTES: K.S.A. 21-3504; K.S.A. 22-3502, -3503; and K.S.A. 60-260, -1507, -2606

STATE V. TALKINGTON
LYON DISTRICT COURT – AFFIRMED
COURT OF APPEALS – REVERSED
NO. 107,596 – MARCH 6, 2015

FACTS: While searching for person wanted on outstanding warrant, police searched backyard of residence that Talkington was visiting and discovered methamphetamine near back door. Police arrested Talkington and then discovered marijuana on his person in jail inventory search. During prosecution on various drug charges, Talkington filed motion to suppress all drug evidence. District court granted the motion, finding (1) methamphetamine was discovered in curtilage of the home, (2) Talkington as a social guest had standing to assert host’s Fourth Amendment rights in the curtilage, and (3) marijuana found on Talkington after his arrest was fruit of the poisonous tree. State filed interlocutory appeal. Relying on backyard not being enclosed by tall privacy fence and visible through partial
fence and low rock wall, Court of Appeals reversed in unpublished opinion, finding (1) backyard where methamphetamine was found was not curtilage subject to a reasonable expectation of privacy, (2) issue of Talkington’s standing as a social guest was moot, and (3) subsequent search of Talkington following his arrest was lawful. Talkington’s petition for review was granted.

ISSUES: (1) Review of district court’s order – curtilage, (2) standing of social guest to challenge search of host’s residence, and (3) suppression of evidence as fruit of poisonous tree.

HELD: Fourth Amendment curtilage law was reviewed. Under facts in this case, substantial competent evidence and case law supported district court’s findings on each factor in United States v. Dunn, 480 U.S. 294 (1987). Court of Appeals panel exceeded its standard of review by reweighing the evidence to favor the State on two Dunn factors.

Cases addressing protected privacy interests of social guests were examined. A social guest standing in the shoes of his or her host has standing to assert a reasonable, subjective expectation of privacy in the residence, which includes the curtilage. Talkington had standing to assert Fourth Amendment claim.

District court’s suppression of marijuana as fruit of the poisonous tree was affirmed. Substantial competent evidence supported district court’s conclusion that there was insufficient attenuation between officers’ unlawful entry into backyard and arrest, and the subsequent discovery of marijuana during jail inventory search.

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

STATE V. WILSON
RILEY DISTRICT COURT – AFFIRMED
NO. 111,328 – FEBRUARY 27, 2015

FACTS: Wilson pled no contest to charges of first-degree murder, attempted first-degree premeditated murder, and aggravated battery. District court denied Wilson’s motion for concurrent sentences, and imposed hard 25 life sentence for the murder conviction concurrent to 310 months for the remaining convictions. Wilson appealed, claiming that district court abused its discretion by ordering consecutive rather than concurrent service of the sentences.

ISSUE: Review of sentence for abuse of discretion

HELD: Under facts in case, district judge did not abuse his discretion in ordering Wilson’s sentences to run consecutively. District judge weighed severity of the crimes against Wilson’s remorse and troubled personal history, and determined consecutive service of the sentences would be proportionate to the harm and culpability associated with the crimes. State’s filing of amended journal entry ordering lifetime parole mooted Wilson’s challenge to district court ordering lifetime post-release supervision.

ATTORNEY FEES, CONTINGENT FEE, AND QUANTUM MERUIT
CONSOVER V. HOTZE
SEDGWICK DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 110,483 – MARCH 20, 2015

FACTS: Consover decided to change lawyers partway through the personal injury action she filed in Sedgwick County District Court. Her fired attorney, Pistotnik, filed a lien against any recovery for his fees and expenses. After Consover’s new lawyer settled the underlying tort claim for $360,000, the district court enforced the lien, characterizing the award as reflecting quantum meruit, by awarding Pistotnik a partial fee based on the contingency clause of his contract with Consover. To determine a fee satisfying the lien, the district court began with the $300,000 offer made shortly after Pistotnik had been fired, deducted the expenses, and then applied the 33-1/3 percent contingency from the contract—yielding $96,518. Based on its finding that Pistotnik “did the majority of the work to prepare the case for settlement [or] trial,” the district court concluded 90 percent of that amount or $86,944 represented an appropriate attorney fee. Finally, the district court added in the expenses to come up with an award of $97,101 to Pistotnik in satisfaction of his lien.

ISSUES: (1) Attorney fees, (2) contingent fee, and (3) quantum meruit

HELD: Court held the district court stepped outside the legal principles guiding quantum meruit to premise the fee award to Pistotnik on the contingency percentage in the contract with Consover. Court stated a quantum meruit payment is fundamentally incompatible with a contingency fee in a contract for legal services. Court reversed and remanded the case to the district court for determination of a lodestar fee calculation of a reasonable hourly rate for the legal services and multiplying that by the reasonable number of hours required to handle the litigation. Court stated even though this is a contingency fee arrangement, the district court will need to determine the reasonable time to perform the work, commonly derived from contemporaneous records showing specific tasks and the time taken to perform them.

STATUTE: K.S.A. 7-108

HABEAS CORPUS – INVOLUNTARY COMMITMENT IN RE CARE AND TREATMENT OF ZISHKA
JOHNSON DISTRICT COURT – REVERSED AND REMANDED
NO. 112,116 – MARCH 6, 2015

FACTS: Zishka was involuntarily committed in 2008 as a sexually violent predator. In annual review of Zishka’s status, district court simply signed state’s proposed order that Zishka should remain in the Sexual Predator Treatment Program. Zishka appealed, claiming the district court violated his rights by not holding a hearing and by not appointing an attorney as Zishka had requested.

ISSUE: Procedural rights of involuntarily committed persons

HELD: Constitutionality of Kansas Sexually Violent Predator Act requires full respect of procedural rights of persons involuntarily committed under the Act. Here, district court violated Zishka’s rights when it reviewed papers associated with its annual review of Zishka’s commitment without holding a properly noticed hearing or appointing counsel. Reversed and remanded with directions to appoint counsel for Zishka and to hold an annual review hearing.
FACTS: This was an interlocutory appeal following the district court’s denial of a motion to dismiss a 42 U.S.C. § 1983 (2012) claim filed by a former state employee against two other state employees in their individual capacities. In August 2013, Quidachay sued Heimgartner – the warden at the El Dorado Correctional Facility (EDCF) – and Bratton – the human resources manager at EDCF – as well as several other defendants based on failure to accommodate Quidachay’s Crohn’s disease. Although the district court dismissed the other claims asserted against Heimgartner and Bratton, it denied their motion to dismiss the 42 U.S.C. § 1983 claim. The district court declined to grant Heimgartner and Bratton qualified immunity.

ISSUES: (1) § 1983 action and (2) Americans with Disabilities Act (ADA)

HELD: Court held the district court appropriately dismissed Quidachay’s ADA claim because the Act does not impose individual liability. But the district court should have also dismissed Quidachay’s § 1983 claim – arising out of an alleged violation of the ADA by Heimgartner and Bratton in their individual capacities – for failure to state a claim upon which relief can be granted. Court did not address the issue of qualified immunity.

STATUTE: K.S.A. 44-313, -1001

SUGGESTION OF DEATH AND SUBSTITUTION OF PARTY
HOLLISTER V. HEATHMAN
SHAWNEE DISTRICT COURT – REVERSED AND REMANDED
NO. 111,823 – MARCH 6, 2015

FACTS: Hollister sued his former attorney, Heathman, for legal malpractice under the Kansas Consumer Protection Act. Following Hollister’s death, Heathman filed a suggestion of death with the trial court. Shortly afterward, Heathman moved to dismiss for failure of Hollister’s successor or representative to substitute a party within a reasonable time after the service of the statement noting Hollister’s death. The trial court ultimately granted Heathman’s motion to dismiss for failure to substitute a party within a reasonable time. In her pro se brief, the decedent’s wife argued that because she was not properly served with the notice of suggestion of death, the trial court abused its discretion when it granted Heathman’s motion to dismiss for failure to substitute a party within a reasonable time.

ISSUES: (1) Suggestion of death and (2) substitution of party

HELD: Court held that because Heathman never properly served the suggestion of death on the wife, there was no proper service of the suggestion of death on the record. The reasonable time period started to run only when there had been a proper service of the suggestion of death on the record. Court held the trial court abused its discretion when it made its reasonable time calculation. The relevant time period for determining the reasonableness of a delay in substituting a party started with the notice of suggestion of death and ends with the filing of the motion of substitution. Here, the wife wrote the letter which the trial court stated it would consider as a “Motion for Substitution of the Proper Party” on May 1, 2013. Because the trial court considered the time that had elapsed after her motion to substitute a party was filed, it applied the incorrect legal standard in its calculation of the relevant time period for determining the reasonableness of a delay in substituting a party.

STATUTE: K.S.A. 60-205, -225, -303, -304

Criminal

STATE V. MBURU
JOHNSON DISTRICT COURT – REVERSED AND REMANDED
NO. 111,797 – MARCH 13, 2015

FACTS: Mburu was charged with refusal to submit to alcohol or drug testing at a time when he had a prior DUI conviction or diversion. He stipulated to a prior DUI conviction, but asked the court to prevent the state from presenting stipulation to jury because it would relieve state of burden to prove that element of the crime. District court granted the motion, finding the prejudicial effect of the stipulation outweighed its probative value, and instead indicated the jury would be instructed with elements that excluded the stipulated element. State filed interlocutory appeal. Mburu argued there was no jurisdiction for the appeal because state did not show the district court’s ruling would substantially impair the prosecution.

ISSUES: (1) Appellate jurisdiction, (2) suppression of stipulation, and (3) undue prejudice


District court’s refusal to provide stipulation to jury, and to instead provide modified elements instruction, presented a matter of first impression in Kansas. Analysis in State v. Lee, 266 Kan. 804 (1999), and Mitchell applied. Mburu could stipulate to the prior DUI; district court is required to accept the stipulation; and district court could instruct jury that Mburu’s status had already been proven by parties’ stipulation.

Prejudicial nature of the stipulation in this case was examined, finding no undue prejudice. District court’s decision to exclude stipulation of prior DUI conviction from jury instructions was abuse of discretion. Consistent with Lee and Mitchell, court was required to submit the agreed-upon stipulation to an element of the crime to the jury for its consideration.

STATUTES: K.S.A. 2013 Supp. 8-1025, -1025(a), -1025(a)(2); K.S.A. 2013 Supp. 22-3603, -3604; and K.S.A. 60-401(b), -407(f), -455
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