No Lawyer is an Island
P8

Airports, Bathrooms, and Why is that Guy Standing Over There?
P12

Anti-Social Judges
P13

Ready, Set ... Proportionality!
Preservation of Electronically Stored Information Under the Proposed Amended Federal Rules of Civil Procedure
PAYMENT PROCESSING, EXCLUSIVELY FOR ATTORNEYS.

KANSAS BAR ASSOCIATION
Proud Member Benefit Provider

1.95% & 20¢ per transaction | No swipe required | No equipment needed

Helping law firms get paid.

IOLTA guidelines and the ABA Rules of Professional Conduct require attorneys to accept credit cards correctly. We guarantee complete separation of earned and unearned fees, giving you the confidence and peace of mind that your transactions are handled the right way.

www.LawPay.com/ksbar | 866.376.0950

Affinipay is a registered ISO/MSP of BMO Harris Bank, N.A., Chicago, IL
16 | Ready, Set ... Proportionality!  
Preservation of Electronically Stored  
Information Under the Proposed  
Amended Federal Rules of Civil  
Procedure  
By Amii N. Castle

9 | KBF and Tom Murray Announce the Frank M.  
Rice Scholarship  
By Edward J. Nazar

11 | Guardians of the Law  
By Anne McDonald

Regular Features

6 | KBA President  
By Gerald L. “Jerry” Green

8 | YLS President  
By Sarah E. Warner

10 | The Diversity Corner  
By Amanda Marshall

12 | A Nostalgic Touch of Humor  
By Matthew Keenan

13 | Law Practice Management Tips & Tricks  
By Larry N. Zimmerman

14 | Law Students’ Column  
By Johnathan Koonce

15 | Members in the News

15 | Obituaries

22 | Appellate Decisions

23 | Appellate Practice Reminders

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

Our Mission

2014-15
KBA Officers & Board of Governors

President
Gerald L. Green, ggreen@ksbar.org

President-Elect
Natalie Haag, nhaag@ksbar.org

Vice President
Stephen N. Six, ssix@ksbar.org

Secretary-Treasurer
Gregory P. Goheen, ggoheen@ksbar.org

Immediate Past President
Dennis D. Depew, ddepew@ksbar.org

Young Lawyers Section President
Sarah Warner, swarner@ksbar.org

District 1
Christi L. Bright, cbright@ksbar.org
Toby J. Crouse, tcrouse@ksbar.org
Mark A. Dupree, mdupree@ksbar.org
Mira Mdivani, mmdivani@ksbar.org

District 2
Charles E. Branson, cbbranson@ksbar.org
Hon. Sally D. Pokorny, spokorny@ksbar.org

District 3
Eric L. Rosenblad, erosenblad@ksbar.org

District 4
Brian L. Williams, bwilliams@ksbar.org

District 5
Terri S. Bezek, tbezek@ksbar.org
Cheryl L. Whelan, cwhelan@ksbar.org

District 6
Bruce W. Kent, bkent@ksbar.org

District 7
Gary Ayers, gayers@ksbar.org
J. Michael Kennalley, mkennalley@ksbar.org
Calvin D. Rider, crider@ksbar.org

District 8
John B. Sweareger, jsweareger@ksbar.org

District 9
David J. Rebein, drebein@ksbar.org

District 10
Jeffery A. Mason, jmason@ksbar.org

District 11
Nancy Morales Gonzalez, nmgonzalez@ksbar.org

District 12
William E. Quick, wquick@ksbar.org

At-Large Governor
Bruce A. Ney, bney@ksbar.org

KDJA Representative
Hon. Daniel A. Duncan, dduncan@ksbar.org

KBA Delegate to ABA
Linda S. Parks, lparks@ksbar.org
Rachael K. Pirner, rpirner@ksbar.org

ABA State Delegate
Hon. Christel E. Marquardt, cmarquardt@ksbar.org

Executive Director
Jordan E. Yochim, jyochim@ksbar.org

Let your VOICE be Heard!

4 The Journal of the Kansas Bar Association
Need clients?  
Need increased VISIBILITY?

Join
The Kansas Bar Association’s

Lawyer Referral Service

“... LRS is a good source for a steady flow of persons seeking assistance with the kinds of cases I handle. The benefits of working with LRS far exceed the costs of enrollment. It is the most effective use of advertising budget I can imagine.”

~ Joseph Seiwert, Snider & Seiwert LLC, Wichita

For more information about the KBA Lawyer Referral Service program, visit us online at www.ksbar.org/LRS or call 785-234-5696
Putting the Past Year Into Perspective

This is my last president’s column, and I have enjoyed having a forum to write about matters of interest (hopefully) to lawyers and members of the Kansas Bar Association. I trust from time to time, some of you, at least once in a while, appreciated what I had to say. And I want to thank those of you who took the time to tell me. And for those of you who didn’t like what I had to say, didn’t agree with me, or just didn’t find it interesting, I especially want to thank you too for not pointing that out!

It has been a busy 12 months for the KBA, and I believe they were productive ones. It is not possible to list everything the KBA has been doing, or all changes that have occurred. But there have been many. In Law Practices Services, we launched on-demand CLE programming and conducted our second annual Solo and Small Firm Conference in May. We once again partnered with Sean Carter, one of the keynote speakers from last year’s annual meeting, for another webinar series. Our Board of Publishers selected new editors, and new handbooks are now on the way, including employment law, basic will drafting, and alternative dispute resolution, among others. The Law Office Management Assistance Program has continued to grow, as has the size of the KBA’s lending library and the number of member consultations provided.

In Public Services, the demand for public service pamphlets continues to grow, and the KBA is meeting that need. The Law Related Education Committee has put together a packet that includes lesson plans, scripts, and giveaways (including pocket Constitutions) discussing the Constitution. Those packets have been used with much success by judges, attorneys, and teachers. The “On Your Own” (high school) and “For the Record” (middle school) pamphlets have been updated, and “On Your Own” is now available in Spanish as well. Our inaugural Pro Bono Summit was held last December.

A major accomplishment was bringing Lawyer Referral Service in-house and the employment of Dennis Taylor as its director. Many positive changes have occurred as the KBA focuses on our LRS program, making it more meaningful to the public, as well as to the attorney panel members.

In Legislative Services, Joe Molina, our legislative services director, issues the “KBA Advocate” via the KBA weekly, every week the Legislature is in session. Joe has a blog that members can log into and read at http://www.ksbar.org/advocate. In Member and Market Services, we have seen the largest membership renewal in many years. We have added CaseCheck+, in addition to CiteCheck and Casemaker Digest to the suite of legal research software that comes free of charge with a KBA membership.

The Board of Governors created three new committees: one to look at membership, one to look at the annual meeting, and a strategic planning committee. The KBA was a member of the Judicial Evaluation Coalition that provided voter information for the most recent retention elections and conducted broad membership surveys about reasons for joining the KBA, IOLTA, and the Journal. The KBA also helped facilitate a survey regarding the state of legal education in the United States.

The annual meeting format was changed last year and was held in September, rather than the traditional month of June. The annual meeting remains a focus of the KBA Board, and as mentioned above, a special committee has been formed to continue to analyze and consider its future.

The above undertakings are of course in addition to the countless other services the KBA regularly provides its members and the public. CLE remains a large part of what the KBA does, as well as lobbying and legislative services. This last legislative session was quite a challenge in light of the proposed legislation aimed at changing the method of selecting our Supreme Court justices, as well as legislation and issues surrounding the judicial budget and our courts. Many of our members testified and contacted legislators regarding specific pieces of legislation, and I thank all of you who did. I expect these issues and efforts by some in the legislature and the administration will continue and remain as issues in the foreseeable future.

My term as president has gone by fast, or at least it has for me. I can’t speak for the Board, KBA staff, or anyone else who had to put up with me during the last 12 months. It has been a great privilege and honor to serve as President. I believe the KBA is one of the best professional associations around. We are a voluntary bar. Members choose to join, and I extend my heartfelt thanks to each of you who do. I fully realize there are many places one can spend their “dues money.” There are many professional organizations we can choose to join. I am a member of several, and they are all worthwhile and important. Many compliment each other, and the KBA works cooperatively with our specialty and metropolitan bars. We should support them as well. As attorneys, we need to come together in professional associations for the good of our profession and our own professional development. If you are a KBA member, then once again, thank you. If not, I urge you to consider joining. I earnestly believe it is money well spent, and will not only benefit the KBA, but you as well.

Finally, I would be seriously remiss if I didn’t thank the many people who have provided so much help, encouragement and support during the last 12 months. I want to thank the Board for their commitment to the KBA, and their help and support during my term as president. We have an excellent Board, and there is no shortage of participation in what we have undertaken and are seeking to accomplish. I don’t recall ever asking or calling upon a board member to do something and have them say no. They spend many hours not only in attending Board meetings or participating in conference calls, but in preparing for meetings, remaining informed, and helping carry out the functions of our association.

Like any professional association, we cannot exist or function without our staff. We have one of the best. I appreciate our executive director, Jordan Yoichim, and thank him for his help and assistance in so many ways. I appreciate his knowledge and information, his providing me guidance when I have needed it (which is often), and even those gentle reminders when I have not timely done something I should have done. Collectively, all of our staff is what makes the KBA what it is.
They work diligently to accomplish their work, and to promote the KBA. I thank all of them for their hard work, support, and the work they do. I also want to thank our Section and Committee chairpersons for their efforts on behalf of the KBA, and want to thank the executive committee and other KBA officers. Our association is in good hands with President-elect Natalie Haag ready to assume the office of president, and with Steve Six becoming president-elect; Greg Goheen, vice president; and Bruce Kent, secretary-treasurer.

Last, but not least, I want to thank my firm for allowing me the opportunity to be away from the office a bit more than normal (OK, maybe a lot more) and my wife, Janice, who has supported and encouraged me during my term as president. There are plenty of challenges ahead for our association. Challenges, however, that I am confident we will embrace and meet. Thanks again to all who support and make the KBA the excellent professional association it is.

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

Pro Bono Legal Services

YOU CAN HELP

Help is Needed...

to provide pro bono legal services to low-income Kansans; ALL areas of practice are needed.

Go to http://www.ksbar.org/probono to learn how you can volunteer.

BROWN BAG ETHICS

Video Replay — Topeka, Kansas

Recent Developments in Ethics

Jack Scott McInteer, Depew Gillen Rathbun & McInteer L.C., Wichita

Ethical Obligations Regarding Impaired Attorneys

Joseph Colantuono, Colantuono Bjerg Cuinn LLC, Overland Park

REGISTER TODAY:

www.ksbar.org/cle
(785) 234-5696

JUNE 22 - JUNE 23 - JUNE 24 - JUNE 29 - JULY 16 - JULY 23 - AUGUST 12 - AUGUST 21

Approved for 2.0 CLE credit hours, including 2.0 hours ethics and professionalism, in Kansas and Missouri.
No Lawyer is an Island

I discovered Simon and Garfunkel during my sophomore year of high school. My parents, like any good children of the ’60s, already had instilled in me a love for The Beatles, James Taylor, Arlo Guthrie, and Bob Dylan. Still, upon introduction, I became obsessed with the harmonies and lyricism of the musical duo. I spent countless hours plunking out “Bridge Over Troubled Water” on our piano, and singing along with “The Boxer,” “Homeward Bound,” and “The Sound of Silence.”

But no song captured the spirit of a girl’s teen angst like “I Am a Rock.” To this day, I know all the words by heart. <i>I am a rock. I am an iiiiiiii-i-i-island.> Of course, even then I realized the song’s lyrics were intended to be ironic—an homage to John Donne’s “Meditation XVII,” which famously observed that “No man is an island, entire of itself.”

Donne’s observation is equally relevant to the practice of law. As catchy as Paul Simon’s songwriting is (you know you’re singing now, too), no lawyer is a fortress, steep and mighty; no lawyer is an island. We do not go it alone. In choosing this profession, we have chosen to be part of something greater than any of us individually. As the preface to our Rules of Professional Conduct states: “A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.”

I recently came across a column titled, “Ten Things I Like about Being a Lawyer.” Three points, in particular, struck a chord:

1. We are professional problem solvers.
2. We possess the power of change.
3. We have great role models.

It struck me that these observations embody so much of what I love about the practice of law. And as I reveled in how cool it is to be part of our profession, another thought crossed my mind: These cannot be achieved on our own; they don’t occur in a vacuum. They depend on relationships and connections—on other attorneys, judges, mentors, and the rule of law.

I bring this up because lawyers often ask me about the relevance of the KBA generally, or what the benefit is of attending some conference. So, why become involved in the KBA? I leave you with this answer: Because you’re a Kansas lawyer. Because you need us, and we need you, and we’re all the better for it.

The KBA is the only professional association in Kansas that makes these goals possible. It’s that simple.

In the KBA Young Lawyers Section, I have had the opportunity to work with and get to know some truly amazing people. Particularly this year as YLS president, I have met not just brilliant attorneys, but attorneys who care deeply about the cause of justice in our state. We are professional problem solvers. This year’s YLS Board of Directors has spent hundreds of hours creating opportunities for young lawyer development and engagement throughout Kansas to enhance the future of our legal system. We possess the power of change. The members of our KBA Board of Governors are devoted to furthering our profession and supporting our justice system. We have great role models. And I have forged strong friendships and professional networks that I will cherish (and rely on) throughout my career.

On July 1, I become immediate past president (code for “oldest young lawyer”) of our 1,400 plus section members, and Justin Ferrell will be taking over the reins as YLS president. I have no doubt that the section is in great hands with Justin and his new board—and, of course, the KBA staff, who are always willing to go the extra mile for the volunteers and members of our organization. We are so fortunate.

So, why become involved in the KBA? I leave you with this answer: Because you’re a Kansas lawyer. Because you need us, and we need you, and we’re all the better for it.

Therefore never send to know for whom the [gavel falls]; it [falls] for thee.

About the YLS President

Sarah E. Warner is an attorney at the Lawrence firm of Thompson Ramsdell Qualseth & Warner P.A. She serves as an adjunct professor at Washburn University of Law, and is a member of both the KBA Appellate Practice Section executive committee and Board of Publishers.

sarah.warner@trqlaw.com
On behalf of the Kansas Bar Foundation, I am pleased to announce that Thomas V. “Tom” Murray is establishing an endowed scholarship honoring his longtime friend and colleague, Frank M. Rice, of Topeka. Kansas residents, accepted to attend either the University of Kansas School of Law or Washburn University School of Law are eligible to apply.

Whether an adversary or a co-counsel, Tom will tell you “. . . Frank Rice is among the finest gentlemen I have known in the Bar.” They met in the 1970s on opposite sides of a bank case. “Frank always applied the highest level of legal scholarship to any legal matter in which he was involved,” Tom said. Together they worked for a decade as colleagues to achieve a successful outcome in the KPERS litigation. They served together for over a decade on the Kansas Board of Law Examiners.

While Frank may quietly deflect the attention this scholarship brings to his distinguished career, it stands as a lasting testament to both his ability and civility as a lawyer. His life’s work shows to those paying attention that a gentleman can disagree without being disagreeable.

The first Frank M. Rice Scholarship recipient will be selected by the Kansas Bar Foundation at the conclusion of the 2016-2017 scholarship application cycle. The recipient will be introduced at the Court Appreciation Dinner in February 2017.

My personal thanks to Tom Murray for selecting the Kansas Bar Foundation to be his partner in philanthropy. He was recognized at the Foundation dinner as the first Pillar of the Profession.

About the KBF President

Edward J. Nazar is a member of the Hinkle Law Firm LLC in Wichita, where he practices in the areas of bankruptcy, health care law, and real estate law. He has been a chapter 7 (since 1981)and chapter 12 trustee (since 1986) for the U.S. Bankruptcy Court for the District of Kansas. Nazar earned his B.A. from Boston College in 1971 and his J.D. from Washburn University in 1978.

enazar@hinklaw.com
Two years ago, I was recruited to join the KBA Diversity Committee by Eunice Peters. Through the group, I have had amazing opportunities to meet unique members of the legal community from across the state. One of our goals as a committee is to encourage dialogue between lawyers of all ages, ethnicities, genders and disabilities. I truly believe that we are better as a profession if we recognize what makes each of us unique and figure out ways to capitalize on those strengths.

In previous years, one of the ways the KBA Diversity Committee has tried to encourage this dialogue was by hosting a speed networking event. The goal of the event was to give new lawyers the opportunity to meet experienced lawyers at one event in the hopes of finding a mentor. This year, however, we decided to try something new and hosted our very first DiCom Bowling Tournament. We invited a diverse group of organizations from across the state to meet in Emporia and compete for bragging rights. We had a FANTASTIC turnout and everyone had a wonderful time bowling (or in my case attempting to bowl) while meeting new people.

This year six teams competed for bragging rights (and a really awesome T-shirt). The teams included the KBA Board of Governors, the KBA Diversity Committee, the Emporia Bar Association, the Kansas Women Attorneys Association, the Wichita Bar Association, and the Washburn Black Law Students Association. The tournament was set up as a round robin so each team had the opportunity to interact with two different organizations during the two hours of bowling. For the first hour, I was lucky enough to compete against the BLSA law students, led by Morgan Johnson who took a break from studying for finals to attend our event. I really enjoyed having the opportunity to meet some of our future Kansas lawyers. The second hour I competed against the KBA Board of Governors.

Prior to the event, I think the last time I went bowling was Cosmic Bowling in college the night before finals at least eight years ago, so I learned some important things during the event, such as: (1) Bowling shoes are not any more comfortable than the last time I wore them. They are slippery and always seems to rub just a little bit funky. (2) when hosting a bowling event always remind people to bring socks because odds are very good someone will forget. (3) Bowling on crutches is a lot harder than it sounds. (4) Most people bowl better after a beer (or maybe two). (5) Don’t compete against the KBA Board of Governors. They take bowling seriously! The Board of Governors came to the event ready to compete. They even came early to “warm up” but I guess all that practice came in handy because I am pleased to announce they are our first ever DiCom Bowl winners! The team was led by Dennis Depew and consisted of Brian Williams, Rachael Pirner, Linda Parks, and Jerry Green. The overall top bowler was Robert Moody from the Wichita Bar Association Diversity Committee. All the winners took home gift cards and the top overall scorer received a gift certificate for an online CLE.

So if you see our winners please congratulate them and next year come out and give them a run for their money! The next big event for the Diversity Committee will be a welcome breakfast at the annual meeting. We look forward to seeing you all soon!

About the Author

Amanda Marshall is a graduate of Newman University, summa cum laude, where she received a Bachelor of Science in biology and the University of Kansas School of Law. While at KU Law, she was involved with the Kansas Journal of Law and Public Policy, first as staff editor and then on the executive board as symposium editor. Marshall currently serves on the KBA Diversity Committee.
In his State of the Judiciary address on January 21, Chief Justice Lawton Nuss referred to a book about Bill Tilghman, titled “Guardian of the Law.” Tilghman was one of the famous Kansas lawmen in the late 1800s, working with Bat Masterson, Wyatt Earp and others to tame Dodge City, which was known as “the wickedest town in America” and where, it was said, “a man might break all ten commandments in a single night, die with his boots on and be buried at sunrise.”

The book recounts the life of Sheriff Tilghman in exhaustive detail. (It is amazing that they had time to write so much down between manhunts and gunfights!) “He . . . made more arrests . . . than any individual officer on the frontier, and with it all was quiet, gentlemanly, soft-spoken, never overbearing.” “For [35] years after he donned his first lawman’s badge, his service was almost continuous, always arduous; his reputation for fidelity and fearlessness was untarnished . . .”

And one of the points the chief justice was making in his report was that all members of the judicial system are still guardians of the law today, although that may look a bit different in 2015 than in Tilghman’s time. There are two parts to that phrase: guardian and law, so in traditional legal form, let’s dissect them. We all learned what guardianship was in law school and many of us have served as a Guardian ad Litem. Ye Olde Black’s Law Dictionary says: “One who legally has the care and management of the person, or the estate, or both, of a child during its minority.” Dictionary.com defines it generally as “a person who guards, protects, or preserves.” And this seems to be actually a more pertinent definition for our purposes.

So hold that thought and go on to “the law” – an idea and an ideal with great meaning to lawyers, judges, law students, and all Americans. For simplicity’s sake, let us keep it to two complementary connotations: (1) The statutory and common law which underpins our government; and (2) the embodiment of the concept of the rule of law, which is usually set out in a country’s constitution and is part of the fabric of the nation’s conscience and consciousness.

As lawyers, part of the oath we take when sworn in requires us to uphold the laws and constitution. In fact, I just heard the clerk of the appellate court, Heather Smith, administer the oath to new Kansas attorneys a couple weeks ago. Here’s the first part: “I do solemnly swear or affirm that I will support and bear true allegiance to the Constitution of the United States and the Constitution of the State of Kansas; . . .” So we each make a separate, definite, and firm commitment to be guardians of the law right from the start. And this column could go in the direction of patriotic and romantic rhetoric about our country and what the rule of law means. Those feelings may well be our inspiration and motivation, but for today, I would like to go in a more practical direction.

We become guardians of the law one day at a time, even one minute at a time, by being our best self and the best lawyer we can be. Attitudes and beliefs prompt actions and actions become habits, so that, when challenges arise, we can instinctively react in an honorable manner. That usually takes a period of time and, while sounding simple, is not often easy. For most of us, it takes intention and effort to practice those behaviors that build a reputation for fearlessness and fidelity, for honesty and zealous and effective advocacy.

Referring back to that oath we took, Supreme Court Rule 202 says in part: “The license to practice law in this state is a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters, and to aid in the administration of justice as an attorney and as an officer of the Court. It is the duty of every recipient of that privilege to conduct himself or herself at all times, both professionally and personally, in conformity with the standards imposed upon members of the bar as conditions for the privilege of practicing law.” We don’t hear this particular rule mentioned all that much but to me it is the cornerstone of being a guardian of the law.

So, one last thought: prevention is way better than remediation or rehabilitation. We need to make taking care of ourselves a priority, precisely to ward off the possibility of failing to meet the standards imposed. Taking care of oneself is not only not selfish, it is perhaps the most unselfish thing we can do – so as to remain a faithful guardian of the law.

About the Author

Anne McDonald was appointed to the Lawyers Assistance Program Commission at its inception in 2001 and has served as the Executive Director of KALAP since 2009. She graduated from the University of Kansas School of Law in 1982.

Anne McDonald
mcdonalda@kscourts.org
Airports, Bathrooms, and Why is that Guy Standing Over There?

Generally speaking I’m no fan of airports. I mean, who is? Maybe the birds that fly in them, I suppose, I saw two last week at KCI. But I mean, what people like airports?

Invariably if you’re not running through them you are stuck there due to a missed connection or worse. The gate agents at some airports like in Philadelphia flunked the Dale Carnegie course and then bumped Dale off his next flight. Airport restaurants specialize in greasy, grimy, deep fried foods baked under a heat lamp and the bars are jammed with patrons staring at their phones playing Candy Crush.

But all of this pales in comparison to the airport bathrooms. Crime scenes are more enjoyable and have fewer hygiene issues. Almost without exception they are small, crowded and out of paper towels. I know this may shock you but sometimes I’d had a few beverages and need to make a visit before my connection. It’s not a pleasant experience. Get in, get out and get home. After mechanical problems are fixed, of course.

With me so far? Good, because now it gets complicated. You see, there is one airport that is different from all the others. And anyone who has been to Charlotte Airport knows their bathrooms feature something found nowhere else. There is a man who stands in there. He’s an airport washroom attendant. He hovers near the entrance like someone who asks for your ID. Beyond that, I’m not sure what function he serves. He is dressed like he is heading to the KBA Foundation dinner. To maybe work the bathroom there, I suppose.

His trappings include a tip jar with dollar bills brimming out the top. Mints, mouthwash and sanitizer can often be part of his tools of trade. Other times he might guide you to an open stall. All of this raises one question?

Why?

Consider it one of life’s mysteries. Maybe it’s just me, but I don’t like men standing around idling while I’m well, you know, busy. Sometimes my kidneys cooperate, sometimes they don’t. Meanwhile I hear them paging that my flight is boarding and it’s last call. They usually add something like “Paging Matt Keenan. If you miss this flight, you will walk home.”

Compounding the problem is that Charlotte is the hub for USAIR which has its own issues. Mechanical difficulties with their planes that go from “minor” to “going to take some time” to “we have requested another plane” to “there are buses arriving to take you to Birmingham.”

One time I was super grumpy and charged out without acknowledging the man. I felt guilty and returned and dropped a buck in the tip jar. I told this to my wife Lori. “He probably has three kids at home and works 12-hour shifts. He makes nothing and you barge in like jerk lawyer? Can you imagine your office being a bathroom?” Point made but that won’t stop me from writing a column about it.

Seems I’m not alone with these issues. Bathroom attendants, no matter where they are found, have popularity ratings rivaling John Edwards. Some comments I found online:

“I love having some weird guy watch me urinate then offer to serenade me in cologne and wipe my hands. Then give me dirty looks for not tipping them. Unless that dude is going to hand me a cold beer, I don’t think that job position should exist.”

“Imagine my horror when I walked into the men’s room in the friggin’ Charlotte AIRPORT only to find that they had added these attendants. These are the most uncomfortable interactions ever. I usually give in if I have a single because this has got to be one of the worst jobs ever.”

And then I found something that made it all make sense. That well-known source for authoritative information, Wikipedia, says this:

“Some washroom attendants also provide services to the patrons, and keep good order by preventing drug-taking and fights.”

Considering that it’s Charlotte, US Airways, and hordes of angry depressed travelers, suddenly it all makes sense.

About the Author

Bruce Nystrom, PhD
Licensed Psychologist
River Park Psychology Consultants, LLC
www.riverparkpsych.com
727 N. Waco, Suite 320
Wichita, KS  67203
telephone: (316) 616-0260    fax: (316) 616-0264

Matthew Keenan has practiced with Shook, Hardy & Bacon LLP, Kansas City, Mo., since 1985.
mkeenan@shb.com
Anti-Social Judges

H. L. Mencken wrote, “A judge is a law student who marks his own examination papers.” That ornery assessment can feel especially true in disciplinary matters where precedent, as Ambrose Bierce writes, “. . . has whatever force and authority a Judge may choose to give it, thereby simplifying his task of doing as he pleases.” Unfortunately, the Texas Commission on Judicial Conduct was somewhat careless both in interpreting and making social media precedent and we now rely on the judiciary to fairly mark its own test.

Judge Slaughter, Texas

Michelle Slaughter left private practice in 2012 when she was elected judge of the 405th Judicial District Court in Galveston, Texas. She promptly set up a public Facebook page believing it would be “the most efficient way to fulfill [her] campaign promise and [her] own goals of educating the public about our courts.” In April, the Commission on Judicial Conduct issued a public admonition of Slaughter and ordered her to obtain additional training in social media ethics. That admonition is available at http://bit.ly/1zJDS1J.

The findings of fact focused primarily on Facebook posts Slaughter made regarding a criminal trial against a man accused of confining his 9-year-old son to a small box — State v. Wieseckel. In that trial, the judge had provided written instructions to the jury which included the following:

“Do not make any investigation about the facts of this case. . . . All evidence must be presented in open court so that each side may question the witnesses and make proper objection. This avoids a trial based upon secret evidence. These rules apply to jurors the same as they apply to the parties and me (the judge).”

That instruction was a key component of the Commission’s findings against Slaughter as it weighed her use of Facebook during the Wieseckel trial. Three particular posts were especially troubling to the Commission. On April 29, 2014, after the first day of testimony, the judge posted the following:

“Opening statements this morning at 9:30 am in the trial called by the press ‘the boy in the box’ case.”

“After we finished Day 1 of the case called the ‘Boy in the Box’ case, trustees from the jail came in and assembled the actual 6’x8’ ‘box’ inside the courtroom!”

“This is the case currently in the 405th!” (This post linked to a Reuters article on the case.)

Those Facebook posts by the judge prompted defense counsel in Wieseckel to file a motion to recuse Slaughter from the case and to file a motion for mistrial. Both were granted.

The Commission’s argument was two-fold. First, she had violated her own instructions to the jury by reading and posting a link to the Reuter’s article on the Wieseckel case. Second, she had used the word “box” before the box had been introduced as evidence in the trial. The Commission concluded that, “The comments went beyond providing an explanation of the procedures of the court and highlighted evidence that had yet to be introduced at trial. Judge Slaughter’s Facebook activities interfered with her judicial duties in that, as a direct result of her conduct, a motion to recuse was filed and granted requiring the judge to be removed from the Wieseckel case.”

While the second sentence quoted is defective circular reasoning, the first highlights the meat of the matter before the Texas Supreme Court in Slaughter’s appeal of the Commission’s sanction. Does a judge have a First Amendment right to share true and publicly available information about proceedings via social media? If an observer in the courtroom can obtain the same information as the judge provides in a Facebook post, has the judge “. . . cast public discredit upon the judiciary or administration of justice . . . ?”

The most likely, unfortunate result of such a case will be further pressure on judges to avoid social media. Kansas judges are already cautious after the bungled, politically-motivated case of Satterfield’s click of the “like” button on Facebook. Between Satterfield and Slaughter, the message seems to be that there is very little content a judge could safely post to social media and very little safety in subscribing to (“liking”) information provided by others. In other words, retreat from the digital town square in which over 70 percent of the country congregates.

Connecting Judges

Texas attorney and author, John G. Browning, noted in an April 7, 2015, op-ed about the Slaughter case that all 14 of the states in which judicial ethics authorities considered the question of judges using social media have approved of judicial use of it. The American Bar Association in 2013 also weighed in approvingly in Formal Opinion 462. In fact, even Texas said in its only case on the matter, Youkers v. State, that “social websites are one way judges can remain active in the community.” Browning cites a national survey of judges by the Conference of Court Public Information Officers which showed that social media use by judges grew from 40 percent in 2010 to 86 percent in 2013. That is a positive direction showing the judiciary is finally willing to join the public it serves where the public congregates.

Browning concludes with sage advice saying, “Unless we want [judges] to be philosopher-priests isolated in their jurisprudential temples, judges should be connected to society and all its foibles, with their work reflecting accessibility to the citizens they serve.”

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
Practice Makes Perfect

Over the last three years, I’ve noticed striking similarities between playing sports and being a law student. Both activities require lots of time and dedication. To excel in either, you must learn the game, discover your strengths and weaknesses, and of course practice, practice, practice in preparation for game day. To be successful in law school, there are three things to remember: train daily, practice makes perfect, and play until the end.

Train Daily

Like players of a new sport, very few people come to law school already knowing how to play the game. During the first year, I spent most of my time learning the fundamental concepts and doctrines of the law. The thought of having only one exam at the end of the semester to determine my grade was worrisome. What I learned was that I have to train daily to be successful.

High-performing athletes maintain a daily training regimen: early morning workouts, strict diets and meal plans, and reviewing game film. Similarly, successful law students train daily. My daily training consists of reading for class, reviewing class notes, or preparing an outline/study guide. Something can be done everyday to prepare for finals. Spreading work over a span of 15 weeks is much easier than cramming at the end of the semester. A classmate of mine goes on a series of short runs, ranging from 6 to 10 miles, in the months leading up to running a marathon. The same concept must be applied to law school exams. Mastering your coursework a day at a time paves the road to law school success.

Practice Makes Perfect

Practice? Yes. In the famous words of Allen Iverson, “We talkin’ about practice.” Practice is an essential piece of playing a sport. In practice, you learn plays, prepare for specific scenarios, and build endurance. Some high-performing athletes even visualize their performance before each game. I have learned that, by practicing, I am much more prepared to answer final exam questions.

After I have spent some time training, I like to see how well I’ve mastered the material by answering practice questions. One invaluable resource available to law students is access to old exams and test questions. If time permits, I take as many practice tests as possible to get familiar with analyzing facts and applying the law clearly and concisely. Similar to professional athletes preparing for certain situations, the more familiar you are with various fact patterns, the more prepared you will be on test day. An NFL football team would not show up to the Super Bowl without practicing first; a successful law student should not show up to the final exam without answering practice questions.

Play Until the End

Playing “until the whistle blows” is a familiar sports mantra. I have learned to apply that same attitude toward law school. A shining example of playing until the end of the game is KU’s late season basketball game against West Virginia. The Jayhawks rallied from down 18 to beat the Mountaineers in overtime. The 'Hawks erased a 4-point deficit in the last 49 seconds of the fourth quarter. If the team had decided that the game was over and had given up, they would not have tied the game, sending it to overtime and ultimately claiming victory.

In the last few years, there have been times that I didn’t fully comprehend a concept or doctrine until the final week, even days, before the semester’s end. Sometimes it is hard to see the big picture until you’ve learned all of the parts that make the whole. Sticking with a subject until it clicks is necessary for success.

Similarly, I have had the same attitude in final exams. Last semester I found myself extremely flustered during my federal income tax final. I came to a question that completely derailed me, and I contemplated what would happen if I quit, left the exam unfinished and walked out. After a split second, I came back to reality and said to myself, “Just finish the exam.” Good thing I did, because I did much better than expected. Deciding to give up is never a good plan. It is unwise to let one question get under your skin. There are many points to gain on a final exam. Staying the course, finishing the exam and answering as much as possible before time runs out is the best way to maximize your test score. Athletes and law students alike should commit to playing until the end.

To conclude, successful law students should approach the semester the same way athletes approach a big game or match. Taking time to train daily, practicing to gain familiarity, and playing until the end are all methods that have worked for me in my journey through law school. Hopefully one or more of these tips will assist you with navigating through your education experience as well.

About the Author

Johnathan Koonce is a 3L from Colorado Springs, Colorado. He graduated from Colorado State University, where he studied political science and business. Koonce is currently a KU Law admissions ambassador and VITA Tax Program volunteer. He plans to begin his legal career at the Colorado Attorney General’s Office.
Members in the News

Changing Positions

Gwynne E. Birzer has been selected as US Magistrate Judge, Wichita.

Dennis D. Depew has been appointed deputy attorney general by Kansas Attorney General Derek Schmidt, Topeka.

Fahryn E. Hoffman has joined Fisher, Patterson, Sayler & Smith, Topeka, as an associate.

Jan M. Jarman has joined the City of Wichita Attorney’s Office.

Richard E. Jarrold has joined Constangy, Brooks, Smith & Prophete LLP, Kansas City, Missouri, as an associate.

Jennifer L. Lautz has joined Minter & Pollak, Attorneys at Law, Wichita, as an associate.

Jennifer L. Magana has been named city attorney and director of law of Wichita.

David H. Moses has been appointed as general counsel for Wichita State University, Wichita.

Richard A. Olmstead has joined Kutak Rock LLP, Wichita.

Richard C. Paugh has joined Moses & Pate, LLC, Wichita.

Kelly J. Rundell has joined Hite Fanning & Honeyman, Wichita.

Jesse D. Tanksley joined Mann Law Offices LLC, Hutchinson.

John F. Thompson II has been promoted to shareholder at Kennedy Berkley Yarnevich & Williamson Chtd., Olathe.

Janelle L. Williams has joined the Kansas City Region office as an associate at Jackson Lewis P.C., Overland Park.

Changing Places

The Gepford Law Group L.C. has moved to 300 S. Liberty, Independence, MO 64050.

Marilyn B. Keller has moved to 1200 Main St., Ste. 2110, Kansas City, MO 64105.

Krieger Law Firm LLC has moved to 100 E. Park St., Ste. 204, Olathe, KS 66061.

Leverage Law Group LLC has moved to 4501 College Blvd., Ste. 280, Leawood, KS 66211.

Luder & Weist LLC has moved to 6300 W. 143rd St., Ste. 140, Overland Park, KS 66223.

Minter & Pollak, Attorneys at Law, has moved to 8080 E. Central St., Ste. 300, Wichita, KS 67206.

Joseph A. Schremmer has started his own firm, J.A. Schremmer Attorney at Law, PO Box 438, Haysville, KS 67060.

Miscellaneous

Richard L. Honeyman, Wichita, has been named a member of the Wichita Sedgwick County Historical Museum Board.

Laura Ice has been appointed to the Kansas Board of Law Examiners, Wichita.

David J. Rebein, Dodge City, received Honorary Life Membership by Washburn University School of Law at its 2015 Awards Recognition Reception.

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

Obituaries

Mark E. Lindstrom

Mark E. Lindstrom, 62, died April 6 in Shawnee after a battle with cancer. He was born January 17, 1953, in Clay Center to the Rev. Edgar and Carol Lindstrom. After graduating from Manhattan High School, he received a degree from North Park University in Chicago. He continued his education by earning his juris doctorate from Washburn University School of Law and a Master of Law in taxation from the University of Missouri-Kansas City School of Law. Lindstrom practiced law as a solo attorney and with several firms, during the last six years at the firm that became Post Anderson Layton Lindstrom LLP in Overland Park.

Lindstrom is survived by his wife, Patti; sons, Tim and Drew; stepdaughter, Mallory Shropshire; grandson, Benjamin; his mother; and siblings.

View your professional listing at www.LegalDirectories.com
“The Legal Search Engine”

Marketing Solutions that boost your online visibility and attract clients

Link to your website from LegalDirectories.com
Professional Profile listings available
Advertise your business

Legal Directories Publishing Co • PO Box 189000 • Dallas, TX 75218-9000 • 800.447.5375

www.ksbar.org | June 2015 15
Ready, Set ... Proportionality!
Preservation of Electronically Stored Information Under the Proposed Amended Federal Rules of Civil Procedure

By Amii N. Castle
I. Introduction

In December 2015, amendments to the Federal Rules of Civil Procedure will most likely take effect,1 changing the way practitioners think about and manage electronic discovery. With the current rules, discovery is broadly permitted as to matters that are relevant to a party’s claims or defenses; however, amended Rule 26(b) will require that a matter be relevant and “proportional to the needs of the case.” As such, practitioners will have to consider proportionality at the very outset of a case, particularly when making decisions about the preservation of electronically stored information (ESI).

Indeed, gone will be the “safe harbor” provision currently governing the preservation of electronically stored information;2 amended Rule 37(e) will require “reasonable steps” to preserve ESI to avoid curative measures or spoliation sanctions. Reasonable steps—not defined by the amended rules—will necessarily require practitioners to view their preservation efforts through the lens of proportionality, which can be difficult to assess, especially at the beginning of a case.

II. ESI under the Current Federal Rules of Civil Procedure

It should come as no surprise to any practitioner that clients store vast amounts of information in some sort of electronic format. From the large conglomerate to the sole proprietor, email has become the preferred means of communication, information is gathered on Internet-enabled devices, and data is stored on hard drives, on back-up tapes, and in the cloud. In the context of litigation, and discovery in particular, the pervasiveness of ESI means that, in all likelihood, the sheer volume of information is dramatically increased—ESI is easier to store, it tends to replicate itself, and it is harder to delete. Paradoxically, electronic data also is more fragile than paper documents: the contents of electronic documents can be altered, hard drives can crash, and deletion policies may cause electronic data, including emails, to be automatically deleted or overwritten. ESI also is by its very nature more complex because it includes metadata, which is data about data. Finally, readable electronic data requires hardware—a computer on which to view the data—and software—a program to view the data in its native format. For all these reasons, discovery of ESI is complicated, and therefore costly.

Discovery always has been expensive, but with the proliferation of the digital age, discovery is costlier than ever. Not surprisingly, courts struggle with the extent to which ESI is discoverable. To that end, the new proposed amendments to the Federal Rules of Civil Procedure will expressly define discoverable information as that which is relevant and “proportional.” Get used to hearing the term because, in conjunction with relevance, proportionality will be the standard by which courts will judge whether ESI should be preserved, can be requested, and must be produced.

The concept of proportionality finds its origin in Rule 13 and runs implicitly throughout the Federal Rules. For example, current Federal Rule of Civil Procedure 26(b)(2)(C)(iii) requires courts to consider whether the burden or expense of proposed discovery outweighs its likely benefits, the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues

Footnotes
1. On September 16, 2014, the Judicial Conference Committee on Rules of Practice and Procedure approved the proposed amendments and referred them to the Supreme Court of the United States. On April 29, 2015, the Supreme Court approved the proposed amendments and referred them to Congress. If Congress does not pass legislation to reject, modify, or defer the rules, they will become effective on December 1, 2015. Historically speaking, Congress has rarely rejected rule changes that have been approved by the Supreme Court.
2. Fed. R. Civ. P. 37(e) (courts may not impose sanctions “for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system”).
3. The federal rules are to be “construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.” Fed. R. Civ. P. 1. Notably, Rule 1 also is slated to be amended, requiring that the rules be “construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” Proposed Fed. R. Civ. P. 1 (emphasis added). The proposed amended federal rules can be found at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2015-04-29-TRANSMITTAL%20TO%20CONGRESS%20(FINAL).pdf.
III. The Revised Federal Rules of Civil Procedure

A. Rule 26(b)(1): Scope of discoverable evidence

The current rules embodying the concept of proportionality place limitations on the frequency and extent of discovery. However, missing is a rule that defines the scope of discovery—at the outset—to that which is proportional to the needs of the case. Enter proposed amended Rule 26(b)(1), which will provide as follows:

Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.9

The amended rule will incorporate the factors currently set forth in Rule 26(b)(2)(C)(iii).6 The stated reason for moving the factors from 26(b)(2)(C)(iii) to 26(b)(1) is to make them an explicit component of the scope of discovery, requiring parties and courts to consider the factors when pursuing discovery and resolving discovery disputes.7 Notably, the order of the factors will change slightly. The “amount in controversy” factor will be moved to a secondary position behind “the importance of the issues at stake in the action.” That rearrangement is intended to add prominence to the importance of the issues and avoid the implication that the amount in controversy is the most important concern.8 In addition, an express reference to “the parties’ relative access to relevant information” will be added to the list of considerations. These are your proportionality factors, now officially codified in the federal rules.9

Thus, under new Rule 26(b)(1), if information is relevant and proportional, it is discoverable. Along those lines, information that may in fact be relevant may not be discoverable, if it is not proportional. Proportionality will be a fundamental element of discoverability and, as such, proportionality must be considered at the front end of a case.

Judge Shira A. Scheindlin, distinguished jurist and scholar on electronic discovery,10 recently expressed concerns about “proportionality” being part of the definition of discoverable evidence—namely, that proportionality considerations will enter a case too early.11 First, Judge Scheindlin believes that parties will file more discovery motions upfront, arguing that evidence may be relevant, but not proportional. According to Judge Scheindlin, this motion practice is contrary to the just, speedy, and inexpensive determinations of discovery matters and will overburden an already full-to-capacity judiciary. Moreover, Judge Scheindlin points out that, as parties seek proportionality decisions early on, magistrate and district judges may not yet be familiar with important aspects of the case. With little information about the parties and their respective resources, the pertinent claims and defenses, and the potential merits and value of the case, courts may find it challenging at such an early stage to render thoughtful decisions about whether certain electronic evidence is in fact proportional to the needs of a case.

From a practitioner’s standpoint, Judge Scheindlin’s remarks are well taken: proportionality will be at issue early on in litigation. Thus, proportionality factors should necessarily be considered in the initial stages of a case, particularly when practitioners are determining what ESI should be preserved.

B. Rule 37(e): Preservation of electronically stored information

The new Rule 37(e) will provide as follows:

If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

4. The concept of proportionality also is found in Rule 26(b)(2)(B) (limiting discovery of electronic information deemed not reasonably accessible because of the costs and burdens of retrieving it); Rule 26(b)(2) (C) (permitting a court to limit discovery of information if the discovery sought is unreasonably cumulative or can be obtained from a less burdensome, less expensive source); Rule 26(c)(1) (permitting a court to issue a protective order upon a showing of undue burden or expense); and Rule 26(g) (requiring that attorneys, by signing discovery requests, responses, and objections, certify the discovery is neither unreasonable nor unduly burdensome or expensive).


6. Proposed Rule 26(b)(1) also will eliminate discovery on the basis that information could be “reasonably calculated to lead to the discovery of admissible evidence.” As the Committee reported, that standard has been incorrectly used to define the scope of discovery. See Reports to the Judicial Conference, Rules Appendix, at B-44 (Sept. 2014).

7. Id. at B-8.

8. Id.

9. With the factors moving to Rule 26(b)(1), amended Rule 26(b)(2) (C)(iii) will direct courts to limit the frequency or extent of discovery upon.
(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.12

Thus, the new rule will call for “reasonable steps” to preserve electronically stored information. Under subsection (e)(1) when there is no intent to destroy ESI, if a party’s failure to take reasonable steps to preserve electronic information results in prejudice to the opposing party, a court will be authorized to impose measures no greater than necessary to cure the prejudice. In other words, no finding of culpability will be required for a court to sanction a party with curative measures. The curative measures could include preclusion of evidence and the presentment of evidence regarding the failure to preserve.13

In contrast, if a party has acted with the intent to deprive a party of ESI, section (e)(2) is triggered. Upon a finding that a party has acted intentionally, a court will be authorized to impose spoliation sanctions, including presuming for itself or instructing the jury that the electronic information was unfavorable, dismissing the action, or entering default judgment.14

1. Reasonable steps

Taking reasonable steps toward preservation will be imperative to prevent the imposition of curative measures or spoliation sanctions should information be lost or destroyed during the preservation stage. Notably, the rule will not define “reasonable steps,” but the Advisory Committee has explained that the rule requires only reasonable preservation behavior, not perfection.14

At the very least, reasonable steps will require a written litigation hold. This means that, when a company is on notice of a credible threat of litigation or is seriously contemplating initiating litigation, that company must identify relevant electronic information and notify appropriate custodians (and sometimes third parties) to take measures to preserve that evidence. Determining the scope of a litigation hold—what information should actually be preserved—must include proportionality considerations. Indeed, if ESI is not discoverable in the first instance, that ESI need not be preserved.

To that end, practitioners must consider proportionality at the onset of litigation and document their analysis of why certain ESI is proportional to the needs of the case, and

14. Id. at B-16.
Ready, Set ... Proportionality

why other ESI is not. That means serious thinking about the facts and issues involved in a case, assessing what ESI may be relevant to the claims and defenses, and determining where that information likely resides. For example, are employee-to-employee communications relevant to a claim or defense and, if so, how do employees typically communicate—emails, instant messaging, or text message? Are past statements on a company’s website relevant, or does a Facebook or Instagram account contain information that may bear on a material issue? To make those determinations, the practitioner must interview key witnesses and players in the case, particularly the custodians who create and control the relevant data. Practitioners should document in detail the substance of those interviews, detailing their analysis of the nature of the issues actually in dispute and what ESI may be important to those issues.

Because it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant ESI, the practitioner’s next determination should be whether relevant electronic information is relatively accessible and, if not, whether identical or substantially similar information is available through a more accessible source. At this point it is incumbent on practitioners to learn the processes and technologies their client uses to create, manipulate, and store electronic information. To discover that information, smart practitioners will meet with their client’s information technology team or third-party vendor (if applicable) to gather information about the costs and burdens associated with preserving the particular electronic information the practitioner believes is needed to prosecute or defend the case. For instance, if employee-to-employee text messages may be relevant, is it possible to preserve those text messages and, if so, what is the cost? Is this analysis impacted if the text messages reside on employees’ personal phones rather than company-issued phones? Does the amount in controversy justify the expense? What are the opposing party’s resources? These same types of questions should be asked whether the client is an individual or company.

Only after asking those sorts of questions can practitioners make reasonable determinations about their respective preservation obligations, and only then can practitioners have meaningful discussions with opposing counsel about the obligations. And those discussions will now come early in the case.

2. Proportionality analysis comes early

The discussion of preservation—and thus proportionality—will now occur early in a case. Indeed, other amendments to the federal rules will require that preservation of ESI must be discussed at the parties’ Rule 26(f) conference and may be provided for in a court’s Rule 16 scheduling order. As such, the days of drive-by Rule 26(f) conferences will be gone; now, courts will expect the parties by this early stage in the litigation to have engaged in meaningful discussions about what ESI is relevant to the material facts of the case, where that relevant ESI is kept, and what steps the parties are taking to preserve that information. In fact, under the new rules, parties may be simultaneously discussing both preservation of ESI and specific requests for production of ESI, as new Rule 26(d)(2) will permit Rule 34 document requests to be served prior to the parties’ Rule 26(f) conference.

Cooperation with opposing counsel will be key, and courts increasingly expect a higher level of cooperation during dis-
Early cooperation can help the savvy practitioner avoid curative measures or spoliation sanctions later: Get an agreement with opposing counsel at the beginning of the litigation as to what ESI should be preserved. That requires detailed and substantive discussions at the outset about the factual and legal issues actually in dispute, the potentially relevant ESI, and what it would take to preserve that ESI. Indeed, the party who agreed that your preservation steps were reasonable at the time will be hard-pressed to later argue your efforts were not reasonable. Along those same lines, the party who refused to cooperate in those discussions will have difficulty later arguing its steps were reasonable. Either way, good faith, early discussions about what ESI is truly and actually discoverable will be crucial, and getting an agreement in place early on will protect you and your client.

IV. Conclusion

In the end, the preservation analysis means weighing the burdens and costs of preserving potentially relevant information against the potential value and uniqueness of the information. Undoubtedly that is challenging at the inception of a case: while it may be relatively easy to calculate the hard costs associated with preserving certain electronic information, it may be difficult, if not impossible, to place an overall value on a case or understand the importance of the issues at stake. However, because proportionality will be the end-standard by which discovery of ESI may be had, a thoughtful, cooperative, and well-documented approach, with due consideration of the proportionality factors, will go a long way in later demonstrating, if need be, that reasonable steps were taken to preserve discoverable ESI.

About the Author

Amii N. Castle currently serves as a law clerk to Judge Carlos Murguia, U.S. District Court for the District of Kansas. Castle graduated from the University of Kansas School of Law in 1997, after which she clerked for Judge Pasco Bowman, Eighth U.S. Circuit Court of Appeals, and practiced commercial and class-action litigation in the Kansas City metropolitan area.


ATTORNEY DISCIPLINE

ONE-YEAR SUSPENSION SUSPENDED AND THREE YEARS’ SUPERVISED PROBATION
IN RE SAM S. KEPFIELD
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 112,897 – APRIL 3, 2015

FACTS: This is an original proceeding in discipline filed by the office of the disciplinary administrator against the respondent, Kepfield, of Hutchinson, an attorney admitted to the practice of law in Kansas in 1989. Kepfield’s ethics situation involved his representation of an inmate with the goal to secure the inmate’s release from prison.

HEARING PANEL: A hearing was held on respondent’s complaint before a panel of the Kansas Board for Discipline of Attorneys on August 20, 2014, when the respondent was personally present and was represented by counsel. The hearing panel determined that respondent violated KRPC 1.2 (2014 Kan. Ct. R. Annot. 470) (scope of representation); 1.3 (2014 Kan. Ct. R. Annot. 475) (diligence); 1.4(a) (2014 Kan. Ct. R. Annot. 495) (communication); and 1.16(d) (2014 Kan. Ct. R. Annot. 583) (termination of representation). The hearing panel unanimously recommended that respondent be suspended for one year, but imposed three years’ supervised probation after serving 90 days of the suspension.

DISCIPLINARY ADMINISTRATOR: On July 16, 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 24, 2014. The disciplinary administrator recommended that respondent be suspended for a period of 90 days, but imposed supervised probation for three years.

HELD: Court held that respondent’s misconduct was established by clear and convincing evidence. Court also stated that it was persuaded that respondent’s misconduct was largely a product of his depression, which is being successfully monitored and treated. Court also noted his effort to make full restitution of the fee paid by J.L., despite financial challenges, and his attendance at attorney support group and 12-step meetings. Court ordered that respondent be disciplined by a one-year suspension, imposition of which is suspended and respondent is placed on three years’ supervised probation as outlined in his probation plan.

THREE YEARS’ PROBATION IN RE JAMES E. RUMSEY
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 112,923 – MARCH 31, 2015

FACTS: On February 27, 2015, the Supreme Court issued its opinion imposing a three-year suspension, stayed the imposition of that discipline, and placed the respondent, Rumsey, on probation for a three-year period. Court ordered respondent to submit a plan of probation to the disciplinary administrator within 14 days of the filing of the decision. The plan must include, at a minimum, mental health therapy, some level of practice supervision, and a requirement to immediately self-report any violation of the KRPC. If the parties could not agree on a probation plan, both parties would submit a proposal to the court. If the parties agreed, they could jointly submit a proposed order of probation or simply indicate their agreement with the other party’s proposal.

HELD: On March 13, 2015, the parties submitted a joint supervised probation plan. Court considered and adopted the supervised probation plan. Therefore, Court incorporated the supervised probation plan into the order by reference. Respondent was placed on probation for a three-year period, subject to the terms and conditions detailed in the supervised probation plan.

CIVIL

ANNEXATION
STUECKEMANN ET AL. V. CITY OF BASEHOR
LEAVENWORTH DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 105,457 – APRIL 24, 2015

FACTS: In 2008, the city of Basehor adopted resolutions to initiate unilateral annexation of Cedar Lake Estates, a platted residential subdivision of approximately 115 acres that adjoins the city’s boundary and is accessible from city streets. The city published annexation resolutions and proper notice of the public hearings regarding the proposed annexation. The Stueckemanns and more than 50 other people attended the hearing and opposed annexation. The Stueckemanns’ attorney notified the city council of the discrepancies in the sketches, GIS map, and legal description of the estates. The city’s engineer corrected the mistakes, and the city council ultimately officially annexed the Estates. The Stueckemanns and the association sued the city to invalidate the annexation. The district court granted summary judgment to the city by rejecting all of the Stueckemann’s contentions. The Court of Appeals affirmed and held the city’s land descriptions and plan for the extension of municipal services both substantially complied with the statutory requirements. The Court of Appeals also rejected a de novo review and instead found that statutes expressly permitting landowners to challenge the reasonableness of an annexation merely codified preexisting case law which severely limits judicial review and is quite deferential to the city.

ISSUE: Annexation

HELD: Court held that the district court and Court of Appeals did not err by concluding the city’s plan adequately described the land subject to the annexation. Court stated that the city substantially complied with the relevant statutes requiring identification and that, even with the initial identification errors and inconsistencies acknowledged by the city, the Stueckemanns seemed to be able to

All opinion digests are available on the KBA members-only website at www.ksbar.org. We also send out a weekly newsletter informing KBA members of the latest decisions. If you do not have access to the KBA members-only site, or if your email address or other contact information has changed, please contact member and market services at info@ksbar.org or at (785) 234-5696. You may go to the courts’ website at www.kscourts.org for the full opinions.
determine what area the city sought to annex because they actually notified the city council of the specific discrepancies at the February 9 public hearing. Next, Court held that the district court and Court of Appeals did not err by concluding that the city’s service plan for police protection and for street and infrastructure maintenance was adequate. Last, Court held the district court and Court of Appeals did not err by concluding that the city’s annexation was reasonable.

STATUTES: K.S.A. 12-520, -520a, -520b, -521, -538, -712, -760; and K.S.A. 60-2101, -3018

INMATE ACCOUNTS AND KANSAS UNIFORM TRUST CODE
MATSON V. KANSAS DEPARTMENT
OF CORRECTIONS ET AL.
NORTON DISTRICT COURT – REVERSED
AND REMANDED WITH DIRECTIONS
COURT OF APPEALS – REVERSED

FACTS: Matson is an inmate in the custody of the Kansas Department of Corrections and after becoming dissatisfied with the management of the inmate trust fund, he filed this pro se suit in Leavenworth District Court pursuant to the Kansas Uniform Trust Code (KUTC). He alleged the defendants were in breach of trust as a result of various fees charged against the balance held in his inmate trust fund. The defendants quickly moved to transfer venue to Norton District Court in order to better serve the convenience of the parties. The Leavenworth District Court granted the motion without a hearing and prior to any responsive pleading from Matson. Once the case reached Norton District Court, Matson filed a motion to transfer venue back to Leavenworth District Court, arguing the only proper venue was Leavenworth County. The Norton District Court denied the motion. Then, the district court then granted summary judgment to the defendants on all of Matson’s claims. The Court of Appeals affirmed, finding Leavenworth District Court correctly found that Matson could have filed his suit in Norton County under K.S.A. 60-602(2) because one of the named defendants was the warden of the Norton Correctional Facility.

ISSUES: (1) Inmate accounts and (2) KUTC
HELD: Court held the inmate trust accounts are subject to the KUTC. Court held it is clear the legislature, in adopting the KUTC, established a specific venue exception to the more general rules. K.S.A. 58a-204 controls the venue question in this case and establishes the exclusive venue for Matson’s claims in Leavenworth District Court as the county in which the trust’s principal place of administration has been. Court found the error was not harmless in this case and reversed and remanded to the Leavenworth District Court for further proceedings.

CONCURRENCE: Justice Biles concurred in the decision that Leavenworth District Court was the proper venue, but wrote separately to encourage the district court to look deeper into the practices under the Internal Management Policy and Procedure (IMMP) brought to light by Matson’s lawsuit.

STATUTES: K.S.A. 58a-101, -102, -204; K.S.A. 60-602, -609,-2101; K.S.A. 76-173; and K.S.A. 77-415

MEDICAL MALPRACTICE AND PROXIMATE CAUSE
DROUHARD-HORDHUS V. ROSENQUIST ET AL.
SEDGWICK DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED

FACTS: In this medical malpractice case, Drouhard went to the emergency room complaining of abdominal pain and a history of nausea and dry heaving. Dr. Rosenquist, a radiologist, looked at Drouhard’s CT scans and concluded Drouhard had an enlarged gallbladder, funny-shaped liver, and an absent spleen. Rosenquist’s written report never made it to the surgeon Dr. Beamer. Drouhard died at the hospital of an intrahepatic hematoma with adjacent hepatic tissue damage. Drouhard’s widow filed a medical malpractice action. The district court granted summary judgment. Only the claims against Rosenquist were on appeal. The district court held there was insufficient evidence of a cause-and-effect relationship between the radiologist’s alleged negligent diagnosis and the patient’s death. The Court of Appeals affirmed the district court’s granting of summary judgment in favor of Rosenquist.

ISSUES: (1) Medical malpractice and (2) proximate cause
HELD: Court stated Drouhard-Nordhus needed expert medical opinion testimony to show there was a treatment approach that would have prevented Drouhard’s death and tie the failure to pursue that approach to Rosenquist’s allegedly negligent CT scan evaluation. Court held the district court correctly granted judgment for Rosenquist because the facts as set out on summary judgment demonstrated plaintiff failed to establish causation, an essential element of plaintiff’s medical malpractice claim, by failing to come forward with evidence that the patient would not have died but for Rosenquist’s alleged breach of the standard of care.

STATUTES: K.S.A. 20-3018; and K.S.A. 60-2102

Appellate Practice Reminders . . .

From the Appellate Court Clerk’s Office

One Subject Per Motion

When drafting motions, it is important to keep in mind Supreme Court Rule 5.01. On July 1, 2012, this rule was amended to limit motions to only a single subject. See Rule 5.01(a) [2014 Kan. Ct. R. Annot. 34]. It is also a best practice to keep the titles of motions concise and specific.

Including Opinions in Petitions for Review

Each petition for review must include an appendix containing a copy of the opinion that is the subject of the petition. See Rule 8.03(a)(4)(F). With modern copiers, it is very easy to forget to print both sides of an opinion. If a petition for review only contains an odd number of pages for an opinion, the petition cannot be filed. Please check your petitions for review after they are copied to ensure that all needed pages are present before attempting to file with the appellate courts.

For further information, call the Clerk’s Office at (785) 296-3229 and ask to speak with Heather L. Smith, Clerk of the Appellate Courts, or Jason Oldham, Chief Deputy Clerk of the Appellate Courts.
Appellate Decisions

OIL AND GAS, AND "SUBJECT TO" CLAUSE
NETAHLA V. NETAHLA
SUMNER DISTRICT COURT – REVERSED
COURT OF APPEALS – REVERSED
NO. 109,297 – APRIL 10, 2015

FACTS: Larry Netahla and Janet Netahla Curtis are the sole heirs of Joe and Rose Netahla, the grantors. Defendants-appellees Mike Netahla and Debra Francis are the sole heirs of Frank Netahla, the grantee. On November 24, 1969, grantors and Mack Oil Company entered into an oil and gas lease covering the property. Less than seven months later, grantors entered into a “Sale of Oil and Gas Royalty,” i.e., a mineral deed, covering the same property. The document also contained the following clause, which addressed the existing lease agreement, making it “subject to the terms of the lease.” The mineral deed concluded with the limitation that it was in existence for 15 years and as long thereafter as oil and/or gas was produced or the land developed.

The well was later declared a shut-in gas well, and no oil or gas was produced from it from June 1, 1985, until 2003. In 2003, Vess Oil Corp. took over the operation of the lease and began to produce oil or gas from the well. In August of 2012, plaintiffs filed the declaratory judgment petition underlying this appeal. They sought a declaration that the royalty interest held by defendants had terminated. The district court judge granted the defendants’ motion for summary judgment, declaring that the mineral interest remained “in full force and effect.” On appeal, a panel of the Court of Appeals affirmed, concluding that the mineral deed was subject to the lease.

ISSUES: (1) Oil and gas and (2) “subject to” clause

HELD: Court held that the “subject to” clause in the mineral deed did not incorporate the provisions of the lease. Court therefore looked only at the provisions of the mineral deed itself to determine whether defendants’ mineral interest had terminated. Court held that absent a provision in a mineral deed stating otherwise, the payment of shut-in royalties pursuant to a lease is not the equivalent of actual production or development. Standing alone, the mineral deed at issue here required actual production for its term to perpetuate. Because it is undisputed that there was no actual production as of June 1, 1985, the defendants’ mineral interest did not continue past its 15-year term.

STATUTES: No statutes cited.

WRONGFUL DEATH
SIRUTA V. SIRUTA
THOMAS DISTRICT COURT – REVERSED
AND REMANDED
COURT OF APPEALS – REVERSED
NO. 105,698 – APRIL 24, 2015

FACTS: In this wrongful death action, an heir sues an alleged tortfeasor for the death of a decedent pursuant to the Kansas Wrongful Death Act. The unusual facts were a bereaved father sued his wife, the bereaved mother; the two parties are the sole heirs at law of a decedent child; and, to add one more wrinkle, both parties are potential tortfeasors. The jury found both parties 50 percent at fault. The mother contended the father was not legally entitled to bring a wrongful death action against her because the suit was brought on behalf of all the decedent’s heirs at law, including the mother, and she cannot be permitted to benefit from her own negligence. The mother also contended she was entitled to either pretrial summary judgment or midtrial judgment as a matter of law on the issue of negligence because there was a lack of evidence supporting her liability. The father argued the district court erred in allowing the jury to compare his negligence, as a mere passenger in a car, to that of the mother, who was the driver of the car at the time it crashed and their son was killed. In the remaining issues, the mother argued the district court

www.bradleysoftware.com

Bradley Software

Since 1992
Criminal

STATE V. ALCALA

SHAWNEE DISTRICT COURT – AFFIRMED IN PART AND VACATED IN PART

NO. 111,006 – APRIL 24, 2015

FACTS: This is a consolidated appeal from two aspects of Alcala’s criminal sentence after he pleaded guilty to first-degree premeditated murder for killing his estranged wife. He challenges: (1) a no-contact order prohibiting communication with the victim’s family; and (2) a restitution order requiring him to pay attorney fees in connection with the CINC proceedings and the adoption case. Court held the district court properly rejected the claim that any restitution plan was unworkable because Alcala failed to meet his burden of proof on that issue by presenting evidence regarding his inability to pay upon release.

STATUTES: K.S.A. 21-6604; K.S.A. 22-3601; and K.S.A. 38-2202, -2205, -2241

IN RE E.J.D.

LEAVENWORTH DISTRICT COURT – AFFIRMED

COURT OF APPEALS – AFFIRMED


FACTS: On December 3, 2008, the state filed a complaint alleging that E.J.D. had committed one count of aggravated robbery and two counts of criminal threat. The district court eventually denied the motion for adult certification and sentenced E.J.D. to a term of 51 months in a juvenile facility and an extended-jurisdiction adult sentence of 94 months. On January 28, 2009, the state filed a complaint alleging that E.J.D., while confined in the juvenile facility, committed two counts of battery on juvenile detention officers. The court denied the state’s motion to prosecute E.J.D. as an adult but determined that a preponderance of evidence demonstrated that the proceedings should be designated as an extended-jurisdiction juvenile prosecution under K.S.A. 2008 Supp. 38-2347. The court sentenced him to a term of 36 months in a juvenile correctional facility, with 24 months’ aftercare. The court also sentenced him to an adult criminal sentence of 32 months with 36 months’ post-release supervision, with the sentence to run concurrently with the adult sentence. The court stayed the adult criminal sentence on the condition that he not violate the provisions of the juvenile sentence and on the condition that he not commit a new offense. On August 4, 2011, the state filed a motion to revoke the stay of execution of the adult sentence. The state based its motion on 86 disciplinary violations committed by E.J.D. while in custody and specified one particular act of alleged battery on another resident. On September 12, 2011, the state amended its motion to include a second incident of battery on another resident. E.J.D. then filed a motion for a lesser sentence and a durational departure from his sentence in his 2009 case. The district court denied the motion and determined that he had committed an act that would constitute a criminal act if perpetrated by an adult and ordered him to serve an additional 32 months. The court also sentenced him to an adult criminal sentence of 32 months with 36 months’ post-release supervision, with the sentence to run concurrently with the adult sentence.

STATUTES: K.S.A. 21-6817; and K.S.A. 38-2347, -2364, -2371
STATE V. HUDGINS
CHEROKEE DISTRICT COURT – AFFIRMED

FACTS: Hudgins killed two occupants in a vehicle he rear-ended while fleeing from police in a high-speed chase. Jury convicted him of first-degree murder, and fleeing or attempting to elude a police officer. Hudgins appealed, claiming district court erred in (1) imposing time constraints on defense counsel’s voir dire, (2) admonishing defense counsel in jury’s presence to “pick up the pace” of voir dire, and (3) refusing to change venue because of pretrial publicity. Hudgins also claimed (4) prosecutor committed reversible misconduct when discussing lesser included offenses of felony-murder charge, (5) district court improperly excluded evidence that officer’s pursuit of Hudgins violated the department’s high-speed pursuit policy, (6) state should have charged Hudgins with more specific offense of involuntary manslaughter while driving under the influence (DUI) instead of felony murder, and (7) cumulative error denied him a fair trial.

ISSUES: (1) Time constraints on defense counsel’s voir dire, (2) admonishment of defense counsel during voir dire, (3) change of venue, (4) prosecutorial misconduct, (5) excluded evidence, (6) failure to charge DUI manslaughter, and (7) cumulative error

HELD: District court intervened to avoid what it perceived to be unnecessary delay and needless questioning. No abuse of district court’s discretion by prodding defense counsel to compete voir dire or in setting time limitation, and no showing that it prejudiced Hudgins.

Careful review of record does not reveal district court’s comments to defense counsel during voir dire were disrespectful or implied partiality toward one counsel or party or the other. Comments at issue were within district court’s discretion to control pace of voir dire and conveying information about manner in which case would proceed based on legitimate concern for trial participants.

No abuse of district court’s discretion in denying motion for change of venue. Factors for determining actual prejudice from pretrial publicity are stated and applied. Balance of factors in this case does not favor Hudgins, and no showing of actual prejudice from pretrial publicity.

As in State v. Hurt, 278 Kan. 676 (2004), prosecutor erroneously stated the lesser included offenses could be considered only if jury found Hudgins not guilty of felony murder. But no reasonable probability that prosecutor’s comments affected jury’s verdict in this case.

Issue regarding exclusion on departmental high-speed pursuit policy was not preserved for appeal. Hudgins did not make an adequate proffer of the excluded evidence.

Under rationales in State v. Williams, 250 Kan. 730 (1992), and State v. Helms, 242 Kan. 511 (1988), state was not required to charge Hudgins with DUI manslaughter because that offense was not a more specific crime than felony murder.

Cumulative error analysis inapplicable because only error found was harmless prosecutorial misconduct.

STATUTES: K.S.A. 2014 Supp. 22-3601(b)(3); K.S.A. 2014 Supp. 43-158(c); K.S.A. 8-1568(b); K.S.A. 21-3401(b), -3442; K.S.A. 22-3408(3); and K.S.A. 60-261, -405

STATE V. MCCLELLAND
SHAWNEE DISTRICT COURT – AFFIRMED IN PART, SENTENCES VACATED IN PART, AND REMANDED
NO. 109,044 – APRIL 24, 2015

FACTS: McClelland convicted of felony murder (of Stone), three counts of attempted aggravated robbery (of Stone, Penry, and Laeli), and one count of aggravated burglary. (Laeli’s home). On appeal McClelland claimed: (1) insufficient evidence supported felony murder conviction because victim’s death did not result from all three underlying felonies where one of the attempted aggravated robberies (of Laeli) was complete before McClelland shot Stone; (2) district court’s jury instruction on felony murder was broader than the charged crime because instruction identified three alternate felonies (attempted aggravated robberies of Stone, Penry, and/or Laeli); and (3) district court violated “double-rule” of K.S.A. 2011 Supp. 21-6819(b)(4) because sentence exceeded twice the base sentence for primary crime of attempted aggravated robbery.

ISSUES: (1) Sufficiency of the evidence, (2) jury instruction on felony murder, and (3) violation of double rule

HELD: McClelland set off chain of violent events when planned robbing Laeli’s house and brought gun in furtherance of that plan. Elements of time, distance, and causal relationship were met. Evi-
dence viewed in light most favorable to prosecution was sufficient to establish beyond a reasonable doubt that the murder occurred during res gestae of principal occurrence — the attempted aggravated robbery of Laeli.

No error in district court’s jury instruction on felony murder. Felony-murder charge did not identify or imply that Stone was victim of the underlying felony, thus state was not limited to pursuing that sole theory at trial. Based on evidence showing Stone’s death occurred during course of McClelland’s attempt to rob Stone, Penny, and Laeli, it was factually appropriate to instruct jury that any one of the attempted aggravated robberies could satisfy the inherently-dangerous-felony element.

State concedes district court’s violation of “double-rule” of K.S.A. 2011 Supp. 21-6819(b)(4). Hard 20 life sentence for felony murder was affirmed. Sentence on remaining counts were vacated. Case remanded for resentencing.


STATE V. OVERMAN
CHEROKEE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 105,504 – APRIL 17, 2015

FACTS: Jury convicted Overman of drug offenses arising from traffic stop and warrantless search of vehicle for drug evidence incident to his arrest for outstanding warrants and driving on a suspended license. In unpublished opinion, Court of Appeals affirmed in part and reversed in part. Overman’s petition was granted to review the panel upholding: (1) district court’s denial of Overman’s motion to suppress on alternative ground of probable cause plus exigent circumstances, because district court’s reliance on search incident to arrest was negated by State v. Julian, 300 Kan. 690 (2014), and State v. Pettay, 299 Kan. 763 (2014); (2) district court’s ruling that convictions for separate offenses of possession of red phosphorous and iodine with intent to manufacture, and possession of drug paraphernalia with intent to manufacture, did not violate Double Jeopardy Clause; and (3) district court’s use of Overman’s prior convictions to enhance his sentence.

ISSUES: (1) Motion to suppress, (2) multiplicity – double jeopardy, and (3) sentencing

HELD: Under facts established by state and found by district court, the automobile exception applied in this case. District court’s denial of Overman’s motion to suppress is upheld as right for the wrong reason.

precedent in State v. Schoonover, 281 Kan. 453 (2006), was applied. When there is clear legislative intent to provide multiple punishments for the same conduct, double jeopardy was violated even if overlapping statutory provisions have identical elements. Legislature intended separate punishments for violations of K.S.A. 2007 K.S.A. 2007 Supp. 65-7006(a) and K.S.A. 2007 Supp. 65-4132(a)(3).

Controlling Kansas precedent defeats Overman’s sentencing claim.

CONCURRENCE (Biles, J., joined by Nuss C.J.): Would affirm panel’s decision on search question because suppression issue not properly before the court for review. Overman’s petition did not challenge alternative rationale that search was lawful because of the automobile exception.

STATUTES: K.S.A. 21-3107, 33-2501, -2501(c); and K.S.A. 2007 Supp. 65-4150(c), -4150(c)(11), -4152, -4152(a), -4152(a) (2), -4152(a)(3), -4159, -4160(a), -4162(a)(3), -7006, -7006(a)

STATE V. VRABEL
JOHNSON DISTRICT COURT – REVERSED
AND REMANDED
COURT OF APPEALS – AFFIRMED

FACTS: City of Prairie Village officers set up controlled buy of drugs from Vrabel to occur in neighboring city Leawood. Eight months later, felony drug charges were filed against Vrabel. District court suppressed evidence of drugs and conversation between Vrabel and confidential informant because Prairie Village obtained that evidence while exercising police powers outside their jurisdiction as authorized by K.S.A. 2014 Supp. 22-2401a(2). State filed interlocutory appeal. Court of Appeals reversed, finding the cities’ normal protocol for conducting a controlled drug buy in a neighboring city constituted an oral agreement of mutual assistance that satisfied the “request for assistance” exception in K.S.A. 2014 Supp. 22-2401a(2)(b). 49 Kan. App. 2d 61 (2013). Supreme Court granted Vrabel’s petition for review, and state’s cross-petition to review whether K.S.A. 2014 Supp. 22-2401a applied to facts of the case and whether excluding evidence was appropriate remedy for jurisdictional violation under that statute.

ISSUES: (1) Extraterritorial jurisdiction to conduct controlled drug buys and (2) suppression of evidence

HELD: District court correctly found Prairie Village officers lacked jurisdiction to conduct the controlled buy in Leawood. Mere acquiescence or acceptance of assistance by officers of invaded jurisdiction after notification by invading officers does not satisfy the “request for assistance” exception in K.S.A. 2014 Supp. 22-2401a(2) (b). Johnson County bordering municipalities exception in K.S.A. 2014 Supp. 22-2401a(7) applies when crime has been or is being committed in view of the intruding officer, but does not apply when intruding officer anticipates a future viewing of a crime for which the officer has arranged, such as a controlled buy.

District court’s suppression of the evidence is reversed; Court of Appeals decision is affirmed on different grounds. Legislative purpose for imposing territorial jurisdiction limitations on exercise of police powers by city law enforcement officers is to maintain and protect local autonomy of neighboring cities and counties, allowing each governmental unit to control the exercise of police powers within its respective jurisdiction. K.S.A. 2014 Supp. 22-2401a was not intended to create additional individual rights for criminal defendants. Suppression of evidence is not the appropriate remedy when city law enforcement officers have exercised their police powers to arrange and fund a controlled drug buy in another jurisdiction in violation of the jurisdictional constraints of K.S.A. 2014 Supp. 22-2401a(2) and when the aggrieved person has made no illegal search or seizure claim and has not alleged a willful and recurrent violation of the law by city law enforcement officers involved in the drug buy.

STATUTES: K.S.A. 2014 Supp. 22-2401a, 2401a(2), 2401a(2) (b), -2401a(7); K.S.A. 22-2202(13), -2403, -3216, -3216(1); and K.S.A. 74-2108

www.ksbar.org  |  June 2015    27

The Law Firm of Stinson, Lasswell & Wilson, L.C.

Is pleased to announce the Board Certification in family trial advocacy of

JEFFREY N. LOWE
by the
National Board of Trial Advocacy
**FACTS:** Phillips appeals the district court's enforcement of child-support orders against him based on a claim that the orders arose out of Washington state and that the claims should no longer be collectible under a 10-year Washington limitation period. But the applicable statute in both Kansas and Washington provides that in an interstate proceeding for arrearages—or overdue payments—the longer limitation period between the forum state (here, Kansas) and the other state shall apply. The underlying principal of the child support payment had been paid in federal proceedings. The district court ruled that the attorney fees, unpaid medical expenses, and interest on the child support were arrearages governed by Kansas statutes and never became dormant.

**ISSUES:** (1) Child support orders, (2) Uniform Interstate Family Support Act, and (3) choice of law

**HELD:** Court held subsection (a) of K.S.A. 2014 Supp. 23-36,604 refers both to “current payments and other obligations of support” and to “the payment of arrearages under the order.” In other words, in subsection (a), the term “arrearages” specifically refers to arrearages under a support order, and a support order can include interest, attorney fees, and medical-expense reimbursements. Court held that because all of the sums at issue were part of a “proceeding for arrearages” under UIFSA, the longer statute-of-limitations period between Washington and Kansas will apply. Court stated that child-support judgments in effect as of July 2007 will never become dormant in Kansas and, thus, will always be collectible through court proceedings if the Kansas limitation period applies, which it did in this case.

**STATUTES:** K.S.A. 23-36,101, 36,603, -36,604; and K.S.A. 60-2403

---

**CIVIL**

**CHILD SUPPORT ORDERS, UNIFORM INTERSTATE FAMILY SUPPORT ACT, AND CHOICE OF LAW**

**MARTIN V. PHILLIPS**

**JOHNSON DISTRICT COURT – AFFIRMED**

**NO. 110,714 – APRIL 10, 2015**

**FACTS:** This is an appeal from a wrongful-death jury trial in which the jury returned a verdict in favor of the defendants St. Luke's South Hospital Inc. and two doctors. The jury determined that none of the defendants were at fault, and then it attributed 0 percent of the fault for Nicole Dickerson's death to each defendant. Virginia Dickerson, as lawful heir of Nicole Dickerson (estate), appealed this result because it requested that the court instruct the jury to compare the fault of three nonparty doctors along with the named defendants and to list those nonparty doctors' names on the verdict form, but the court refused. The estate argued this was error because it was entitled to any instruction it had evidence to support, and it presented evidence of the fault of the nonparty doctors. The estate contended that it was entitled to a new trial because, as a result of the error, the court asked the jury to attribute 100 percent of the fault to only 50 percent of the people accused of causing the harm.

**ISSUE:** Medical malpractice

**HELD:** Court held in light of the fact that the estate's expert testified that Nicole died because of a Vasotec error, which caused low blood pressure, kidney failure, and subsequent death, a reasonable jury could have concluded that Drs. Anderson, Chan, and Zink were each partially causally responsible for Nicole's death had the verdict form and instructions allowed for it to do so. Sufficient evidence therefore supported the estate's request to compare the fault of the nonparty doctors, and the district court erred by not instructing the jury that it could compare the fault of the nonparty doctors, with the fault of the named parties and by not including their names on the verdict form. However, court held that the instruction error was harmless because had the jury attributed any fault to the defendants, the error might well have been reversible because this court would be forced to agree that the jury attributed 100 percent of the fault to less than 100 percent of those who caused the harm. But to be clear, such an error would have benefitted the estate because more fault would have been assigned to the parties that the estate could recover from. Here, however, the jury found the existing named parties were not at fault. Those parties would still be 0 percent at fault no matter how many more nonparties were added.

**STATUTE:** K.S.A. 60-251, -258a, -261

---

**WATER RIGHTS**

**GARETSON BROTHERS ET AL. V. AMERICAN WARRIOR INC. ET AL.**

**HASKELL DISTRICT COURT – AFFIRMED**

**NO. 111,975 – APRIL 3, 2015**

**FACTS:** This is an interlocutory appeal arising out of a water appropriations action in Haskell County. In 2005, Garetson Brothers, a Kansas general partnership, filed a complaint with the Kansas Department of Agriculture's Division of Water Resources (DWR) alleging that two junior water rights located on neighboring land had impaired its senior water right. DWR immediately began investigating the complaint by installing water level monitoring equipment and gathering data to help determine the degree of well-to-well impairment—if any—occurring between the water rights at issue. However, in 2007, Garetson Brothers withdrew the complaint. In 2012, Garetson Brothers filed a petition alleging impairment of its senior water right by Kelly and Diana Unruh. The Unruhs sold their land and water rights to American Warrior Inc. (AWI). The Garetson Brothers sold their senior water right to Foreland Real Estate LLC (FRE). The district court granted a temporary injunction in favor of the senior right holder (Garetson Brothers) and ordered the junior right holder AWI to refrain from pumping water from two wells located on the junior right holder's land during the pendency of this action. The Unruhs sought to vacate the temporary injunction.

**ISSUE:** Water rights

**HELD:** Court held the district court did not err in admitting or considering the DWR's final report at the temporary injunction hearing without first requiring the chief engineer or another witness to establish a foundation. Court held a review of the record reveals that the district court's finding regarding the status quo is supported by substantial evidence and that the last time the parties were in a peaceable, noncontested position was prior to 2005 when water was not being diverted from the senior water right holder by the junior water right holders. Court found AWI's argument that the temporary injunction would not cure the impairment to FRE's senior water right was beyond the scope of a temporary injunction. Court stated the temporary injunction issued by the district court was aimed at preventing FRE's senior water right from being impaired or injured further pending the final determination of this case on the merits. Court concluded the temporary injunctive relief was
an appropriate remedy under the circumstances presented and the district court did not abuse its discretion by ordering AWI and its tenant to stop pumping water from AWI's two junior wells during the pendency of this action. Court stated that its opinion was not the final determination on the merits.

STATUTES: K.S.A. 60-221, -253, -401, -407; and K.S.A. 82a-701, -702, -703, -705, -706, -707, -711, -716, -717a, -720, -725

Criminal

STATE V. BENNETT

FACTS: Pursuant to plea agreement Bennett pled no contest to second-degree murder, agreed to upward durational departure sentence of 300 months, and waived right to appeal that sentence. Pre-sentencing report indicated sentencing guidelines range of 166-186 months. Sentencing court imposed 300-month prison term and stated Bennett had 14 days to appeal that sentence. Bennett timely appealed, claiming the upward durational departure sentence was unconstitutionally imposed because she was never advised of and never waived her constitutional right for aggravating factors to be submitted to jury and proven beyond a reasonable doubt. State claimed there was no jurisdiction to hear the appeal because Bennett waived right to appeal the 300-month sentence.

ISSUES: (1) Constitutionality of sentencing procedure, (2) appellate jurisdiction, and (3) sentence appeal waiver

HELD: As in State v. Duncan, 291 Kan. 467 (2010), Bennett was never advised on the record of right to have aggravating factors determined by a unanimous jury. In light of Duncan and State v. Horn, 291 Kan. 1 (2010), district court conducted an unconstitutional departure proceeding, and resulting sentence is illegal.

Bennett's sentence appeal waiver is not implicated because she is not appealing the sentence itself. Rather, she challenges the constitutionality of the departure sentence proceeding. An appellate court has jurisdiction to review the constitutionality of an upward durational departure proceeding, and if unconstitutional, any illegal sentence that resulted.

Appellate jurisdiction also exists in this case because plea agreement was ambiguous under the facts and circumstances, and must be strictly construed in Bennett's favor. As in State v. Cópes, 290 Kan. 209 (2010), the plea agreement did not include the information necessary for Bennett to make a knowing and voluntary waiver of right to appeal sentence that would be unconstitutionally imposed. The illegal sentence was vacated. Case was remanded for resentencing.

STATUTES: K.S.A. 2014 Supp. 21-6815(b), -6815(c), -6817, -6817(b), -6817(b)(4), -6820; K.S.A. 21-4718, -4718(b)(4), -4721(c)(2); and K.S.A. 22-3404, -3403(1), -4513

STATE V. CHAPMAN

FACTS: Evidence supporting Chapman's conviction for identity theft was discovered in home search that Chapman allowed only after his parole officer called to explain he had no choice because 2012 change in Kansas law allowed search of parolee's home if officers had reasonable suspicion of a crime. The day after his arrest, Chapman met with parole officer and signed acknowledgment of the 2012 change in parole conditions. Prior to trial, Chapman filed motion to suppress evidence seized from his residence. In response, state argued the search was authorized by K.S.A. 22-3717(k)(3) and by Chapman's consent. District court conducted an evidentiary hearing and denied the motion, finding search was valid under K.S.A. 2012 Supp. 22-3717(k)(3). Chapman's appeal, in part, claimed district court erred in denying motion to suppress because police failed to comply with K.S.A. 22-3717(k)(3) by searching home prior to his written agreement to the new condition of parole, his consent to the search was coerced, and officers lacked reasonable suspicion.

ISSUES: (1) Compliance with K.S.A. 2012 Supp. 22-3717(k)(3), (2) consent to search, and (3) reasonable suspicion

HELD: A parolee's written agreement is a condition for law enforcement officer's search of a parolee's home based reasonable suspicion. State v. Anderson, 40 Kan. App. 2d 69 (2008), rev. denied 287 Kan. 766 (2009), was distinguished. Police did not comply with K.S.A. 2012 Supp. 22-3717(k)(3) prior to searching Chapman's house, thus district court erred by denying Chapman's motion to suppress based solely on finding the search was valid under that statute.

Chapman's consent to search was not knowingly given. Parole officer failed to explain that written consent to the new condition on Chapman's parole was required before officer's could search the residence based on reasonable suspicion. State failed to meet burden of showing Chapman's consent was unequivocal, specific, and freely given without duress or coercion, express or implied. Although police had reasonable suspicion to search Chapman's home under totality of circumstances and information that evidence of identity theft could be found in the residence, district court erred in granting motion to suppress because requirements of K.S.A. 22-3717(k)(3) were not satisfied and Chapman's verbal consent to the search was not freely and voluntarily given. Reversed and remanded with directions to grant motion to suppress. Remaining issues in Chapman's appeal not addressed.

STATE V. HARDY
SEDGWICK DISTRICT COURT – REVERSED
AND REMANDED
NO. 110,982 – MARCH 27, 2015

FACTS: Hardy fired handgun from inside car, striking victim who had punched Hardy in face several times. State charged Hardy with aggravated battery. Hardy filed motion for self-defense immunity, K.S.A. 2014 Supp. 21-5231(a). District court held non-evidentiary hearing, considered material inadmissible at preliminary examination or at trial, and plainly resolved some factual conflicts in Hardy’s favor in granting Hardy’s motion and dismissing the complaint. State appealed.

ISSUE: Procedure for deciding motion for self-defense immunity

HELD: No guidance in K.S.A. 2014 Supp. 21-5231 or in State v. Ultreras, 296 Kan. 828 (2013), on how a claim for self-defense immunity should be handled in district or appellate courts. Preliminary examination protocol offers a better model than procedures for handling a motion to suppress. In considering a motion for self-defense immunity under K.S.A. 2014 Supp. 21-5231, district court must conduct an evidentiary hearing, unless the parties otherwise stipulate to the factual record. The rules of evidence apply. At that hearing, state has burden to establish probable cause that the defendant acted without legal justification in using force. District court must view the evidence in a light favoring the state, meaning conflicts in the evidence must be resolved to state’s benefit and against a finding of immunity. Here, district court’s reliance on Kentucky procedure referenced in Ultreras was misplaced. Considering Ultreras and purpose of statutory self-defense immunity, district court’s dismissal of the complaint based on Hardy’s self-defense immunity motion is reversed. Case is remanded with directions to reinstate the complaint, and to hold hearing on self-defense immunity.


STATE V. HUCKEY
ELLSWORTH DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS
NO. 112,273 – APRIL 24, 2015

FACTS: After hearing that probationer Huckey had not reported to his supervisor for more than two months, the district court ruled Huckey was an absconder and declined to impose any intermediate sanctions as required by law when it revoked his probation.

ISSUE: Probation revocation

HELD: Court stated that by legislative directive, intermediate sanctions are now the norm and the district court must impose them unless the probationer has committed a new crime or absconded from supervision. The district court may bypass the sanctions altogether if the court makes specific findings that public safety or the probationer’s own needs compel their avoidance. Here, the record does not indicate that Huckey committed a new crime, and the court made no specific findings concerning public safety or Huckey’s welfare. Because there is an absence of evidence in the record that Huckey had fled or hidden himself from the jurisdiction of the court in order to avoid arrest, prosecution, or service of process, court held the district court’s finding that Huckey was an absconder from supervision was not supported by substantial competent evidence.

STATUTE: K.S.A. 22-3716

STATE V. MEITLER
RENO DISTRICT COURT – REVERSED AND REMANDED
NO. 111,697 – MARCH 27, 2015

FACTS: Meitler was severely injured when his vehicle crossed center line and collided with another vehicle, killing the other driver.
While he was unconscious at hospital, state troopers directed blood draw which revealed presence of methamphetamine and marijuana. State charged Meitler with involuntary manslaughter, aggravated battery, and driving under the influence. Meitler filed motion to suppress blood test results, arguing a fatality collision involving a driver who commits a traffic offense does not provide probable cause the driver was impaired at time of collision, and arguing that the statute permitting the blood draw, K.S.A. 2011 Supp. 8-1001(b)(2), was unconstitutional as decided in State v. Declerck, 49 Kan. App. 2d 908 (2014), rev. denied 299 Kan. ___ (June 20, 2014). District court granted the motion, ruling that Declerck applied, and good-faith exception to the exclusionary rule did not apply. State filed interlocutory appeal.

ISSUE: Good-faith exception to exclusionary rule

HELD: Exclusionary rule does not apply to evidence obtained by law enforcement officers who acted in objectively reasonable reliance on K.S.A. 2011 Supp. 8-1001(b)(2) prior to Declerck. District court's order suppressing the blood draw evidence is reversed because good-faith exception applies here. Under facts of case, when tied to U.S. Supreme Court precedent, a reasonable officer would not have known in February 2012 that K.S.A. 2011 Supp. 8-1001(b)(2) was unconstitutional. Majority also finds doctrine in Illinois v. Krull, 480 U.S. 340 (1987), involving legislature's abandonment of its responsibility, should not be applied to Meitler's motion to suppress.

DISSENT (Atcheson, J.): Legislature's amendment of K.S.A. 8-1001 undercut established Fourth Amendment principles and controlling U.S. Supreme Court decisions. Although application of legislative abandonment provision in Krull has not been applied in cases, the redefinition of "probable cause" in K.S.A. 2011 Supp. 8-1001(b)(2) is so dramatically at odds with proper legislative purpose and function that the exclusionary rule should be applied regardless of a government agent's good-faith reliance on it. Would affirm district court's ruling because no facts known to government agents at time of blood draw suggested Meitler had been intoxicated, or established probable cause for such a belief. Instead, justification for the blood draw unconstitutionally relied on the impermissible statutory presumption in K.S.A. 2011 Supp. 8-1002(b)(2).


STATE V. KNIGHTEN
SEDGWICK DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, DISMISSED IN PART, AND REMANDED
NO. 110,718 – APRIL 24, 2015

FACTS: Knighten was convicted of second-degree intentional murder and aggravated battery. District court initially met with counsel in chambers to discuss responses to jury's questions, and then held hearing with Knighten present to discuss written answers to be given to jury. On appeal Knighten claimed district court erred in: (1) denying Knighten's Batson challenge to jury composition by focusing on ultimate question of discrimination without first requiring state to produce race-neutral reasons for striking jurors at issue; (2) failing to require Knighten's presence during critical stages in answering jury's questions; (3) failing to instruct jury on lesser included offense of voluntary manslaughter as Knighten requested; and (4) sentencing without requiring aggravating factors or criminal history score to be proven to a jury beyond a reasonable doubt.

ISSUES: (1) Batson challenge, (2) defendant's presence at all critical stages of trial, (3) instruction on lesser included offense, and (4) sentencing

HELD: District court abused its discretion in finding state did not engage in purposeful pattern of discrimination. District court erred as matter of law in not requiring state to produce race-neutral reasons, and given absence in record of any race-neutral reasons by state, court's ruling lacked substantial competent evidence. As in State v. Bolton, 271 Kan. 538 (2000), case was remanded for proper Batson hearing.

Procedural amendment of K.S.A. 22-3420 in 2014 to allow written answers to jury applies retroactively, thus there was no statutory violation in district court's written answers in this case. Court does not address whether Sixth Amendment right exists absent an underlying statutory violation, because any resulting error in giving jury written answers would have been harmless here. Although Knighten's statutory and constitutional rights are presumed violated by lack of evidence establishing his presence during chambers conference, the error was harmless in this case.

A voluntary manslaughter instruction would not have been factually appropriate because no evidence of legally adequate provocation was presented to jury.

Knighten's assertion that district court had to find aggravating factors in order to impose highest number in applicable sentencing grid box was dismissed as misstating the law. Claim that criminal history had to be proved to jury is defeated by Kansas Supreme Court precedent.

STATUTES: K.S.A. 2014 Supp. 21-5404(a)(1), -6804(a), -6804(e)(1), -6820(c)(1); K.S.A. 2014 Supp. 22-3405(a), -3420, -3420(d), -3420(f), -3414(3); and K.S.A. 22-3405, -3420, -3420(3)

STATE V. SPENCER GIFTS LLC
JOHNSON DISTRICT COURT – AFFIRMED
NO. 111,398 – APRIL 24, 2015

FACTS: Johnson County charged Spencer Gifts LLC with promoting obscenity harmful to minors. Spencer Gifts sought dismissal of the complaint, claiming violation of statutory right under K.S.A. 2014 Supp. 22-3402(b) to a speedy trial. State argued the speedy trial statute did not apply to a limited liability company that was not subject to an appearance bond. District court dismissed the complaint, relying on City of Elkart v. Bollacker, 24 Kan. 543 (1998), to find K.S.A. 2014 Supp. 22-3402(b) applied to Spencer Gifts regardless that it had been ordered to appear by summons. State appealed.

ISSUE: Statutory right to speedy trial

HELD: Based upon Bollacker, provisions of K.S.A. 2014 Supp. 22-3402, including the 180-day time limitation, apply to criminal defendants whose appearances were secured by receiving notice to appear or a summons, and apply to a corporate defendant, including a limited liability company. District court's dismissal of the case is affirmed.

DISSENT (Malone, C.J.): Would reverse and remand for further proceedings. Believes Supreme Court would no longer follow Bollacker because it ignores plain and unambiguous language of the Kansas speedy trial statute, and Supreme Court has since given mixed signals on how to interpret the statute.

STATUTES: K.S.A. 2014 Supp. 21-5211(a), -5915, -5915(c)(1), -6611(b)(2); K.S.A. 2014 Supp. 22-3402, -3402(a), -3402(b); K.S.A. 21-3813(b), -4301c; K.S.A. 22-2202(2), -2202(15), -2202(19), -2809, -3204(c), -3402, -3402(2); K.S.A. 21-3813, -3813(2); K.S.A. 22-3402(2) (Ensley 1981); and K.S.A. 1997 Supp. 22-3402
Positions Available

Courtroom Deputy. The U.S. District Court for the District of Kansas is seeking a courtroom deputy to join our Wichita team. Administrative and computer skills required. Legal experience preferred. Competitive starting salary and excellent federal benefits! For a full job announcement, visit www.ksd.uscourts.gov. To apply, send a cover letter, resume, and application form via email to: ksdcourtrrecruitment@ksd.uscourts.gov. EOE.

Concordia Firm Seeking Associate. North Central Kansas law firm of Condray & Thompson LLC, recently voted “Best Law Firm of Concordia,” seeks an outgoing associate attorney with at least three years’ experience. Candidates must have good academic credentials, strong written and oral communication skills, and experience with a general practice office handling corporations, estate planning, real estate, title insurance, administrative law, and tax planning and preparation. They must possess a good work ethic and be comfortable interacting with the community. They must also be happy living and working long term in a rural community of 5,300 people. Please send resumes and cover letters to Condray & Thompson LLC at PO Box 407, Concordia, KS 66901, or email them to condraylaw@condraylaw.com. All inquiries will be kept confidential.

Go West Young Lawyer. After nearly 39 years of solo law practice in northwest Kansas, I am ready to sell my practice and move on to other pursuits. My office building and tenants, client files, and office equipment will soon be ready for you to take over. There are nine county courthouses within an hour’s drive. A run for county attorney will be available in August 2016. My secretary might even be persuaded to stay on. This has been a great place to live and work. Interested candidates should send resume and cover letter by email or mail to: Stover Law Office, PO Box 275, Quinter, KS 67752, or Stoverlaw@hotmail.com. All inquiries will be kept confidential.

Lateral Attorney. McDowell Rice Smith Buchanan P.C. is actively seeking lateral mid-senior level candidates with established practices who are interested in continuing to serve their existing clients but also interested in providing depth and experience to the firm in the areas of commercial, business, dispute resolution, tort and professional liability litigation. Minimum requirements include:

- Licensed in Missouri and Kansas
- Excellent academic credentials
- Exceptional verbal and written communication skills
- Strong interpersonal skills
- Capability and continued potential to retain and develop business

Please forward your introductory letter and resume for immediate consideration to: korme@mcdowellrice.com.

Topka City Attorney. As a member of the City of Topeka’s executive management team, the city attorney is responsible for management of the Legal Department, including prosecution and litigation. Minimum qualifications: Juris doctorate, license to practice law in the state of Kansas, five years of professional law practice with supervisory experience. Must be a resident of Shawnee County or relocate upon completion of the probationary period. Salary range is $86,709-$131,322, DOQ. Submit a cover letter, resume and City of Topeka employment application to the City of Topeka Human Resources Department. Electronic employment application available at www.topeka.org/jobs.shtml

Attorney Services


Contract Brief Writing. Former federal law clerk and Court of Appeals staff attorney available to handle appeals and motions. Attorney has briefed numerous appeals in both the Kansas and federal appellate courts. Contact me if you need a quality brief. Michael Jilka, (785) 218-2999 or email mjilka@jilkalaw.com.

Contract Brief Writing. Former research attorney for Kansas Court of Appeals judge, former appellate division assistant district attorney in Sedgwick County. Writing background includes journalism degree, Kansas City Times intern, U.D.K. beat reporter and grant writer. I have written more than 50 appeals and had approximately 30 oral arguments in the Kansas Court of Appeals and Kansas Supreme Court. I have criminal and civil litigation experience, in addition to civil and criminal appellate experience. I welcome both civil and criminal appeals. Rachelle Worrall, (913) 397-6333, rwdlaw310@outlook.com.


QDRO Drafting. I am a Kansas attorney and former pension plan administrator with years of experience in employee benefit law. My services are available to draft your QDROs, communicate with the retirement plans, and assist with qualification of your DROs or other retirement plan matters. Let me help you and your client through this technically difficult process. For more information call Curtis G. Barnhill at (785) 856-1628 or email cgb@barnhillatlaw.com.

Veterans Services. Do you want to better serve your veteran clients without going to the trouble of dealing with the VA? I am a VA-accredited attorney with extensive experience applying for various VA benefits, including Improved Pension. I regularly consult with attorneys (and their clients) about the various services attorneys can offer their clients to help qualify veterans and their families for various VA programs. As soon as a client is in position to qualify, I can further assist by handling the entire application to the VA for you. For more information about my various consultation and application services, please contact the Law Office of Scott W. Sexton P.A. at (785) 409-5228.
Law Office Software

Juris DOC Pro Law Office Software. Free use of Juris DOC Pro law office software for 60 days, to see if it may be useful in your practice, by saving time and helping to increase billable hours each month. Application contains child support worksheet for both Kansas and Missouri, in addition to an extensive library of other forms connected to a database. If interested, download the trial version at http://www.jurisdocpro.com/ then request a 60-day license key from Tom Harris at gtharris@sbcglobal.net.

Office Space Available

Class A Law Office in Downtown Olathe. Two large office spaces available – located across the street from the Johnson County Courthouse in the prestigious Park-Cherry Building. Services available include telephone, Internet, copier/scanner/fax, two conference rooms, file space, full kitchen with eating area. Space for staff person, if needed. Call Kay Martin or Jadh Kerr for more information at (913) 782-1000.

Downtown Overland Park Office Space for Rent. Free parking, reception area, kitchen, and conference room available for tenant use. The offices are in walking distance of coffee shops, restaurants and retail stores. 2,970 sf of space available. Easy access to Metcalf, I-35, I-635. Contact Tim Gates at Agnes Gates Realty (913) 645-5900 or timothygates@yahoo.com.

Office Sharing/Office for Lease—Country Club Plaza, Kansas City. Office sharing or office lease opportunity on the Country Club Plaza in a Class A high profile corner building with ample free public parking for clients. 200 to 11,000 square feet available. Window offices available, high-speed DSL, printer, copier, facsimile, scanning, telephone, kitchen facilities, reception area, and multiple conference rooms. Offices are state-of-the-art with award-winning interior finish and design. Dedicated area available for your assistant if needed. Reasonable rent. No long-term lease required. Some possibility of business referrals depending on your area of practice. We are an AV-rated litigation firm with full management, accounting, research, and other support services. We would consider cost sharing these services with a compatible transactional, tax, and/or real estate practice. Professional, collegial, friendly atmosphere with other attorneys. Confidential inquiries can be made to Michael Grier at mgrier@wardengrier.com.

Office Space Available. Great space for attorney, businessperson, or CPA. Up to 3,000 square feet available, conference room, security system, easy access to downtown Topeka or interstate. Call Bob Evenson at (785) 231-7987.

Office Space for Attorney. AV-rated downtown Topeka law firm has spacious window office available for lease. Reception area, free parking, client parking, kitchen, two conference rooms, printers and copiers, space for staff. Prime location – walking distance to courthouse, City Hall, State Capitol and state offices. Would consider office-sharing or of counsel arrangement. Email shery@hensonlawoffice.com.

Office Space for Lease. Located at 921 SW Topeka Blvd., which offers quick and easy access to downtown Topeka including the County, Municipal, and Federal Courthouses; State Capitol Building; Docking State Office Building; Curtis Building; and more. There is available space on the first or second floor of the building, which includes individual offices and/or office suites. The building also includes a beautiful glass atrium sitting room used as an art display. Provided services include private parking and receptionist services. Please call Swinnen & Associates LLC at (785) 272-4878 for more information and to schedule an appointment to view the space.

Professional Office Building For Sale or Lease Near 28th & Fairlawn in SW Topeka. A 10,000 SF, two-story building recently remodeled with new HVAC and lighting systems. Building could be used as a whole or easily divided into four or more work areas to accommodate numerous professional organizations. Convenient to the Hwy Loop for quick access to all city, state, and court buildings, turnpike and the mall areas. Great food and other support close at hand. Call Dick May at (785) 633-2217 or (785) 267-8632.


Professional Office Space for Lease or Sale. Newly vacated space at 79th and Quivira, Lenexa, KS. Great rates, and will consider valuable upfront lease concessions for high quality, long term lease. Office is located in a commercial center that is for sale. Excellent income-producing investment opportunity for an owner-occupant. Attractive owner financing available for qualified buyer. Call (816) 805-6415.

We Have the Space You Need at the Price You Want! We have offices available in all sizes from 200 sq. ft. to 8,000, or no office at all under our virtual program. We offer a cost-effective solution for small- to medium-sized companies and branch offices with very little upfront cost and flexible lease terms. You can typically move into your office in a day and have access to a professional environment and services without all the overhead. Please visit us at www.officetechcenter.us.
Legislative & Case Law Institute

Need CLE? Attend the KBA’s popular video replay series – Legislative and Case Law Institute

LCLI will provide the latest case law and legislative update for this year. The Kansas Annual Survey of Law serves as the written materials for this fast-paced seminar.

Both sessions (morning and afternoon) have been approved for 4.0 hours of CLE, including 1.0 hour ethics and professionalism, in Kansas and Missouri.

Attend both sessions and save on registration!

June 26, June 30, July 10 & August 5: Kansas Law Center, Topeka

ALPS KANSAS
YOUR KANSAS BAR ASSOCIATION-ENDORSED MALPRACTICE CARRIER FOR OVER 25 YEARS

- ALPS was founded in partnership with the Kansas Bar Association in 1988
- Kansas lawyer input on policy features and risk management
- From Lawrence to Goodland and all points in between, we have Kansas lawyers covered

(800) 367-2577  |  www.alpsnet.com
Help protect an important part of your financial future.

If an unexpected illness or injury prevents you from earning an income, Long Term Disability Insurance can help pay for bills, the mortgage, and more. In fact, you can think of it as income protection.

- **It’s affordable**: competitive rates help make coverage accessible.
- **Up to $10,000 in monthly coverage available**: can cover mortgage, credit card bills, medical premiums, and more.
- **Your occupation definition**: receive total benefits if you can’t perform the duties of your regular job because of your disability.
- **Survivor benefits**: paid to your beneficiary if you die while receiving benefits.
- **Optional cost of living adjustments**: receive an annual automatic increase in benefits.
- **Flexible benefits**: receive benefits whether you are disabled and not working or disabled and still working.

Kansas Bar Long Term Disability Insurance can give you more coverage than what you may already have through your employer—which can be typically only 30-40% of your salary. You could also receive benefits even if you continue working part time through your disability. Apply today and make sure you have enough coverage to protect your financial future.

Take advantage of your membership and request coverage. Call 1-888-ISI-1959 today for more information or to apply!
A TRADITION OF SUCCESS

OUR EXPERIENCE PAYS

We have a long history of success inside and outside the courtroom. For over 40 years, we have maximized the value of cases referred to our firm and we will continue to do so into the future. If you have a client with a serious injury or death, we will welcome a referral or opportunity to form a co-counsel relationship.