Remembering Chief Justice Kay McFarland
P9

Celebrate Pro Bono 2015 – Take Part in the Celebration
P12

November 2 Mandate is Inspiration for Attorneys to Electronically File in Appellate Courts
P20

Daubert in Kansas: Prompting a Fresh Look at the Admissibility of Scientific Evidence
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22 | Daubert in Kansas: Prompting a Fresh Look at the Admissibility of Scientific Evidence
By Kyle Malone

9 | Remembering Chief Justice Kay McFarland
   By Amanda Stanley

12 | Celebrate Pro Bono 2015 – Take Part in the Celebration

14 | Thinking Ethics: Resolving Ethical Dilemmas
   By Stanton A. Hazlett

18 | KBA Benefits: Helping You With Peace of Mind, Efficiency, and Becoming a Better Lawyer
   By Jordan E. Yochim

20 | November 2 Mandate is Inspiration for Attorneys to Electronically File in Appellate Courts
   By Justice Dan Biles

Regular Features

6 | KBA President
   By Natalie G. Haag

8 | YLS President
   By Justin Ferrell

10 | Substance & Style
   By Joyce Rosenberg

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

16 | Law Students’ Column
   By Merideth Hogan

17 | Members in the News

17 | Obituaries

30 | Appellate Decisions

32 | Appellate Practice Reminders

38 | Classified Advertisements
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Are You Prepared to Protect Your Employees and Clients?

It may seem like we have a proliferation of monthly awareness campaigns, i.e., Breast Cancer Awareness Month, Alzheimer’s Awareness Month, ALS Awareness Month, etc. Recent news reports pointing to the successful medical research results funded by the ALS Ice Bucket Challenge demonstrate one reason we need to remain aware of and contribute toward the cure for all these diseases. While all of these are worthwhile causes, October is Domestic Violence Awareness Month, and I want to remind you about how domestic violence directly impacts the entire legal community and have you consider some points of action.

Based upon 2003 Centers for Disease Control and Prevention estimates, the American Bar Association reports that the cost of intimate partner rape, physical assault, and stalking totals more than $8.3 billion each year in the United States for direct medical and mental health care service and lost productivity for paid work and household chores.

While most lawyers don’t stop to think about the negative ramifications of domestic and sexual violence has on them, as employers we experience the negative impact on employee work attendance, performance, morale, and longevity. Our employment policies should address how to report and respond to violence in the workplace as well as the rights of victims to time off work to deal with medical and legal matters arising out of domestic violence situations. The ABA encourages lawyers to have formal workplace policies in place and provides information on its website about key issues.

As the ABA data reflects, those issues are widespread in our workforce: “Domestic, dating, sexual, and stalking violence are workplace issues that do not stay at home when victims and perpetrators go to work. By conservative estimates, 2,800,000 people are victimized by intimate partners annually.” The ABA also points to a recent study that reported “29 percent of male workers and 40 percent of female workers reported having been subject to intimate partner violence at some point in their lives.”

Violence impacts not only our workforce but also the daily practice of law for many practitioners dealing with domestic litigation, criminal cases, and child in need of care matters. Outside these areas of practice, we may not consider whether our clients and employees in a broader context are dealing with the impact of domestic violence.

For instance, even though the Violence Against Women Act and the Fair Housing Act provide specific housing related protections, 50 percent of U.S. cities surveyed reported that domestic violence is a primary cause of homelessness. The impact of domestic violence on housing in Kansas is reflected in cases like In re T.J.C.-R., where the court noted that evidence presented when the CINC action was initiated showed the mother was living in a one-bedroom apartment with five children and though the mother, at the insistence of the case worker, applied for Section 8 housing, the mother found that she was ineligible for residency in some apartments because of her history of domestic violence.

Other potential benefits or protections to consider are provided by the Employment Security Insurance Act for Domestic Violence Survivors; Americans with Disabilities Act; Kansas Protection from Abuse Act; Protection from Stalking Act; and the Workers Compensation Act.

Outside the legal community, state and local programs also provide resources for helping victims. In a survey by the National Network to End Domestic Violence it was found that during one 24-hour period, local domestic violence programs across the country provided help and safety to 67,646 adults and children who were victims of domestic violence. Yet on that very same day, there were 10,871 requests for services that could not be met due to lack of funding. In Kansas there were 951 victims served by existing programs in that same 24-hour time period and 284 unmet request for service, of which 113 (46 percent) were for housing.

Action plan: (1) ensure that your employment policies adequately address domestic and sexual violence; (2) consider whether your client is a victim and if so, what protections might be available; (3) don’t tolerate violence in your workplace; (4) educate others about domestic and sexual violence; and (5) get involved in the efforts to manage these issues by donating time and money to your local program and/or the Kansas Coalition Against Sexual and Domestic Violence.

Topeka lawyers deliver “briefs”!

Thanks to the fun idea generated by KBA staff member Cassandra Blackwell, the KBA and the Topeka Bar Association jointly filled the “brief bin” at Let’s Help in Topeka. Let’s Help reported that it had been two years since they had received a donation of new undergarments and a Let’s Help

Footnotes

4. Id.
8. K.S.A. 44-706, et seq.
10. K.S.A. 60-3101, et seq.
11. K.S.A. 60-3101, et seq.
13. Id.
14. Id.
employee made a birthday wish that the bins would be full. Thanks to the efforts of TBA President Jim Rankin and TBA Executive Director Tiffany Fisher, together with wonderful donations from KBA members, the brief bin at Let’s Help is full. Since only a lawyer would call a 50-page document a “brief” this was a fun way for local lawyers to support our community. We hope you join us in finding ways to remind your local communities about the good things lawyers do!

About the President

Natalie G. Haag currently serves as executive vice president/general counsel for Capitol Federal Savings Bank. She has been a member of the Kansas Bar since 1985, and received her bachelor’s degree from Kansas State University in 1982 and her law degree from Washburn University School of Law in 1985.

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Cyber Liability and the Lawyer: A Tale of Anguish and Confusion

The only problem with troubleshooting is that sometimes trouble shoots back. – Unknown

We live in a time of significant technology, technology that seems to evolve at a rapid pace, a pace best described as “as soon as I figure this out, they change it.” However, technology has made our lives much easier; instead of having a massive library with books to wade through, we can now access thousands of cases with a simple search on an iPad, or pull up an obscure statute in a matter of seconds with a Google search. What took hours, now takes seconds.

However, with such advances, come increased problems and liabilities. From viruses, to malware, to electronic extortion, it seems there is always something in the news regarding breaches or issues with technology. So what risks do we as lawyers face? Most firms keep electronic records paired with their paper files; these electronic records almost always include names, addresses, Social Security numbers, or sensitive personal data, along with privileged and confidential information. The theft of this type of information can pose not only a financial problem for firms and their clients, but it can create an ethical issue for the lawyer. Jody R. Westby in her article for the Law Practice Magazine, Cybersecurity & Law Firms: A Business Risk (Vol. 39, No. 4) stated:

New commentary to Rule 1.1 of the Model Rules of Professional Conduct requires attorneys to “keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.” So the days of attorneys being technology troglodytes are over. Model Rule 1.6(c), on the confidentiality of client communications, acknowledges that disclosures can happen by providing: (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Commentary on the Rule notes that [18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure.

Thus, Rules 1.1 and 1.6 may allow a law firm to avoid an ethics violation stemming from a breach if it has acted in a competent manner (e.g., having a strong security program) to protect its client data from disclosure.

Thus is seems that not being technologically savvy is not going to be an excuse. Not only must we be competent in understanding the law, we must be competent in properly storing and preserving vital information from our firm and our clients. So what can a firm do to better insulate itself from cyber risks? Westby went on in her article to cite a list of things to consider when implementing an enterprise security program (ESP).

The basics of an ESP, including the roles and responsibilities of all personnel, are provided in a security program guide developed by Carnegie Mellon University’s Software Engineering Institute. A simplified listing of the activities required to establish and maintain an ESP that has been tailored toward law firms is provided below:

• Set the “tone from the top” and issue high-level policies regarding the privacy and security of firm data. This includes the use of encryption, remote access, mobile devices, thumb drives, laptops, Wi-Fi “hotspots,” clouds, Web email accounts, and social networking sites.
• Inventory the firm’s software systems and data, and assign ownership and categorizations of risk. Client data may need to be compartmentalized; not all clients are equal. Extremely sensitive matters have the highest risk and could cause the greatest magnitude of harm if breached. Firms may want to keep this data on a separate server with stronger security protections and stronger access controls.
• Identify points of contact with law enforcement, Internet service providers, and the communications companies that service the firm, and cyber forensic experts. If the firm has multiple offices, this should be done for each, with particular attention to foreign offices.
• Conduct third-party vulnerability scans, penetration tests, and malware scans. Antivirus software is essential, but it detects only a small percentage of new malware. Specialized services that detect sophisticated attacks may be required.
• Perform software code reviews on Web applications and custom code to detect vulnerabilities.
• Enough data is now gathered to develop a security strategic plan (a two- to five-year plan) and security program plan (the firm’s 12-month plan for security activities, which will include remediation activities identified in scans and penetration testing).
• Deploy needed security technologies for encryption, intrusion prevention and detection, monitoring, security event management, etc.
• Identify and document security controls.
• Establish security configuration settings, access controls, and logging.
• Develop security policies and procedures to support the security plan and technologies.
• Conduct training (general awareness, governance, operational, and technical).
• Develop incident response, business continuity, or disaster recovery plans and communications plans. Test them.
• Develop contractual security requirements for outsourcing vendors, cloud providers or other entities that connect to the firm’s network, including notification in the event of a breach.
• Conduct regular reviews of the security program and update as necessary.

In 2012 in a survey conducted by the Ponemon Institute, it was found that the average cost of a cyber-crime was $8.9 million. But there is a way to transfer some of this risk; there are many companies now writing cyber liability insurance coverage for businesses, including law firms. The coverages and amounts vary widely, but it can certainly be of service to your firm in the event a breach takes place.

Obviously this article just brushes the surface of cyber risks we as lawyers must be aware of, but hopefully with a little bit of knowledge we can look further into this issue and better protect and prepare ourselves.

About the YLS President

Justin Ferrell serves as in-house counsel/risk manager for the Kansas Counties Association Multi-Line Pool in Topeka. He currently serves on both the TBA Young Lawyers and KBA Young Lawyers.

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Remembering Chief Justice Kay McFarland

By Amanda Stanley, Kansas Court of Appeals, Topeka

Former Kansas Supreme Court Chief Justice Kay McFarland passed away on August 18. She had just celebrated her 80th birthday. During her impressive 80 years, McFarland touched the lives of all Kansans and dramatically impacted the diversity of the Kansas Bar. While at a recent funeral, I heard a quote by Thornton Wilder that really resonated with me as I researched McFarland for this article, “The highest tribute to the dead is not grief but gratitude.” In the days following Justice McFarland’s death, various articles called her a “judicial pioneer” or, in the words of Kansas Public Radio, a “trailblazer for women working in the field of law and justice.” As a female attorney in Kansas, I am profoundly grateful to her for shattering glass ceilings. In the words of Justice Marla Luckert, McFarland was a “woman whose pioneering spirit opened doors for me—as an attorney, a district court judge, and a Supreme Court justice.”

Justice McFarland was born July 20, 1935, in Coffeyville to Dr. Kenneth Warren McFarland and Clara Eleanor Thrall McFarland. Dr. McFarland’s work as an educational consultant and motivational speaker afforded his family numerous opportunities to explore new locales and instilled in McFarland a lifelong love of travel, which included three African safaris.

In Topeka, McFarland was raised on a farm with horses and other pets. She especially loved dogs and horses and was considered a world-class show ring rider of Tennessee walking horses, and she bred champion Irish wolfhounds with stock brought directly from Ireland.

McFarland’s legal career was anything but ordinary. At her funeral, Luckert described how McFarland’s career choice was propelled from her education. She had enrolled at Washburn University intending to become a teacher. It only took one class for her to decide teaching wasn’t for her. At that point she was more interested in riding in horse competitions, so she chose a major with no career in mind. She graduated from college magna cum laude with a double major in English/history-political science.

Kay spent the next four years traveling the competitive Walking Horse show circuit. An article in the December 1958 edition of The National Horseman summarized her accomplishments, saying: ‘Since Kay McFarland and Midnight Secret got together...they have made a record never equaled in the walking horse world. In show after show they have met all the top competition in the nature and never lost a class! In the amateur competition of the 1958 Celebration they emerged as the undefeated world champions. Since the Celebration, this great horse and rider have repeated their sensational victories.’

When the McFarland family decided to retire Midnight Secret, Kay was at a loss of what to do. She first enrolled in Clark’s business school—after all she had been repeatedly told that the only occupations for a woman were as a nurse, teacher, or secretary. She knew she didn’t want to do either of the first two, so she tried the third. According to her, she only lasted an hour. Considering her options, she thought about the fact there was a law school in town. Apparently she had given this some thought before, because she had taken the LSAT, even though it was not mandatory. She really enjoyed taking the test, which made her think she might like law school. She sought the advice of a local attorney, who told her she would be bored and would end up sitting and doing dull things because that’s all women lawyers could do. Kay got madder and madder and with that feisty spirit and a sense of defiance enrolled in law school. I’ve been told there was only one other woman in law school at the time, and she just took a class or two each year as she worked in her family business.

Not only was McFarland the only women attending law school full time, according to the book “Kansas Quilts and Quilters,” during school she ran a successful mail order quilting business to pay for her education.

According to the biographical page on the Supreme Court’s website, McFarland graduated from Washburn Law in 1964 and was admitted to the Kansas Bar the same year. She worked in private practice until 1971 when she defeated the incumbent to become judge of the Probate and Juvenile courts in Shawnee County. She was the first female elected to a judgeship in Shawnee County. In 1973 she was elected district court judge for the newly created 5th Division of the district court in Topeka. McFarland was the first female district court judge in Kansas history. On September 19, 1977, Gov. Robert Bennett appointed McFarland as the first female justice of the Kansas Supreme Court. On September 1, 1995, she was named chief justice of the Kansas Supreme Court. She held that job until her retirement in January 2009 after 31 years on the Supreme Court.

While McFarland shattered multiple glass ceilings during her long and distinguished career, she also had an excellent sense of humor and loved being a storyteller. According to Luckert:

In her typical way, Chief Justice McFarland had great stories about various cases and experiences during those years. She used to laugh that she never cared for beer but she could claim responsibility for bringing cold beer to Kansas. She wrote briefs and argued in Wilcoxon v. Murphy, 204 Kan. 640 (1970), in which her client had been charged with violating Kansas law by chilling beer, which the state argued was adding a service of value beyond the mere sale of alcohol—something prohibited by law. So next time you drink a cold brew, you can thank attorney McFarland.

In the words of Justice Luckert, “Many—for generations yet to come—will benefit from her accomplishments without even recognizing how she helped open a door for them. But today women attorneys in Kansas and elsewhere are very aware of how Chief Justice McFarland broke glass ceilings.” So today focus not on grief for McFarland’s passing but on gratitude for all her accomplishments.

Memorial contributions may be made to the charity of Chief Justice McFarland’s choosing: Friends of the Topeka Zoo, 635 SW Gage, Topeka, KS 66606.

Footnotes
2. Id.
Anatomy of a Good Argument

I read a lot of legal writing. In addition to my students’ work, I look to other lawyers’ legal writing for ideas of how to improve my own writing. I read briefs and judicial opinions and legal commentary both as a kind of hobby and as a professional necessity. Every once in a while, a piece of writing pops up as an unusual example of effectiveness—perhaps in its novel approach, or in its structure, or in its use of language. I came across one such example recently, in an Emergency Application for Stay filed with the U.S. Supreme Court in Frank v. Walker.¹

The brief is remarkable in at least three ways: The effectiveness of its summary in the brief’s introduction; its use of a bulleted list to explain the claimed errors in the Seventh Circuit; and its framing of the case so that the Seventh Circuit, rather than the state of Wisconsin or the other defendants, looks like the opposing party.

The Introduction

The introduction, taking only four pages of a total 32, focuses on the damage the petitioners allege will occur if the Court denies their application for emergency relief. By the end of the introduction, the petitioners have made clear their arguments, of course. More importantly, the claimed damage is clear from the first paragraph:

Applicants respectfully request an emergency order staying the October 6, 2014 judgment of the United States Court of Appeals for the Seventh Circuit pending the timely filing and disposition of a petition for a writ of certiorari. The judgment below reversed the district court’s permanent injunction of Wisconsin’s new voter ID law, allowing the State to enforce the law in next month’s election despite insufficient time to fairly and responsibly implement the law to prevent the disenfranchisement of hundreds of thousands of registered Wisconsin voters.

The end of this paragraph summarizes the petitioners’ main idea. Ending the first paragraph of the introduction this way accomplishes two important things. First, it provides a road-map that focuses the rest of the argument. After this paragraph, it is clear that the argument is based on the timing of implementation of the law. Second, the final sentence ensures that a reader who is reading quickly, perhaps focusing on the thesis and conclusion of each paragraph, will get the full impact of the writer's point.

This technique bears out throughout the introduction. If a reader read only the first and last lines of most paragraphs in the introduction, here is what it would look like:

Wisconsin’s Act 23 is one of the strictest voter ID laws in the country. . . . [T]he district court found it “absolutely clear that Act 23 will prevent more legitimate votes from being cast than fraudulent votes.”²

A panel of the Seventh Circuit stayed the district court’s permanent injunction on September 12 . . . . The stay thus virtually guaranteed chaos at the polls and irreparable disenfranchisement of many thousands of registered Wisconsin voters.

The court of appeals’ judgment upholding the law did not address whether the State in the coming weeks can adequately train poll workers . . . . Make no mistake, that is no small number of registered voters at issue.

Worse still, many voters have already cast absentee ballots . . . . These voters’ once-valid votes are thus rendered void by the decision below.

Changing the rules so soon before the election is contrary . . . . to the practical realities of an impending election . . . . Many voters, unsure of what identification is now required to vote, will likely stay home from the polls, while others will be turned away.

On the other side of the ledger, the State made no factual showing at trial . . . . The panel changed the rules at the last minute.

The electorate should never have to suffer chaos and confusion on the eve of a major election . . . . The status quo if not restored will irreparably harm registered voters in Wisconsin.

By putting the strongest points first and last throughout, the paragraph structure in the brief’s introduction gives even a hurried reader a strong, persuasive sense of the arguments to follow.

Footnotes

1. See Frank v. Walker, 135 S. Ct. 7 (2014) (granting application to vacate order of the United States Court of Appeals for the Seventh Circuit pending petition for writ of certiorari). The petitioners were plaintiffs seeking to prevent implementation of Wisconsin’s Voter ID law before the 2014 election. The U.S. District Court for the Eastern District of Wisconsin held that the Voter ID law violated the Fourteenth Amendment and the Voting Rights Act and granted a permanent injunction against enforcing the law, 17 F. Supp. 3d 837, which the Seventh Circuit reversed. Frank, 768 F.3d 744 (7th Cir. 2014). The Supreme Court granted the petitioner’s requested stay of the Seventh Circuit’s ruling, which would have permitted immediate enforcement of the Voter ID law. Ultimately, the Supreme Court denied certiorari and vacated its stay. Frank, 35 S. Ct. 1551 (2015).

The Bulleted List of Errors

To win the application for stay, the *Frank* petitioners had to prove, among other things, the likelihood of prevailing on the merits. That section of the brief covers the claimed errors in the court of appeals. Here, the brief writers used a bulleted list as a clever and particularly effective way to communicate the number and materiality of claimed errors.11

A writer has many choices when conveying the claimed errors in a lower court. Each claimed error could have its own subsection, for example. Or the errors could be described in an opening paragraph, then fleshed out in paragraphs to follow. In the petitioners’ brief in *Frank*, the writers chose to incorporate a list. Here’s the visual impact:

The impression is striking. Here are five mistakes the court below made. No fuss, no need to sort through complicated organizational structure or dense prose. It’s like a grocery list. And like a grocery list, this bulleted list of claimed errors makes it easy for the Court to see and to choose the basis for the petitioners’ likelihood of success on the merits of an eventual writ of certiorari.

The Focus on the Court Below

In *Frank v. Walker*, the named defendants were Wisconsin Gov. Scott Walker and other official representatives of the state. This Emergency Application for Stay, however, hardly mentions those parties. Instead, the brief focuses on the Seventh Circuit panel that overturned the District Court’s order. The best example of this focus is the first section of the argument. The section heading reads: “The Seventh Circuit’s Judgment Will Cause Chaos at the Polls and Will Disenfranchise Many Thousands of Voters in November.”12 The rest of the section casts the Seventh Circuit (sometimes referenced as “the panel”) as the adverse party. “The Seventh Circuit’s decision would thrust Wisconsin’s election machinery into disarray . . . .”13 “The panel’s assumption . . . is insensitive and divorced from reality.”14 “[T]he panel wholly misses the mark when it states . . . .”15 and so on. When the argument mentions the State of Wisconsin—nominally, the defendant—it is portrayed as a passive victim in the case.16

In this brief, casting the panel below as the adversary was effective because winning the emergency stay depended on the poor timing of the Seventh Circuit’s order. It might have been tempting, however, to focus instead on alleged harm from the Voter ID law. Identifying the court below and its decision as the main problem puts the need for emergency relief at the forefront.

The Takeaways

Lessons learned from the brief in *Frank*: First, front-load and back-load important information into each paragraph. Start with a persuasive thesis or topic sentence that makes sense standing on its own. And end each paragraph with a punch of information about your argument. Second, make the document’s appearance work for you. In any brief, a list can be an effective way to highlight key facts or other information you want your reader to focus on. Finally, consider who the main adversary is relative to the relief sought. It could be the actual opposing party, but there may be alternative choices: a court’s decision, a piece of evidence, or a witness. These are some great examples of how simple writing techniques can improve advocacy.

About the Author

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

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

11. Id. at 28-29.
12. Id. at 11.
13. Id.
14. Id. at 12.
15. Id. at 13.
16. See, e.g., id. at 12-13 (“Separate from the legality of Act 23, the State cannot effectively implement the law’s photo ID requirements instantaneously, like the flip of a switch. . . . Wisconsin does not have the infrastructure . . . to implement the necessary measures in the next four weeks. The Wisconsin DMV has only 92 offices statewide.”).
Celebrate Pro Bono 2015 – Take Part in the Celebration

The National Celebration of Pro Bono Week officially takes place during the last week of October each year with events in many locations all over the country. However, events begin early in October and often run through the end of the year. According to the American Bar Association, last year there were over 600 events in 48 states and Puerto Rico. Nearly 70 percent of those events were volunteer training or direct service events and the remainder were receptions, fundraisers, or awards ceremonies. The ABA Standing Committee on Pro Bono and Public Service sponsors Pro Bono Week. It is a time to renew your commitment to pro bono, get inspired, and explore ways to give back to your community.

What can I do to give back?

Kansas Legal Services (KLS), a statewide nonprofit corporation, provides essential legal and mediation services to Kansans with limited means. KLS has 11 offices and two mediation offices throughout the state and maintains an extensive network with limited means. KLS has 11 offices and two mediation offices throughout the state and maintains an extensive retainer contract system with cooperating members of the KBA. KLS is in need of your help and here are some ideas to consider.

KLS Pro Bono Program

The KLS Pro Bono Program provides service to low-income clients or children on an uncompensated basis. No potential client is given an attorney's name without specific approval from the attorney. All potential clients will be screened for financial eligibility through KLS. Many of the cases referred will be cases that KLS cannot accept due to conflicts or other barriers. Clients using this program understand that they may be required to pay filing fees, witness fees, etc. Acceptance of the case is based on financial eligibility through KLS. Many of the cases referred will be cases that KLS cannot accept due to conflicts or other barriers. Clients using this program understand that the attorney has agreed to provide services at no cost for the referred case only. Clients also understand that they may be required to pay filing fees, witness fees, etc. Acceptance of the case is based on no expectation of payment for attorney time or office expenses. KLS may be able to help with extraordinary litigation expenses, when the interests of justice require it.

Elder Law Hotline

Join other Kansas attorneys in providing legal services to Kansans who are over age 60. The Kansas Elder Law Hotline is a project of KLS. There is no income eligibility for callers to participate in this program, and volunteers can expect to talk to clients of varying economic and social backgrounds. The hotline provides Kansas senior citizens access to an attorney willing to advise them about legal issues and may also refer them to other resources for additional assistance. The Elder Law Hotline asks that attorneys volunteer a three-and-a-half hour block of time every other month. Calls will be transferred to your office, along with demographic information about each client.

Kansas Emeritus Attorney Program

Any attorney who currently has a status of inactive or retired on their license to practice law in Kansas can work with a not-for-profit provider of civil legal services on a pro bono basis; KLS is such an organization. This practice is covered by 2013 modifications to Supreme Court Rule 208. An attorney interested in working under Rule 208 should complete an application providing information regarding time commitment, type of legal work preferred (i.e., providing advice to clients, representing in court, and drafting documents) and length of commitment.

Applications and additional information on the above programs can be found online at http://www.ksbar.org/probono.

Other ways to help KLS

Make a donation directly to Kansas Legal Services

Donations can be made through your PayPal account or a credit card or bank account. Visit http://www.kansaslegalservices.org/ and scroll to the bottom right corner and click on Donate.

Shop at Dillons

KLS is a participant in the Dillons Community Rewards program. By registering your Dillons Shopper Card, you can direct funds to KLS. Enrollment is easy at https://www.dillons.com/communityrewards. Apply for a (or register an existing) Dillons Rewards Card. Register your card in the community rewards program with your email address. Enter 64929 to select Kansas Legal Services as your charity. Swipe the card when you shop. Dillons will provide funding to KLS.

Amazon Smile

Visit www.smile.amazon.com and register KLS as your charity. Return there to shop. Same merchandise, same prices. But a portion of what you spend goes to KLS.

Jeans for Justice

The KBA hosts a Jeans for Justice event each fall. This is a fun event for firms and organizations to participate in to raise money for access to justice programs at KLS. For $5 participants can wear jeans to work and receive a Celebrate Pro Bono sticker for their participation. Visit http://www.ksbar.org/jeansforjustice to learn more about scheduling your casual day.

KLS Office Supply Drive

Last year was the first office supply drive. It is in full swing again this year. In fact, you can donate supplies any time of the year. Donations can be delivered to the KBA or taken to a local KLS office. They are always in need of the basics like blue and black ink pens, yellow highlighters, letter and legal pads, copy paper, flash drives, and Post-it notes.

Another way to support access to justice

Give back through an IOLTA Trust Account

If you have Kansas clients you have a perfect opportunity to support access to justice by selecting an IOLTA account for your trust account. Over 140 banks in Kansas participate.
and after setting up the account with the bank and submitting your one page application to the Kansas Bar Foundation, the rest of the work is done for you. This year IOLTA will provide $80,000 to Kansas organizations that support access to justice and law related education. That is possible because attorneys have voluntarily opted for an IOLTA trust account. Join your colleagues and establish an IOLTA account soon! http://www.ksbar.org/iolta.

Record your pro bono hours

KBA members can now record their pro bono hours on their member profile online. Please remember to enter your hours before December 15. Go to Manage Profile (then Edit Bio) and scroll to Professional Information. The Pro Bono Hours 2015 box is listed below the County box. This will help us learn more about the number of hours members provide each year.

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

No potential clients will be given your name without approval and all will be screened for financial eligibility through Kansas Legal Services.

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Visit http://www.ksbar.org/probono for more information.
All lawyers understand how difficult it is to practice law. Practicing law is stressful, adversarial, and competitive. We can do our best job and the result of a case can still have dire consequences for the client. In addition, each case we handle requires that we act in compliance with the Kansas Rules of Professional Conduct. We understand that we must act competently, diligently, and communicate properly with the client. Interactions with clients must be held in confidence. While these obligations exist in every case, certain cases present novel ethical issues not previously encountered by a lawyer. If you have doubt as to the proper course of conduct and the applicability of the Kansas Rules of Professional Conduct, call the Disciplinary Administrator’s Office, as we routinely field calls from lawyers seeking assistance in solving ethical dilemmas.

The Disciplinary Administrator’s Office does not have the authority to issue binding ethics opinions. However, the lawyers on staff in the office are available to discuss ethics issues with Kansas lawyers. We routinely discuss issues with lawyers and advise the lawyers of the applicable rules of professional conduct and case law. KRPC 1.6 is the Kansas rule regarding confidentiality. Section (b)(2) of that rule permits a lawyer to reveal such information to the extent the lawyer reasonably believes is necessary to secure legal advice about the lawyer’s compliance with the rules of professional conduct. Therefore, a Kansas lawyer may reveal information to the lawyers in the Disciplinary Administrator’s Office that is confidential in nature to make sure that the lawyer is complying with the rules of professional conduct.

There are times when the answer to an ethics query is not easily determined. In those instances, we routinely hold staff meetings to discuss the ethical problem facing the lawyer. Often times, the conversation is lively with differing views. Eventually, we are able to reach a consensus and then the lawyer is informed of our conclusions. We understand that time is of the essence in many situations. An attempt is made to dispense the advice as quickly as possible. On more than one occasion, we have received calls from lawyers involved in a trial seeking advice.

It is imperative that the lawyer seeking advice provide us all of the relevant facts. Obviously, the advice given is only relevant if all the facts are known. For example, a common question asked is whether a lawyer has the responsibility under KRPC 8.3 to report the misconduct of another lawyer. Absent the whole story, it is not possible to advise the lawyer with respect to the reporting requirement. Recently, a Kansas lawyer called our office and told us that his client’s previous lawyer had engaged in serious misconduct. That lawyer’s dilemma was that his client did not want the misconduct reported to the Disciplinary Administrator’s Office. The lawyer did not know how to resolve this problem. We advised the lawyer that an exception to the reporting requirement exists if the client requests that the information remain confidential. Thus, the lawyer was relieved of his obligation to report the misconduct.

The most common questions asked involve conflict of interest issues. Other issues that come up include proper safekeeping of property, responsibilities arising as a result of client perjury, handling of physical evidence that comes into the possession of a lawyer during representation, communication with represented and unrepresented individuals, and responsibilities of lawyers during the break up of a law firm. The questions are not limited to those areas, but some of the most interesting and challenging questions involve those matters.

Recently, the Disciplinary Administrator’s Office started sending what we call “Ethics Refreshers” through the KSEthics email listserv. The service is the subject of an informative article written by Larry Zimmerman in the July/August edition of the Journal of the Kansas Bar Association. Every two weeks, an ethical hypothetical is sent by the Disciplinary Administrator’s Office to every Kansas lawyer registered as active to practice law. Each hypothetical will include the answer and an explanation of the answer, including citations to the applicable Kansas Rules of Professional Conduct. It is not a discussion list, and messages cannot be sent to the list. The list will not be used to send anything other than the biweekly hypotheticals. The service has been well received. There are over 12,000 Kansas lawyers registered as active and only approximately 100 have unsubscribed from the service.

I am hopeful that the Ethics Refreshers and the willingness of the lawyers in the Disciplinary Administrator’s Office to discuss with Kansas lawyers the ethical dilemmas which arise in the practice are viewed as beneficial by the bar. Certainly, the services provide for positive interaction with our office. Recently, on the Kansas Women Attorneys Association listserv the following was stated: “Does it make me a total nerd that I enjoy these little quizzes?” Not in my book it doesn’t. What it does mean to me is that Kansas lawyers are serious about complying with the Kansas Rules of Professional Conduct. Please feel free to call us.

About the Author

Stanton A. Hazlett received his B.G.S. from the University of Kansas and his J.D. from Washburn University School of Law. From 1977-86, he was engaged in private practice in Lawrence. Since 1986, Hazlett has been with the Disciplinary Administrator’s Office. In September 1997, he was appointed disciplinary administrator.

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Kansas eCourt

Our Founding Fathers understood that ready geographic access to the institutions of government may be vital to ensuring access to justice. They confronted King George in the Declaration of Independence, writing that, “He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures.” Later in that document, they challenge the King “for transporting us beyond Seas to be tried for pretended offenses.” Of the 27 claims of injustice against the King, the locality of government was twice raised as relevant to just power in the eyes of the Founders.

Formation and Purposes

One of the great questions of our day is whether the internet age alters the importance of locality at all. In a small way, we will begin again exploring that question through Kansas eCourt. Three recent events have set the eCourt wheels in motion. First, the 2014 Legislature approved $3.1 million in funding (with some tweaks in the 2015 session) for the Electronic Filing and Case Management Fund. Second, the Kansas Supreme Court formed an eCourt Steering Committee in April (see 2015 SC 22 at kscourts.org). Finally, the Steering Committee actually took up its work in September.

According to the June 2015 Status Summary of the Blue Ribbon Commission Recommendations, “The eCourt system will be supported by a number of interconnected technology strategies, with e-filing, and centralized case management and document management systems providing the foundation. These management systems will be known as Kansas eCourt, and they will complete the conversion from local, paper-based systems to a statewide electronic one. Kansas eCourt will provide litigants, attorneys, and court personnel using an internet connection immediate access to authorized case information, details, and records from across the state. Among other things, it will allow the judicial branch to use its personnel more effectively by having clerks available in one county help with electronic processing of case documents and court payments in other counties.” (http://bit.ly/1MYeF7z)

That may sound relatively complicated but it is simply a next technological step in court unification originally begun in 1977. Instead of 105 different court databases, we will have one centralized system accessible to all counties. The Kansas Supreme Court would, in effect, become the “cloud” service provider for all district courts, hopefully reducing licensing, maintenance, and support costs while also providing efficiency-boosting standardization and improved records access. Additionally, Chief Justice Nuss suggests, “Eventually it will also allow our employees in any location to work ‘virtually’ on Court business in any other location. This additional advantage is a big one, as it allows the Supreme Court to more effectively and efficiently manage the state’s court system.” (See 2013 State of the Judiciary, http://bit.ly/1Upp4Ke)

Policy vs. Technology Question

As Kansas eCourt develops, it will be important for Kansans to be alert to the policy shifts the technology enables. It would be easy to get distracted by databases and forget that locality may still have a role to play in access to justice. Shifting judges and clerks across county lines is worthy of the public interest and the mere potential to shutter a county court, rolling its functions across the internet to another county, is more than an administrative decision. It is a worthwhile experiment to test whether locality of government is in any way outdated in the internet age but public participation in that experiment is vital. We should proceed as deliberatively as our Founders rather than slipping into something solely because numbers on a spreadsheet align a certain way.

Shifting Resources

The advantages eCourt offers are significant. If realized correctly, distance would no longer be a barrier for litigants in obtaining documents from the public record. On-the-fly adjustments of personnel to manage shifting caseloads would reduce or eliminate delays. The standardization required to successfully migrate to eCourt would help litigants and counsel experience more uniformity from district to district. It would seem all is well with eCourt and yet the question of locality remains. Significantly, Kansas eCourt enables reallocation of personnel across county lines (e.g., an Osborne clerk could work Sedgwick filings).

This type of workload-shifting could also apply to judges, as efforts have been underway to repeal K.S.A. 20-301b requiring a judge in every county. Chief Justice Nuss has said of that effort, “We wanted to obtain managerial flexibility so we could apply our limited resources to meet the demands made on our branch of government, both as the demands exist today and as they change in the future.” (See 2013 State of the Judiciary, http://bit.ly/1N7uSci.)

Kansas eCourt could allow a retreat from an active, local courthouse with a local clerk and a local judge in each of our 105 counties as the judiciary feels the same pressures as public schools and community hospitals to consolidate to regional or urban cores. That is probably not accidental.

In a Kansas Policy Institute blog post from 2013, Todd Davidson notes, “Because of the ancient county lines and numerous municipalities, Kansas has one general purpose government for every 1,445.1 residents, according to data from the Census Bureau. Only the Dakotas have fewer residents per government entities. The 105 counties and 1,894 municipalities pay administrators, judges, lawmakers, and other employees; resulting in Kansas having the 3rd highest number of public employees per 1,000 residents. The inefficiencies and duplicative public employees manifest themselves in higher taxes.” (http://bit.ly/1Uppe4ke)

About the Author

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

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Back to the Future

On October 21, 2015, Marty McFly will pay us a visit. When he arrives, he will not find the future envisioned in “Back to the Future Part II.” We have no flying cars or microwaves able to transform a small pill into a chicken dinner. We do, however, possess futuristic communication devices similar to those he encountered. Almost everywhere we go, people are communicating via FaceTime, Skype, Snapchat, and other newfangled apps. These platforms present new opportunities, some of which, I predict, will forever change the face of law.

When clients retain a lawyer, they must contemplate the odyssey they will face. First, they consider the numerous stressful meetings at the attorney’s office that they must attend to explore details they do not understand, but are too afraid to ask about, and also must reveal personal details to a complete stranger. Then they think of taking time off from work, using precious paid vacation or sick leave, to meet with the attorney and discuss something they dread. When the bedraggled clients finally arrive at their attorneys’ offices, having worked up the courage to cross the threshold, they may be subjected to the waiting normally associated with the doctor’s office or the DMV. Hopefully they are able to navigate this process without breaking out in hives from the stress, but after all of this, can we really blame them for wanting to make terrible jokes about our profession?

We all know (or hope) that this story is not typical of a client’s first interaction with the legal system. So, the pivotal question is, how do we change these negative perceptions? How do we change the way people feel about meeting with a lawyer? Technology may play an important role because individuals often communicate more openly on the internet than in person. The cloak of anonymity provides them with the courage to be more honest. As a result, cyberbullying has largely replaced the big kid on the school playground forcing others to surrender their lunch money. Similarly, some have taken to “trolling” the Internet in an attempt to provoke emotional reactions from strangers and acquaintances.

When clients enter our offices in search of legal advice, it is in their best interest to tell us all of the embarrassing details, although they are likely reluctant to do so. Perhaps virtual communication can help solve the problem of clients who withhold information or are slow to open up. Communicating with a virtual barrier between clients and the lawyer to whom they must bare their secrets could make clients more comfortable and motivate a more candid conversation. Additionally, faster revelation of material facts will necessarily shorten the meeting, resulting in the additional benefit of cost savings to the client.

Virtual communication not only helps clients to open up, it would also provide clients with greater access to legal assistance. I grew up in a small town in central Kansas where there were only two attorneys within a 30-mile radius. We were lucky to have those attorneys within a short driving distance. For those who are not so lucky, or who are conflicted out of representation from a nearby attorney, virtual communication would provide access to representation regardless of the distance. This freedom would also extend to rural clients the ability urban clients have to “shop around” for an affordable attorney.

Virtual firms have already begun to pop up around the country. Some would argue that the arms-length relationships inherent to virtual representation will contribute to the breakdown of substantive attorney-client bonds—that our profession will ultimately lose goodwill rather than gain it. That apprehension, in my opinion, is based on the current chasm that exists between those who are fluent in the use of technology and those who are not. The concern fails to account for the increasing proportion of people who use technology extensively and integrate it into nearly every facet of life. Nowadays, even most toddlers are already accustomed to being entertained by games on a phone or tablet. I am skeptical that, when these toddlers grow into adults, they will be content with using the traditional methods of receiving legal advice. More likely, they will seek out firms that have put the newest technology into practice in order to provide more efficient services. As time progresses, technological advancement will become imperative to the survival of traditional law firms.

If used appropriately, as a tool rather than a replacement for thorough legal guidance, communication technologies promise to greatly benefit the practice of law. The possibilities are essentially endless, from video conferencing to signing contracts on a touchscreen. Some firms are even providing clients with usernames and passwords so that they can view documents, court dates, and balance owed.1 We will be able to provide more efficient and economical legal advice and reach distant clients who would otherwise lack adequate access to legal services. Technology is advancing at incredible speeds, and it does not require the prescience of a time traveler to realize that it is time for the legal community to catch up.

About the Author

Merideth Hogan is a 3L student at Washburn University School of Law. She has completed an externship at the Kansas Supreme Court and currently serves as a comments editor for the Washburn Law Journal. She is a law clerk at Cavanaugh, Biggs & Lemon P.A. and intends to pursue employment as a judicial research attorney following graduation.

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Footnote

Members in the News

Changing Positions

Erin A. Beckerman has become a shareholder at Riordan, Fincher Munson & Sinclair P.A., Topeka.
Eric Namee, Michael D. Herd, and Edward J. Nazar have been elected to serve as managing members of Hinkle Law Firm, Wichita.
Michelle Pflumm has joined Brown & James P.C., Kansas City, Mo., as an associate.
Hon. Eric R. Yost, Wichita, has been named county counselor by the Sedgwick County Commissioners.

Eric T. Beck, Topeka, has joined the Washburn University Board of Regents as an appointee of the Shawnee County Commission.
Hon. Sally Pokorny, Lawrence, received the Jennie Mitchell Kellogg Achievement Award at the annual KWAA Conference in Lindsborg.

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

Simon P. Roth Jr.

Simon P. Roth Jr., 88, of Hays, died July 17 after a lengthy struggle with Parkinson’s disease. He was born October 25, 1953, in Hays, one of four children to Simon and Theckla (Rupp) Roth. He graduated from St. Joseph’s Military Academy, Fort Hays State University, and Washburn University School of Law. Roth served in the U.S. Navy’s Pacific Fleet during World War II.

His legal career includes prior service as a member of the Kansas Commission on Civil Rights, a member of the Kansas Adult Authority, Ellis County attorney, counselor, and probate and juvenile court judge. Roth also served on the Thomas More Prep advisory board and the Hays Library board.

Roth is survived by his daughters, Deborah Kane, of Grand Junction, Colorado, and Denise McNickle, of Wichita; son, Douglas Roth, of Wichita; six grandchildren; and five great-grandchildren. He was preceded in death by his wife, Rita; a son, Simon Roth III; his parents; his brother, Raymond Roth; and his two sisters, Dorothy Soderblom and Ruth Reverman.

Walter Irving Shaw

Walter Irving Shaw, 72, of Emporia, died July 10. He was born April 18, 1943, in Wichita, the son of Walter E. and Donna (Schmidt) Shaw. In 1965 he graduated from Kansas State University, receiving a bachelor’s degree in political science, and in 1968 he graduated from St. Louis University School of Law, where he was a member of the St. Louis University Law Journal and Order of Woolsack.

Shaw was a member of the Lyon-Chase County Bar Association, Kansas Association for Justice, Kansas Bar Association, and Kansas Association of Criminal Defense Lawyers. In addition, he served in the U.S. Air Force JAG Corps.

Shaw is survived by his wife, Brenda, of the home; son, David Shaw, of Overland Park; daughters, Kimberly Shaw, of Merriam, Kristen Sanchez, of El Dorado, and Lisa Hafliger, of Manhattan; and seven grandchildren. He was preceded in death by his parents and daughter, Jennifer Shaw.
KBA Benefits: Helping You With Peace of Mind, Efficiency, and Becoming a Better Lawyer

There’s a scene in the movie “City Slickers” in which the leather-faced, hard-as-nails cowhand Curly, played by Jack Palance, tries to help the self-doubting, thin-skinned and soft-hearted Mitch, played by Billy Crystal, by holding up his index finger.

Curly: Do you know what the secret of life is?
Mitch: Your finger?
Curly: One thing. Just one thing. Stick to that and the rest don’t mean $#!&.
Mitch: But what’s the “one thing”?
Curly: That’s what you have to find out.

It’s kind of the same with the KBA. Attorneys ask me all the time, “Why should I join (or renew my membership in) the KBA?” In other words, “What’s the secret?” I’ve tried to craft a compelling answer, but there isn’t one, or rather just one. So, in truth the answer is “You should join the KBA for one thing, but you have to find out what it is.”

Of course the KBA gives you great member benefits. We offer three kinds – some will give you peace of mind as a lawyer, some will make you a more efficient lawyer, and some will help you be a better lawyer.

For peace of mind, the KBA offers:

- **ALPS.** The KBA-endorsed, professional liability insurance carrier that specializes in protecting attorneys’ assets. ALPS has a program designed for new solo attorneys called First Flight, which offers affordable and guaranteed pricing. See http://www.alpsnet.com/home/insurance/new-solo-attorneys.aspx.

- **Credible.** Especially for new attorneys, Credible specializes in brokering lenders for student loan debt to help you refinance at the best rate and under the best terms available.

- **GEICO.** Already great rates on auto insurance made better for KBA members. Got a car? Get Geico.

- **ISI.** An insurance broker partnering with KBA members to provide the best rates for life, health, disability, accident, property and casualty, personal umbrella, and contract litigation insurance. ISI saves you time (and money) by being a one-stop shop for your insurance needs.

- **Principal Financial Group.** Helps you prepare for that time when you aren’t (by choice or otherwise) practicing law any more by saving you money through discounted disability income, retirement security and overhead expense insurance.

- **Go Next.** Provides comprehensive travel packages at a KBA member discount and provides priority booking. Because sometimes peace of mind means peace out . . . of here.

To be a more efficient lawyer, the KBA offers:

- **KBA Website.** Here you can access Casemaker, search for information about other members of the KBA by geographic or practice area, find out about committees, get links to the electronic version of the Journal, get the latest news and legislative updates, access on-demand CLE programming, get information about bar events, and so much more online at http://www.ksbar.org.

- **LawPay Credit Card Processing.** Designed for lawyers, LawPay’s unique processing program correctly separates earned and unearned fees in compliance with ABA Rules of Professional Conduct and most state bar IOLTA guidelines.

Two options for cloud-based office management platforms:

- **Clio.** A comprehensive, cloud-based law office management platform that helps you keep everything organized and secure.

- **MyCase.** Manage all daily tasks using web-based legal practice management software.

To help you be a better lawyer, the KBA offers:

- **LOMAP (Law Office Management Assistance Program).** By using LOMAP you can get confidential, objective guidance in managing the business of your firm. It’s free and offered exclusively to KBA members. LOMAP is staffed by Danielle Hall, a licensed Kansas attorney, management practice expert, and KBA staff member – she won’t try to sell you anything except sound management guidance. Ask anything – about starting or closing a firm, choosing and using software, hiring staff, marketing, client management, technology, and more.

- **KBA Career Center.** List your job opportunities in one place that’s sure to get the attention of attorneys through Job Flash, an email that goes to members and lists job opportunities throughout Kansas. If you’re looking, start here!

- **TBG Conferencing.** Discounted teleconference and videoconference services that includes audio, web, and event conferencing.

- **Commerce Bank Visa Card.** KBA members get a low interest rate and points for future purchases.

- **Office Depot.** KBA members get discounts on many office supplies. Order online for delivery.

- **Casemaker Suite (includes Casemaker, Case-Check+, CiteCheck & Casemaker Digest).** A pow-
ful suite of online legal research tools, with case law from all 50 states and federal courts, citation checks, good law confirmation, a digest of opinions, and more!

- **The Journal of the Kansas Bar Association, the KBA Bookstore, and Your KBA Weekly.** All three of these communications channels provide you – often in both hardcopy and electronic formats – the most up-to-date information and thinking about the legal profession and the law in Kansas.

- **Kansas Legal Directory.** The official directory of the KBA, it includes listings for the Kansas bar, judicial branch, federal offices, and information on most major law firms. The Kansas Legal Directory gives you critical information at your fingertips.

While these are all great reasons to join or renew your membership in the KBA, most attorneys are members because they want something more meaningful. I know because I, too, have asked “why did you join the KBA?” Some tell me they joined to be part of a community of like-minded professionals, devoted to the practice and rule of law. It’s a community that understands and shares their values, challenges, frustrations, and joys. Some tell me they joined to ensure their voices are heard by those who might affect the profession, the practice or the public. They’ve got something to say. Some joined because they come from a tradition of support for the bar, because their fathers, grandfathers (and now and then their mothers) joined, “it’s what a good lawyer does.” And once in a while, someone just won’t tell me, that one thing is still a mystery they’ve yet to discover. The KBA isn’t ever going to be everything to everyone, but it’s always been about just that one thing. When you find out what it is, I’d love to know.

**About the Author**

Jordan Yochim studied anthropology (B.A.) and business (MBA) at the University of Kansas. He worked as a research administrator for a large, state university before joining the KBA. In his spare time he serves as a member of the Douglas County Citizen Review Board and as president of a local nonprofit children’s organization.

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Of Counsel to Fisher Patterson, Sayler, & Smith, LLP
November 2 Mandate is Inspiration for Attorneys to Electronically File in Appellate Courts

The prolific novelist Rita Mae Brown once wrote, “A deadline is negative inspiration. Still, it’s better than no inspiration at all.” On Monday, November 2 of this year, Kansas lawyers practicing in our state appellate courts face an impending deadline of their own—mandatory appellate e-filing for all pending cases and new appeals. It’s time to get inspired.

We are proud to be in the home stretch of a phased-in transition from our traditional paper-filing system to a paperless electronic process. What began as a few volunteer test cases grew to more than 200 new criminal cases filed electronically last year by appellate defenders and prosecuting attorneys, and is now poised to encompass all submissions in all appeals. This upcoming change impacts all appellate practitioners filing documents with the clerk of the Kansas appellate courts for either the Kansas Supreme Court or the Kansas Court of Appeals.

The Kansas Supreme Court began this project in 2009 because of its potential to save the entire court system and the people it serves time, money, and storage space. But we also hope you will find that it personally benefits the way you practice law in our courts. Some of the advantages are well known to those with cases in the U.S. District Court for the District of Kansas. You will be able to file documents in either appellate court from anywhere at any time without concern for courthouse business hours. You will spend less on postage, photocopying, and delivery fees; and, hopefully, less time will be consumed with repetitive data entry.

Because this is a big change, some advanced planning is best. If you haven’t already signed up and used the appellate e-filing system over the past two years during our startup phases, you should take a few moments to get ready before the deadline. We have compiled some tips and resources to help you prepare.

The first step is for you to register to use the Kansas Court Electronic Filing system. You can do this on the Kansas Courts e-filing page: https://filer.kscourts.org/.

Please note that your Kansas bar number is required, and your Kansas registration must be up to date before signing up for a user account. This is important because the e-filing system interacts with the attorney registration system in the clerk’s office to verify applicants for user accounts.

Once you are registered, you will receive a packet of information on e-filing. We have also posted links to online training on the “Kansas Courts Electronic Filing” page of the Judicial Branch’s website, located at http://www.kscourts.org/Cases-and-Opinions/E-filing/default.asp. There are several videos, covering such topics as system features, requesting a user account, filing a new appellate case, and filing additions to an existing appellate case. The videos were prepared in cooperation with our software vendor, Tybera Development Group, and were produced locally by the Office of Judicial Administration. We hope you will find them informative.

For those preferring live webinar training, our vendor provides them each month. The Tybera training dates for October are Monday, October 5, and Monday, October 19, from noon to 1 p.m. Attendees should preregister for...
the sessions by visiting https://attendee.gotowebinar.com/rt/421586105713212418.

In addition, the Office of Judicial Administration will provide a live webinar for up to 25 participants at 1:30 p.m., Wednesday, October 7. To preregister, send your name, email address, and firm or government affiliation to efilingadministrator@kscourts.org. Webinar training will continue in subsequent months with dates and times available on the Judicial Branch’s website at http://www.kscourts.org.

Any questions, comments, or suggestions for system improvements can be directed by email to efilingadministrator@kscourts.org.

It is important to emphasize that the November 2 mandatory e-filing deadline is applicable to state appellate court filings only. At the district court level, individual judicial districts are still deciding when to make the full transition to e-filing. Until then, numerous districts now accept electronic filing, either requiring it or permitting it by agreement of the parties’ attorneys. For the rest of this year and 2016, the number of participating district courts will continue to grow until all judicial districts accept electronic filings.

Appellate lawyers should also know that we are phasing in a new process to generate appellate records electronically. It allows our district courts to generate electronic records on appeal, and should be a huge time saver for everyone. It uses the district court’s computer system to generate an electronic file with the designated record on appeal, a table of contents, and hyperlinks to the individual documents included in the record. Attorneys may also designate electronically any documents they would like to add in much the same fashion as is done now. This software tool is in use in Johnson and Sedgwick counties. At this writing, it is also being tested in Douglas, Shawnee, Geary, and Leavenworth counties. It will then roll out to the rest of the state.

We have come a long way since beginning this project in 2009, thanks to the help and determination of state and local staff, judges, clerks, and many attorneys. That group worked collectively to identify and design the systems needed, select a vendor, and then agreed to serve as virtual guinea pigs. Today, at least 3,000 Kansas attorneys are registered to use the electronic filing system. Filings exceed 1,000 electronic submissions per month at the appellate level, and there are more than 35,000 per month in the district courts where our software has been installed. Mandatory appellate e-filing on November 2 is an important milestone for this overall effort.

The November 2 deadline for appellate electronic filing may be viewed by some as negative inspiration, but it’s better than none at all. While we recognize there will likely be bumps along the road, we have tried to design a system that is easy to use. We hope you will find it benefits your practice.

About the Author

Justice Dan Biles joined the Kansas Supreme Court in 2009 after working in private practice for 24 years in Overland Park. He is a graduate of Washburn University School of Law and Kansas State University. Justice Biles serves as the Court’s liaison for implementing the judicial branch’s e-filing system within the Kansas appellate and district courts, as well as electronic case and document management systems.
Daubert in Kansas: Prompting a Fresh Look at the Admissibility of Scientific Evidence

By Kyle Malone
Introduction

Imagine you are in your office studying the results of a polygraph examination. Your client is facing serious criminal charges, but the evidence is thin and, before trial, your client insisted on taking a polygraph test to show he or she had nothing to hide. To your delight, the results appear to show that your client is, in fact, innocent. Immediately, you realize how powerful the polygraph results could be if you could present them to the jury. But are the results of such a test admissible in Kansas courts?

If you answered “no,” you are in good company.¹ The Kansas Supreme Court has repeatedly refused to find polygraphs admissible in criminal prosecutions absent a stipulation from both parties.² It has also disallowed polygraph evidence in proceedings under the Kansas Sexually Violent Predator Act.³ Under the Kansas Rules of Evidence, polygraph tests have been excluded in part because they are generally not accepted as reliable in the relevant scientific community.⁴

But in 2014, the Kansas Legislature changed the rules of the game by amending K.S.A. 60-456, which addresses expert testimony.⁵ That change, which did away with the Frye standard of admissibility for scientific evidence and adopted the Daubert standard, altered the way courts must analyze the admission of evidence, such as polygraph results.⁶ For reasons more fully developed below, Kansas practitioners and judges should discard any assumptions they may currently hold about the admissibility of such evidence. The recent legislative change requires courts to view all forms of scientific evidence, whether novel or well-established, with a newly critical eye focusing on the reliability of the evidence.⁷

This article will discuss the new rules regarding the admissibility of scientific evidence and provide some examples of evidence that may deserve different treatment, or at least a second look, under the new statute.

The development of Daubert and Frye

For decades, Kansas courts utilized the Frye standard, named for Frye v. United States,⁸ to analyze the admissibility of scientific evidence.⁹ Under that standard, scientific evidence is only admissible if it has gained general acceptance in the relevant field of study.¹⁰ As such, the Frye test represents a conservative approach to the admission of evidence.¹¹ It deliberately imposes a substantial obstacle to the “unrestrained admission of evidence based upon new scientific principles.”¹² The D.C. Circuit’s Frye decision was first cited with approval by the Kansas Supreme Court in 1947.¹³ Thereafter, the Frye test was consistently applied in Kansas courts in conjunction with K.S.A. 60-456.¹⁴

In federal courts, the landscape of scientific evidence changed significantly in 1993 when the U.S. Supreme Court issued its opinion in Daubert v. Merrill Dow Pharmaceuticals Inc.¹⁵ Prior to Daubert, the majority of courts across the country followed the Frye test.¹⁶ But a half century after Frye, the Federal Rules of Evidence were legislatively enacted.¹⁷ Rule 702 governs the admissibility of expert testimony and, in 1993, read: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”¹⁸

The Supreme Court found that nothing in Rule 702 established general acceptance in the scientific community as a prerequisite to admissibility.¹⁹ It further found that the Federal Rules of Evidence generally relaxed the traditional barriers to opinion testimony and were incompatible with Frye’s “general acceptance” standard.²⁰ Consequently, it ruled that the Frye test should not be applied in federal trials.²¹

Differing from Frye, Rule 702 requires proposed testimony to be supported by appropriate validation.²² The Daubert Court stated that “in order to qualify as ‘scientific knowledge,’ an inference or assertion must be derived from the scientific method.”²³ It also highlighted the requirement that any proposed scientific evidence must actually assist a trier of fact in understanding the evidence or determine a fact in issue in the case.²⁴ Thus, there must be a valid connection between proffered scientific evidence and the pertinent courtroom inquiry.²⁵

Under Rule 104(a), a trial judge is responsible for ruling on the admissibility of evidence.²⁶ Therefore, the Daubert Court found that trial judges act as gatekeepers charged with the task...
of determining whether proffered expert testimony complies with Rule 702 involves scientific knowledge.27 “This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.”28 To assist judges in this role, the Supreme Court announced the following five factors courts should consider when ruling on the admissibility of scientific evidence: (1) whether the scientific knowledge has been or can be tested, (2) whether it has been subjected to peer review and publication, (3) the known or potential rate of error, (4) the existence and maintenance of standards controlling a scientific technique’s operation, and (5) general acceptance in the relevant scientific community.29 It emphasized that it was not a definitive list of factors and that the inquiry required by Rule 702 is a flexible one.30 Also, the focus of the inquiry must always be on principles and methodology rather than on the conclusions they generate.31

Later, the U.S. Supreme Court clarified that Daubert’s rationale did not merely apply to scientific knowledge. Rather, “[Rule 702] applies its reliability standard to all ‘scientific,’ ‘technical,’ or ‘other specialized’ matters within its scope.”32 In 2000, Rule 702 was amended in response to Daubert to affirm the trial judge’s role as gatekeeper.33

In contrast, K.S.A. 60-456, the statute governing expert testimony in Kansas, remained unchanged from 1963 until 2014.34 Its language has been found to comport with the Frye standard.35 But in 2014, the Kansas Legislature amended K.S.A. 60-456 by adopting language that is identical in substance to the current Rule 702.36 The new Kansas rule states in pertinent part:

If scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue, a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if: (1) The testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has reliably applied the principles and methods to the facts of the case.37

Although no reported Kansas appellate case has interpreted the effect of the newly amended statute, using the Supreme Court’s ruling in Daubert as a guide, it is safe to assume that the statutory amendment has supplanted the Frye standard in Kansas.38 Therefore, the Kansas legislature has made application of the Daubert standard necessary in Kansas.

How will Daubert change the admission of scientific evidence in Kansas?

Now that Kansas has legislatively adopted the Daubert standard, it is important to consider what, precisely, has changed. On remand from the Supreme Court’s Daubert decision, the Ninth Circuit succinctly summarized the difference between the Frye and Daubert standards.39 First, it reiterated Frye’s general acceptance test.40 It then went on to say that “The focus under Daubert is on the reliability of the methodology, and in addressing that question the court and the parties are not limited to what is generally accepted; methods accepted by a minority in the scientific community may well be sufficient.”41 Beyond opening the doors to evidence accepted by only a minority of the scientific community, the Daubert Court indicated that its holding applied both to novel scientific techniques and well-established propositions, even though challenges to established scientific techniques are more easily defended.42 In other words, the mere fact that expert testimony related to scientific evidence has been routinely admitted in the past does not mean that the same evidence should survive scrutiny under the Daubert standard.43 That said, “theories that are so firmly established as to have attained the status of scientific law, such as the laws of thermodynamics, properly are subject to judicial notice under Federal Rule of Evidence 201.”44 Language equivalent to Rule 201 can be found at K.S.A. 60-409(b).

Kansas’ adoption of the Daubert standard should be treated as an opportunity for practitioners and judges alike to reassess the strengths and weaknesses of scientific evidence with a focus on the reliability of the specific methods or techniques used by expert witnesses. The remainder of this article is devoted to discussing some specific types of scientific evidence and how they have been previously handled in Kansas courts. This is not an exhaustive list of the types of evidence now governed by Daubert, nor is it a thorough treatment of the issues surrounding the admissibility of those or any other types of scientific evidence. Rather, this section seeks to challenge assumptions many may hold about some well-known forms of evidence: the horizontal gaze nystagmus test, fingerprints, polygraphs, bite marks, and burn patterns. Hopefully, the examples generate new questions about forms of scientific evidence not covered in this article.

This article merely scratches the surface of the numerous issues surrounding the strengths and weaknesses of scientific evidence. One excellent resource for lawyers, whether they are seeking to admit, exclude, or simply learn more about the forensic sciences used in courtrooms, is a 2009 report released by the National Academy of Sciences (NAS Report).45 The NAS Report does not attempt to “develop a detailed evaluation of each discipline in terms of its scientific underpinning, level of development, and ability to provide evidence to address the major types of questions raised in criminal prosecutions or civil litigation.”46 But it does raise some systemic concerns regarding standardization of those disciplines. For example, in the introduction of the report, the authors noted: “Although there have been notable efforts to achieve standardization and develop best practices in some forensic science disciplines and the medical examiner system, most disciplines still lack best practices or any coherent structure for the enforcement of operating standards, certification, and accreditation.”47 And the committee also highlighted the need for more research to establish whether certain disciplines are reliable, stating “[w]ith the exception of nuclear DNA analysis . . . no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.”48 Lawyers and judges need to be aware of those realities when weighing what evidence should be admitted under Daubert.
Horizontal gaze nystagmus test in DUI cases

The need for vigilance when it comes to even longstanding forms of evidence is illustrated by the Kansas Supreme Court’s recent decision in *City of Wichita v. Molitor.* In *Molitor,* the Court considered a challenge to the admissibility of the horizontal gaze nystagmus (HGN) test, which is used to determine whether a person is intoxicated. The Court found that the HGN test had yet to be scientifically proven in Kansas and was inadmissible to establish reasonable suspicion that a driver was under the influence of alcohol—at least until the state establishes the test’s reliability in a Kansas proceeding. The *Molitor* Court raised serious concerns about the reliability of the HGN test, stating that “at this point in the state of Kansas, the HGN test has no more credibility than an Ouija board or a Magic 8-Ball.” But that is not to say that HGN test results will never be admissible in Kansas. The Court left open the possibility as long as the legitimacy of the test is proven. Given that the HGN test has been found to be admissible in several other states under both the *Frye* and *Daubert* standards, such proof may be in reach of Kansas prosecutors.

Fingerprint identification

Nationwide, fingerprint identification has been used as reliable evidence in trials for over a century. The admissibility of such evidence is practically assured in Kansas, as demonstrated by *State v. Murdock.* There, the Kansas Supreme Court upheld the admissibility of a fingerprint expert’s testimony even though cross examination revealed that the expert had made no notes during her comparisons of the fingerprints at issue and did not recall the twelve points of identification she discovered between them. But there are grounds to question whether it is really as infallible as is believed. In 2004, Brandon Mayfield, an attorney from Portland, Oregon, was arrested after the FBI identified his fingerprint on bags containing detonation devices similar to those used in the Madrid, Spain, train bombings earlier that year. Later, however, the government announced that the FBI erred in its fingerprint identification. The error was not the result of a single incompetent or unscrupulous examiner; two FBI examiners, an FBI unit chief, and an independent expert all identified the fingerprint as Mayfield’s. Even assuming Mayfield’s case is exceptional, it highlights the potential for human error in interpreting evidence and should raise questions about the principles and methodology underlying fingerprint identification.

Polygraphs

As noted above, polygraphs have been universally disallowed as evidence in Kansas criminal trials absent an agreement by both parties. But there is some evidence demonstrating that they can be reliable, as shown by a report published by the National Academy of Sciences in 2003. That report’s numerous and detailed findings are beyond the scope of this article, but one finding in particular is worth noting here. The authors concluded that, in certain applications, “polygraph tests can discriminate lying from truth telling at rates well above chance, though well below perfection.” That suggests that polygraphs could conceivably have some evidentiary value in certain courtroom applications.

There is also precedent supporting the admissibility of polygraphs in a Kansas federal court applying the *Daubert* standard. In *United States v. Walters,* Walters appealed the district court’s decision to allow a polygraph examiner with the Kansas Bureau of Investigation to testify about the results of a polygraph test he performed on Walters. In that case, the district court found that the KBI examiner was able to articulate his reasons for believing the test was reliable, was able to explain how the polygraph worked, how the results were verified in a subsequent interview of Walters, that the examination had been subjected to peer review and deemed reliable, and that the polygraph method the examiner used had been empirically proven reliable. The Tenth Circuit affirmed the district court’s decision admitting the evidence by specifically finding that the district court properly applied the *Daubert* framework to find that the polygraph evidence was admissible under Rule 702. Other federal courts have similarly admitted polygraph evidence under the *Daubert* standard.

Bite mark identification

In 1980, the Kansas Supreme Court found for the first time that expert testimony on bite mark identification could properly be admitted in Kansas courts. Specifically, it found that bite mark identification was “sufficiently reliable” and could “be a valuable aid to a jury in understanding and interpreting evidence in a criminal case.” It also noted that, at the time, virtually all of the other jurisdictions that had considered the issue had approved of the admission of bite mark evidence. As recently as 2010, the Kansas Court of Appeals relied on the Supreme Court’s *People’s* decision to uphold the admissibility of bite mark evidence. However, some are more skeptical about its reliability. The NAS Report notes:

Although forensic odontologists understand the anatomy of teeth and the mechanics of biting and can retrieve sufficient information from bite marks on skin to assist in criminal investigations and provide testimony at criminal trials, the scientific basis is insufficient to conclude that bite mark comparisons can result in a conclusive match.

It also cautions that “there is continuing dispute over the value and scientific validity of comparing and identifying bite marks” and identifies a number of problems with such evidence. Among them is the fact that “[t]he uniqueness of human dentition has not been scientifically established.” More troubling is that “[t]he ability of the dentition, if unique, to transfer a unique pattern to human skin and the ability of the skin to maintain that uniqueness has not been scientifically
established.\textsuperscript{78} One study showed a staggering incorrect identification rate of 24 percent when analyzing marks on pigskin.\textsuperscript{79} But even that could be a conservative number, as the same study found the incorrect identification rate rose to 91 percent after the mark had been in place for 24 hours.\textsuperscript{80}

Kansas’ recent adoption of the \textit{Daubert} standard should trigger a reassessment of the validity of the methods and techniques used by experts identifying bite marks. It may well be that such evidence should remain routinely admissible in Kansas under certain circumstances, but given the uncertainties surrounding the science of bite mark evidence, neither practitioners nor judges should rely exclusively on past precedent to evaluate its reliability.

\textbf{Burn pattern evidence}

Although there do not appear to be any Kansas cases specifically analyzing burn pattern evidence under \textit{Frye}, such evidence has been used to establish the factual basis for a plea agreement. In 1996, Debra Green pled no contest to several charges, including murder, related to the deaths of two of her children in a house fire.\textsuperscript{81} Prior to the plea, the Eastern Kansas Multi-County Task Force issued a report finding that the fire was intentionally set and that an accelerant was used.\textsuperscript{82} Its report was part of the substantial evidence proffered by the state at Green’s plea hearing.\textsuperscript{83} But in 2004, Green filed a motion to withdraw her plea to all but one of the counts against her, arguing that advances in the field of fire investigation rendered the factual basis for the charges unreliable and insufficient.\textsuperscript{84}

Dr. Gerald Hurst, an expert testifying at the hearing on Green’s motion to withdraw her plea, stated that in the years since Green’s conviction, there had been significant advances in fire investigation.\textsuperscript{85} Hurst testified that a phenomenon called flashover can result in natural burn patterns that resemble pour patterns associated with the use of accelerants.\textsuperscript{86} In short, flashover refers to the point at which the radiation of heat in a burning room becomes so intense that every exposed combustible surface in the room ignites almost at once.\textsuperscript{87} He concluded that an accidental fire could not be ruled out, so it was improper to declare the fire an act of arson.\textsuperscript{88}

Dr. John David DeHaan, an expert testifying for the state, agreed that flashover can conceal the use of accelerants or can create damage that mimics pour patterns, even if no accelerant was used.\textsuperscript{89} He went on, however, to point to many facts uncovered during the investigation that led him to believe the fire was intentionally set.\textsuperscript{90} Although DeHaan found that an accelerant was certainly used, he could not estimate how extensively it was used and even admitted that it was not used throughout the house.\textsuperscript{91}

Differences of opinion will always persist, but the NAS Report also raised concerns about the current state of the science underlying fire investigations. The report concluded that “much more research is needed on the natural variability of burn patterns and damage characteristics and how they are affected by the presence of various accelerants.”\textsuperscript{92} It also found that many of the “rules of thumb” indicating that an accelerant was used in a fire, such as the “alligatoring”\textsuperscript{93} of wood or specific char patterns, have been shown to be untrue.\textsuperscript{94}

There is no more sobering example of the dangers of admitting unreliable scientific evidence than the case of Cameron Todd Willingham.\textsuperscript{95} Similar to Green, he was convicted of murdering his three daughters by intentionally setting his house on fire.\textsuperscript{96} He was executed for his crimes.\textsuperscript{97} Later, experts not involved in the original case found that the evidence of arson used against Willingham at trial was likely invalid.\textsuperscript{98}

Many top experts in the field, including both Hurst and DeHaan, determined that the physical evidence did not support a conclusion that the fire was started intentionally.\textsuperscript{99} Notably, the same phenomenon alleged to have misled the task force in Green—flashover—was thought to be at least partially responsible for some of the inaccurate findings in Willingham’s case.\textsuperscript{100} That is not to say that the cases are equivalent or that Green was innocent. In fact, there was an abundance of additional evidence beyond the burn patterns pointing to Green’s guilt.\textsuperscript{101} But together, those cases raise troubling questions about the accuracy of fire investigations and highlight the dangers of relying on forensic evidence that has not been adequately vetted. The door is now open for those issues to be considered under the \textit{Daubert} standard.

\textbf{Conclusion}

Thoughtful application of the rules related to the admission of expert testimony is important because the simple act of putting scientific evidence in front of a jury can have a profound effect on the trial’s outcome. As justification for utilizing the \textit{Frye} test, the Kansas Supreme Court recognized that there is a “misleading aura of certainty which often envelopes a new scientific process, obscuring its currently experimental nature.”\textsuperscript{102} This article has shown that the misleading aura of certainty can also extend to forms of scientific evidence that have long been admissible in court proceedings. Conversely, the mere fact that a scientific technique is not widely accepted is not, by itself, a sufficient reason to exclude the evidence under \textit{Daubert}. The Kansas Legislature’s adoption of the \textit{Daubert} standard should spark fresh challenges to old forms of evidence and intense scrutiny of any new method or technique that a party seeks to bring into the courtroom. Whether or not Kansas courts ultimately treat evidence differently under \textit{Daubert} than they did under \textit{Frye}, the process of litigating those issues may help foster a greater understanding of the strengths and weaknesses associated with all types of scientific evidence.

\textbf{About the Author}

Kyle Malone, a native of Dodge City, graduated summa cum laude from Kansas State University with a Bachelor of Arts in political science in 2008. He attended Pepperdine University School of Law, where he served as a note and comment editor for the \textit{Pepperdine Law Review} and graduated in 2012. Currently, Malone serves as a research attorney for the Hon. Melissa T. Standridge of the Kansas Court of Appeals.
ENDNOTES

1. As of 2012, 29 states barred the admission of polygraph evidence under any circumstances, 15 states allowed polygraph evidence to be admitted by stipulation of both parties, and only New Mexico routinely allowed the admission of polygraph evidence. Adam B. Schnidman, You Can’t Handle the Truth; Lies, Damn Lies, and the Exclusion of Polygraph Evidence, 22 ALB. L.J. SCI. & TECH. 433, 442 (2012).


5. L. 2014, ch. 84, sec. 2 (effective July 1, 2014).

6. See infra notes 42-44 and accompanying text.

7. See infra notes 41-42 and accompanying text.

8. 293 F. 1013 (D.C. Cir. 1923).


10. Id.


14. See Kahn, 270 Kan. at 454.

15. 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). There appears to be some confusion surrounding the correct pronunciation of the name Daubert. Fortunately, Michael Gottesman, the attorney who argued the case in the Supreme Court on behalf of the plaintiffs, has confirmed that his client’s name is pronounced “dow-burt.” Gottesman, Admissibility of Expert Testimony After Daubert: The “Prestige” Factor, 43 EMORY L.J. 867, 867 (1994). In the same article, however, he admitted that while arguing the case, the Supreme Court justices questioning him mispronounced the name as “dough-bear” and Gottesman opted not to correct them.

16. 509 U.S. at 585.

17. Id. at 588-89.


20. Id. at 588-89.

21. Id. at 589.

22. Id. at 590.

23. Id.

24. Id. at 591.

25. Id. at 591-92.


27. See Daubert, 509 U.S. at 589 n.7.

28. Id. at 592-93.

29. Id.

30. Id. at 593-95.

31. Id. at 595.


33. Fed. R. Evid. 702 advisory committee’s notes.

34. K.S.A. 60-456.

35. See Kahn, 270 Kan. at 454.


38. See Daubert, 509 U.S. at 589 (finding that the Frye test was displaced by the Federal Rules of Evidence.)

39. Daubert v. Merrell Dow Pharm. Inc., 43 F.3d 1311, 1319 n.11 (9th Cir. 1995).

40. Id.

41. Id. (emphasis added).

42. See Daubert, 509 U.S. at 592 n.11.

43. United States v. Williams, 506 F.3d 151, 162 (2d Cir. 2007) (“Thus, expert testimony long assumed reliable before Rule 702 must nonetheless be subject to the careful examination that Daubert and Kumho Tire require.”).

44. Daubert, 509 U.S. at 592, n.11.


46. Id. at 7.

47. Id. at 23.

48. Id. at 7. The reason for this is simple. Many forensic techniques were developed in crime laboratories for the purpose of aiding the investigation of a particular crime scene. Id. at 42. Therefore, researching such techniques more generally applicable limitations and foundations was not a top priority. Id.


50. Id. at 255-56, 259.

51. Id. at 255-56, 264. Although the issue in Molitor was whether the HGN test was admissible under Frye, it was decided a few months after K.S.A. 2014 Supp. 60-456 took effect and the Supreme Court found that the HGN test had not been shown to be reliable under any standard. Id. at 262-63.

52. Id. at 263.

53. Id.


55. NAS Report, supra note 45, at 104.


57. Id. at 151.

58. NAS Report, supra note 45, at 104.

59. Id. at 105. In a review of the case conducted by the U.S. Department of Justice, the Office of the Inspector General (OIG) determined that the primary cause of the error was the unusual similarity between Mayfield’s fingerprint and the fingerprint of the actual person who had touched the bag. Office of the Inspector General, Oversight and Review Division, U.S. DEPARTMENT OF JUSTICE, A REVIEW OF THE FBI’S HANDLING OF THE BRANDON MAYFIELD CASE, UNCLASSIFIED EXECUTIVE SUMMARY 6 (2006) [hereinafter Mayfield Report], available at https://oig.justice.gov/special/o6061/exec.pdf (last visited on Aug. 12, 2015). It found that such similarity in the fingerprints of two different people was an “extremely unusual circumstance.” Id. at 7. But, surprisingly, it had to rely on anecdotal evidence to make this determination, as it could find “no systematic study of the rarity of such an event.” Id. (emphasis added). The OIG also determined that several other factors, including the fact that the examiners’ conclusions were influenced by reasoning “backward” from visible features on Mayfield’s known prints, contributed to the misidentification. Id. at 7-10.

60. Mayfield Report, supra note 59, at 1-2, 3.

61. See Jennifer L. Mnookin, The Validity of Latent Fingerprint Identification: Confessions of a Fingerprinting Moderate, 7 LAW, PROBABILITY & RISK 127, 139 (2008). (“Given the general lack of validity testing for fingerprinting; the relative dearth of difficult proficiency tests; the lack of a statistically valid model of fingerprinting; and the lack of validated standards for declaring a match, such claims of absolute, certain confidence in identification are unjustified.”)

62. See supra note 2 and accompanying text.


64. Id. at 4.


66. Id. at 910.

67. Id. at 910-11.

68. Id. at 911. It should be noted that Walters stipulated to the admission of the evidence prior to submitting to the test. Regardless, the 10th Circuit did not mention that fact in its Daubert analysis. Rather, the 10th

www.ksbar.org | October 2015

27
The Circuit mentioned the fact only to support its finding that the evidence was not more prejudicial than probative under Rule 403.

70. See supra notes 26-27 and accompanying text.
72. Id. at 132.
73. Id. at 131.
75. NAS Report, supra note 45, at 175.
76. Id. at 173-76.
77. Id. at 175.
78. Id.
80. Id. at 1383.
82. Id. at 532.
83. Id. at 533.
84. Id. at 537.
85. Id. at 539.
86. See id.
87. Id.
88. Id. at 540.
89. Id. at 541.
90. Id. at 541-42.
91. Id. at 542.
92. NAS Report, supra note 45, at 173.
94. Id.
96. Id. at 221.
97. Id. at 239-40.
98. Id. at 242-43.
99. Id. at 239-40, 242-43, 247-48. Hurst's analysis is particularly noteworthy. He believed that the fire investigation simply reflected "the shortcomings in the state of the art prior to the beginning of serious efforts to introduce standards and to test old theories that had previously been accepted on faith." Id. at 240. That sort of reliance on blind faith is exactly what Daubert sought to prevent. See Daubert, 509 U.S. at 590 ("in order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method.'").
100. See Giannelli, supra note 95, at 227-28.
101. Green, 283 Kan. at 548.
102. Washington, 229 Kan. at 54 (quoting Kelly, 17 Cal. 3d at 31-32).
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DISBARMENT
IN RE CHAUNCEY M. DEPEW
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 16,184 – AUGUST 17, 2015


HELD: Court, having examined the files of the Office of the Disciplinary Administrator, found that the surrender of the respondent’s license should be accepted and that the respondent should be disbarred.

CRIMINAL

STATE V. BROWNLEE
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 110,262 – AUGUST 7, 2015

FACTS: Brownlee was convicted of first-degree premeditated murder and criminal possession of firearm. On appeal he claims: (1) violation of statutory right to a speedy trial required dismissal of his case; (2) jury should have been instructed on lesser included offense of voluntary manslaughter; (3) prosecutor erred in stating during closing argument that a defendant can form premeditated intent to kill during act of shooting a gun; (4) district court should have granted Brownlee’s motions for mistrial and new trial due to improper testimony by two state witnesses; and (5) cumulative error denied Brownlee a fair trial.

ISSUES: (1) Statutory right to speedy trial, (2) voluntary manslaughter instruction, (3) prosecutorial misconduct, (4) motions for mistrial and new trial, and (5) cumulative error

HELD: Court is not persuaded by state’s arguments and authorities that 90-day statutory limitation does not apply under facts and record of this case. The statutory limit was violated here because district judge erroneously assigned one continuance to the defense. No reversible error, however, because the 2012 amendment, K.S.A. 2012 Supp. 22-3402(g), that eliminated a dedicated individual remedy for dismissal of a case or reversal of a conviction, is procedural and can be retroactively applied in Brownlee’s case.

Instruction on voluntary manslaughter was legally appropriate, but would not have been appropriate under facts of the case.

STATE V. CORDELL
SALINE DISTRICT COURT – REVERSED
AND REMANDED
COURT OF APPEALS – REVERSED

FACTS: Cordell entered guilty plea to aggravated escape from custody. At sentencing he objected to criminal history score, arguing district court should not have considered Cordell’s two juvenile residential burglary adjudications as person felonies because the 1986 journal entry did not specify whether he had entered a “dwelling.” District court overruled the objection based on Cordell’s stipulation to the 1986 charging document which alleged he had entered two identified residences. Cordell appealed. Court of Appeals affirmed in unpublished opinion. Cordell’s petition for review granted.

ISSUE: Classification of Cordell’s 1986 burglary adjudications as person felonies

HELD: Based upon State v. Dickey, 310 Kan. 1018 (2015), Cordell’s sentence was vacated and case was remanded to district court.

Kansas cases discussed and distinguished. Prosecutor’s comments in this case were within bounds of law because they described totality of the evidence regarding premeditation.

Detective violated court order by suggesting that Brownlee had a propensity for carrying guns, and firearms expert violated court order by implying that a firearm matching the casings found at scene of the crime was eventually tested. But no showing that substantial prejudice warranting a new trial resulted from these errors, either separately or cumulatively.

Under totality of circumstances, cumulative error of statutory speedy trial violation and of improper witness testimony did not necessitate reversal.

DISSENT (Luckert, J.,) (joined by Johnson, J.): Disagrees with majority’s reading and interpretation of K.S.A. 2012 Supp. 22-3402(g), and would find the speedy trial violation in this case demands reversal. Would conclude the savings provision in subsection (g) applies only when a defendant has requested or agreed to the delay. Here, Brownlee disagreed with delays and was not consulted about the specific continuance at issue. Without the savings provision in subsection (g), the discharge mandate in subsection (a) applies.

Also disagrees with majority’s holding that a voluntary manslaughter instruction was not factually appropriate, and would hold the district court erred in failing to give that instruction. Testimony properly viewed in light most favorable to Brownlee and in light justifying the instruction constitutes evidence of heat of passion.

court for resentencing because the 1986 burglary adjudications should have been classified as nonperson felonies for criminal history purposes. Under facts of case, district court’s classification of those adjudications as person felonies depended upon the implicit finding that Cordell burglarized a dwelling, which was not a statutory element of burglary in 1986. District court went beyond simply identifying the statutory elements that constituted the prior burglary adjudications, and was constitutionally prohibited from classifying Cordell’s prior burglary adjudications as person felonies.


STATE V. FORD
JOHNSON DISTRICT COURT – REVERSED AND REMANDED
NO. 109,806 – JULY 31, 2015

FACTS: Prior to Ford entering guilty plea, district court ordered and received a competency evaluation (Ford I) in 1992. Seventeen years later Ford filed motion to correct an illegal sentence, claiming district court lost jurisdiction by not conducting a competency hearing as required by Due Process Clause and K.S.A. 22-3302, thus Ford’s convictions and sentences were void. District court held a hearing on the motion, without Ford’s personal presence. District court found competency evaluation was conducted, but no evidence suggested that a hearing was conducted. Based on the 1992 evaluation and attorneys’ testimony, district court concluded Ford had been competent and the convictions and sentences were valid. Ford appealed the denial of his motion to correct an illegal sentence.

ISSUES: (1) Use of motion to correct an illegal sentence to correct invalid convictions, (2) establishing due process error, (3) retrospective competency hearing, and (4) movant’s presence at retrospective competency hearing

HELD: Ford’s arguments did not raise issue of jurisdiction. Reviewing emerging legal trends, the court disapproved of holdings in State v. Murray, 293 Kan. 1051 (2012) (Murray I), and State v. Davis, 281 Kan. 169 (2006), that indicate a failure to comply with K.S.A. 22-3302 is jurisdictional. If a district court violated K.S.A. 22-3302 by failing to suspend criminal proceedings and conduct a competency hearing after finding reason to question the defendant’s competency, the error alleged is procedural and not jurisdictional, and a motion to correct an illegal sentence is not available to reverse the conviction. Future movants seeking to reverse a conviction because of alleged violation of K.S.A. 2014 Supp. 22-3302 must utilize K.S.A. 60-1507. To avoid iniquity of disparate outcomes in cases of two litigants with similar situations decided the same date, Ford’s case was allowed to proceed as in Murray II.

Under facts in this case, where Ford met initial burden of establishing there was a reason to believe he was incompetent to stand trial, and where state failed to show that Ford received a competency hearing, Ford was entitled to evidentiary hearing on his motion to correct illegal sentence. State’s alternative arguments based on legal presumption of competency, invited error, and non-retrospective application of Davis all failed.

A retrospective competency hearing is feasible to rectify procedural error. Factors in McGregor v. Gibson, 248 F.3d 946 (10th Cir. 2001), apply in determining the feasibility of such a hearing. District court judges are urged to assess McGregor factors on the record in a separate step of analysis. Although district court in this case conflated feasibility determination with ultimate substantive question of Ford’s competency to enter the 1993 plea, there was no abuse of discretion in district court’s determination that a meaningful retrospective competency determination could rectify the procedural due process error.

When a movant files a procedural challenge arising from district court’s failure to comply with K.S.A. 22-3302, the movant must be present at a retrospective competency hearing unless there is waiver of that right. Because the record does not demonstrate that Ford was present for the Ford II hearing and there was no indication he waived the right to be present, case was reversed and remanded for additional proceedings.


STATE V. MURRAY
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 110,214 – JULY 31, 2015

FACTS: In 1983, Murray was convicted of felony murder and aggravated robbery. In State v. Murray, 293 Kan. 1051, 271 P.3d 739 (2012) (Murray I), the Supreme Court remanded the case for a determination of Murray’s motion to correct an illegal sentence. In his motion, he argued the district court lacked jurisdiction to convict him because it failed to suspend proceedings after ordering a competency examination in the underlying criminal case. On remand, the district court determined: (1) a competency hearing had not been conducted; (2) a retrospective competency hearing was feasible; and (3) Murray had been competent when tried and convicted. Murray now argues the district court on remand exceeded this court’s man-
The Journal of the Kansas Bar Association

**Appellate Decisions**

**STATE V. TIMS**

**JACKSON DISTRICT COURT – APPEAL SUSTAINED ON QUESTION RESERVED COURTH OF APPEALS – AFFIRMED IN PART AND VACATED IN PART NO. 109,472 – AUGUST 15, 2015**

**FACTS:** State charged Tims in 2012 with felony DUI, based on his 2002 DUI diversion and 2004 DUI conviction. Tims filed motion to strike consideration of the uncounseled 2002 diversion from his criminal history. District court granted the motion, found Tims guilty of the 2012 charge, and treated the conviction as a second misdemeanor DUI conviction. State timely appealed on question reserved. Court of Appeals reversed and remanded for resentencing. Panel found the district court erred in not considering the 2002 DUI diversion as a prior conviction because Sixth Amendment right to counsel did not attach during the diversion proceedings and the diversion agreement Tims signed included valid waiver of statutory right under K.S.A. 12-4416(a) to counsel during the diversion conference. Panel’s reversal of the district court’s judgment was affirmed, but order for remand for resentencing was vacated. **STATUTES:** K.S.A 2014 Supp. 22-3602(b)(3); K.S.A. 8-1567, 12-4413(c), -4413(d), -4414(a), -4414(c), -4415, -4416, -4416(a), -4416(b), -4418; K.S.A. 22-3504; K.S.A. 2011 Supp. 8-1567, -1567(b)(1)(D), -1567(j); and K.S.A. 2002 Supp. 8-1567(d)

**ISSUES:** (1) Constitutional right to counsel in DUI diversion proceedings and (2) statutory right to counsel in DUI diversion proceedings.

**HELD:** The 2002 diversion can be considered as a prior conviction. An uncounseled misdemeanor conviction resulting in a prison sentence (even if suspended or conditioned upon probation) obtained in violation of a defendant’s Sixth Amendment right to counsel may not be collaterally used for sentence enhancement in a subsequent criminal proceeding. Conversely, an uncounseled misdemeanor conviction resulting in no prison sentence may be used to enhance punishment for a subsequent conviction without Sixth Amendment violation. Though a DUI diversion is considered a prior conviction, K.S.A 2011 Supp. 8-1567(j), the diversion does not have an underlying sentence attached to it, and thus is distinguishable from a misdemeanor conviction resulting in a suspended jail sentence. An uncounseled DUI diversion is more analogous to an uncounseled misdemeanor conviction that did not result in any jail sentence. Consequently, an uncounseled DUI diversion can properly be used to enhance punishment for a subsequent DUI conviction without violating the defendant’s constitutional right to counsel.

A defendant has a statutory right to be represented by counsel at a DUI diversion conference with a city attorney, K.S.A. 12-4414(c). The judicial certification language suggested in *State v. Hughes*, 290 Kan. 159 (2010), and *In re Habeas Corpus Application of Gilchrist*, 238 Kan. 202 (1985), to ensure that a municipal judge properly advises a defendant of constitutional right to counsel, is not required for a diversion agreement to be valid because constitutional right to counsel does not attach during diversion proceedings. Any waiver of statutory right to counsel during a diversion conference must be knowing and voluntary. Here, based on clear and unambiguous language in the diversion agreement, Tims knowingly and voluntarily waived his right to be represented by an attorney during the diversion conference. Panel’s reversal of the district court’s judgment was affirmed, but order for remand for resentencing was vacated.

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IN RE A.A. AND J.S.A.

**Johnson District Court – Reversed and Remanded With Directions**

**No. 112,133 – August 14, 2015**

FACTS: Mother and Father married in Kansas in June 2002, but they lived throughout the marriage in Mississippi, where they had two children. In January 2007, Mother filed for divorce in Mississippi; she then moved with the children to Kansas. The mother appeals the child-custody orders entered by a Kansas district court on the ground that it lacked subject-matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act. The Kansas court entered orders in a child-in-need-of-care proceeding, but a Mississippi court had previously entered custody orders concerning the children in the divorce case between their parents.

ISSUES: (1) Divorce, (2) child custody, and (3) UCCJEA

HELD: Court concluded that the Kansas court lacked subject-matter jurisdiction to enter the orders it did, which included a permanent transfer of custody of the children from mother to father. The Mississippi courts had continuing and exclusive jurisdiction in the case, and the Kansas court orders were neither necessary due to an emergency nor the result of a proper forum transfer under the UCCJEA. Accordingly, court reversed the district court’s judgment, directed that the district court vacate its orders, and remanded for further proceedings.

STATUTES: K.S.A. 20-301; K.S.A. 23-37,102, -37,201, -37,202, -37,203, -37,204, -37,207, -37,313; and K.S.A. 38-1303, -2202, -2203, -2204

**Medical Malpractice, Statute of Limitations, and Service of Process**

**Hajda v. University of Kansas Hospital Authority et al.**

**Wyandotte District Court – Affirmed in Part, Reversed in Part, and Remanded**

**No. 111,766 – July 31, 2015**

FACTS: Hajda timely filed a medical malpractice suit against six doctors, the University of Kansas Hospital (the Hospital), and the University of Kansas Medical Center (KUMC). She timely issued summonses on all of the parties, but she failed to obtain valid service. Pursuant to K.S.A. 2014 Supp. 60-203(b) and the district court’s order, after the statute of limitations had run, Hajda re-served the six doctors and received permission from the district court to amend her petition. In the amended petition, Hajda changed the name of the defendant entities she initially served from KUMC and the Hospital to the Kansas University Hospital Authority (KUHA). Valid service on the six doctors was subsequently obtained within the statutory time frame of K.S.A. 2014 Supp. 60-203(b), and the service related back to when the petition was filed. The district court granted KUHA’s motion to dismiss finding that filing a lawsuit and naming the wrong party is not an irregularity in form or procedure or a defect in making service.

ISSUES: (1) Medical malpractice, (2) statute of limitations, and (3) service of process

HELD: Court held Hajda failed to comply with K.S.A 2014 Supp. 60-254(c) in submitting her motion for default judgment in excess of $75,000 when she did not provide notice to the party she claimed was in default of the amount of money she wanted to take default judgment against. The district court misinterpreted K.S.A 2014 Supp. 60-203(b) as it applied to the six doctors. The district court should not have granted the six doctors’ motion to dismiss because Hajda obtained valid service upon all six doctors within the time frame allowed by K.S.A. 2014 Supp. 60-203(b). The district court properly granted KUHA’s motion to dismiss because it was not served with notice of the suit before the statute of limitations ran. K.S.A. 2014 Supp. 60-203(b) cannot be used to circumvent the running of the statute of limitations when the wrong party is identified in the petition. Here, Hajda amended her petition to name KUHA as a defendant and deleted KUMC after the statute of limitations ran. K.S.A. 2014 Supp. 60-203(b) corrects defective service, not a defect in naming the party being sued. Court also stated that Hajda’s requests to change the district court judge and/or assign her case’s venue to another judicial district were without merit and were denied.


**Out-of-State Companies and Closed-Door Statutes**

**Douglas Landscape and Design LLC v. Miles et al.**

**Johnson District Court – Affirmed**

**No. 111,812 – August 7, 2015**

FACTS: Miles appealed a judgment entered against him for work performed on his house by a contractor, Douglas Landscape and Design LLC. Miles argued that Douglas Landscape and Design
should not have been allowed to sue Miles in a Kansas court because the company was doing business in Kansas without having registered to do so. But a lawsuit defendant who claims that the plaintiff lacks the capacity to bring suit must make that claim in the answer filed at the beginning of the lawsuit. Miles did not do so; he first raised the issue midway through trial. The district court held that Miles had waived that defense. Miles also argued that Douglas Landscape and Design should not have been awarded any damages beyond the contract price, which he had paid. But the principal owner of Douglas Landscape and Design, McMullen, testified that Miles had requested extra work beyond the contract. The district court awarded additional damages.

ISSUES: (1) Out-of-state companies and (2) closed-door statutes

HELD: Court stated that a lawsuit begins in Kansas through the filing of the plaintiff’s petition and the defendant’s answer in response. Douglas Landscape and Design noted in the first paragraph of its petition that it was a Missouri limited-liability company. Miles did not raise any issue in his answer about the plaintiff’s capacity to bring suit against him. That waived the defense, and the district court properly said so. Court also held that the district court concluded that the issue of the closed-door statute had not been tried by implied consent, and there was no abuse of discretion in that decision. Last, court found that the district court accepted the evidence of the additional work performed by Douglas Landscape and Design, and a reasonable person could have accepted it as sufficient to represent the value of the additional work done.

STATUTES: K.S.A. 17-7307, -7932, -76,121a, -76,126; and K.S.A. 60-207, -208, -209(a)(2), -215

REAL ESTATE AND TRANSFER-ON-DEATH SHEELS V. WRIGHT
SEDGWICK DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 113,148 – AUGUST 14, 2015

FACTS: Kevin Wright appeals the district court’s ruling that invalidated a transfer his uncle, Richard Sheils, made of an ownership interest in Richard’s home. Shortly before Richard’s death, he transferred his home to himself and Kevin as joint tenants with rights of survivorship. But when Richard died, his brother, Charles, claimed the property because Richard had previously signed a deed that would transfer the property to Charles upon Richard’s death. The district court held that because Richard had not revoked the transfer-on-death deed, the property became Charles’ on Richard’s death.

ISSUES: (1) Real estate and (2) transfer-on-death

HELD: Court stated that the Kansas statutes on transfer-on-death deeds provide that the recipient of property from such a deed takes the property “subject to all conveyances . . . made by the record owner . . . during [his] lifetime.” K.S.A. 59-3504(b). Court held Richard was free to transfer the property during his lifetime, and the joint transfer to himself and Kevin—with rights of survivorship—was therefore valid. The district court erred by ruling that the property became Charles’ upon Richard’s death.

STATUTES: K.S.A. 59-3501, -3503, -3504

WORKER’S COMPENSATION, STATUTORY CAPS, REDUCTION FOR PRE-EXISTING IMPAIRMENT, AND SUBROGATION
BALLARD V. DONDLINGER & SONS CONST. CO. ET AL.
WORKERS COMPENSATION BOARD – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS
112,490 – AUGUST 21, 2015

FACTS: In December 2007, Ballard injured his neck while working and later settled a disability claim with Dondlinger, which included a lump sum payment for a 25 percent permanent partial general disability. In October 2010, Ballard was injured in an automobile accident while working for Dondlinger. As a result, Ballard aggravated his pre-existing cervical condition and also injured his lumbar spine and left elbow. After Ballard filed for workers compensation in 2010, the administrative law judge (ALJ) found that Ballard sustained a permanent partial work disability of 87.5 percent, based on a 10 percent wage loss and a 75 percent task loss. After figuring the amount of Dondlinger’s credit for Ballard’s 25 percent pre-existing impairment and the corresponding reduction in Ballard’s award, the ALJ found that Ballard was still entitled to a statutorily capped, maximum award of $100,000. The Board affirmed the ALJ’s findings in all respects. Dondlinger appealed to the Court of Appeals. Court held that K.S.A. 2010 Supp. 44-501(c) required the Board to reduce Ballard’s $100,000 statutorily capped award by his 25 percent pre-existing functional impairment. While the prior appeal was pending before this court, two relevant events occurred. First, Ballard filed an application for review and modification of his workers compensation award. Following a hearing, the ALJ found that Ballard was now permanently and totally disabled as a result of the 2010 automobile accident. Second, Dondlinger filed with the ALJ a motion for allocation of third-party recovery based on Ballard’s receipt of an insurance indemnity award from the other driver involved in the 2010 accident. The ALJ denied the request due to the pending appeal. Dondlinger requested review by the Board of each of those rulings. The Board concluded that Ballard was permanently and totally disabled. Based on Ballard’s permanent and total disability, a majority of the Board calculated the amount of Ballard’s award as $68,457.45. The Board also found that Dondlinger was entitled to a subrogation credit in the amount of $29,240.02 against future medical and compensation benefits based on Ballard’s settlement with the other driver involved in the 2010 accident. Two Board members dissented.

ISSUES: (1) Worker’s compensation, (2) statutory caps, (3) reduction for pre-existing impairment, and (4) subrogation

HELD: First, court held the modification of Ballard’s injury to a permanent total disability did not change the manner in which the award should be calculated to reflect his pre-existing functional impairment. Payne v. Boeing Co., 39 Kan. App. 2d, 180 P.3d 590 (2008), should no longer be used to determine credit for pre-existing functional impairment when calculating permanent total disability awards. Therefore, under Ward’s methodology, both a permanent total disability and a permanent partial disability workers compensation award must be calculated before any reduction for pre-existing functional impairment can be made. Because the Board used Payne to calculate Ballard’s permanent total disability award, Court reversed and remanded with directions that the Board apply K.S.A. 2010 Supp. 44-501(c) to reduce Ballard’s $125,000 statutorily capped award by his 25 percent pre-existing functional impairment, consistent with the calculation adopted in Ward. Court held it is undisputed that at the time of the settlement of Ballard’s third-party claim, Dondlinger had paid compensation and medical expenses in the amount of $55,848.81. Thus, Dondlinger has a lien on the payment of Ballard’s settlement with the other driver involved in the 2010 accident, which included a lump sum payment for a 25 percent permanent partial general disability. In October 2010, Ballard was injured in an automobile accident while working for Dondlinger. As a result, Ballard aggravated his pre-existing cervical condition and also injured his lumbar spine and left elbow. After Ballard filed for workers compensation in 2010, the administrative law judge (ALJ) found that Ballard sustained a permanent partial work disability of 87.5 percent, based on a 10 percent wage loss and a 75 percent task loss. After figuring the amount of Dondlinger’s credit for Ballard’s 25 percent pre-existing impairment and the corresponding reduction in Ballard’s award, the ALJ found that Ballard was still entitled to a statutorily capped, maximum award of $100,000. The Board affirmed the ALJ’s findings in all respects. Dondlinger appealed to the Court of Appeals. Court held that K.S.A. 2010 Supp. 44-501(c) required the Board to reduce Ballard's $100,000 statutorily capped award by his 25 percent pre-existing functional impairment. While the prior appeal was pending before this court, two relevant events occurred. First, Ballard filed an application for review and modification of his workers compensation award. Following a hearing, the ALJ found that Ballard was now permanently and totally disabled as a result of the 2010 automobile accident. Second, Dondlinger filed with the ALJ a motion for allocation of third-party recovery based on Ballard’s receipt of an insurance indemnity award from the other driver involved in the 2010 accident. The ALJ denied the request due to the pending appeal. Dondlinger requested review by the Board of each of those rulings. The Board concluded that Ballard was permanently and totally disabled. Based on Ballard’s permanent and total disability, a majority of the Board calculated the amount of Ballard’s award as $68,457.45. The Board also found that Dondlinger was entitled to a subrogation credit in the amount of $29,240.02 against future medical and compensation benefits based on Ballard’s settlement with the other driver involved in the 2010 accident. Two Board members dissented.

ISSUES: (1) Worker’s compensation, (2) statutory caps, (3) reduction for pre-existing impairment, and (4) subrogation

HELD: First, court held the modification of Ballard’s injury to a permanent total disability did not change the manner in which the award should be calculated to reflect his pre-existing functional impairment. Payne v. Boeing Co., 39 Kan. App. 2d, 180 P.3d 590 (2008), should no longer be used to determine credit for pre-existing functional impairment when calculating permanent total disability awards. Therefore, under Ward’s methodology, both a permanent total disability and a permanent partial disability workers compensation award must be calculated before any reduction for pre-existing functional impairment can be made. Because the Board used Payne to calculate Ballard’s permanent total disability award, Court reversed and remanded with directions that the Board apply K.S.A. 2010 Supp. 44-501(c) to reduce Ballard’s $125,000 statutorily capped award by his 25 percent pre-existing functional impairment, consistent with the calculation adopted in Ward. Court held it is undisputed that at the time of the settlement of Ballard’s third-party claim, Dondlinger had paid compensation and medical expenses in the amount of $55,848.81. Thus, Dondlinger has a lien in this amount against Ballard’s settlement recovery. And there is no statutory requirement that a lienholder file a notice of lien to be subrogated to recovery from a third party. Such subrogation and creation of a lien occurs automatically under K.S.A. 44-504(b). Court found Ballard’s loss of consortium or loss of services claims were without merit.

STATUTES: K.S.A. 23-2605; K.S.A. 44-501, -504, -510c, -510e, -510f, -556; and K.S.A. 77-601, -618, -621
Criminal

STATE V. DWIGANS

FACTS: Jury convicted Dwigans of possession of cocaine. On appeal Dwigans claimed she was denied due process and a fair trial before an impartial jury because the oath and affirmation used to swear in the jury were unduly coercive in that they required the jury to return a verdict and did not allow for possibility of a hung jury.

ISSUE: Appellate review of challenge to form or administration of jury oath or affirmation

HELD: The defendant must object at trial to the oath or affirmation given to the jury at a criminal trial in order to preserve for appeal any challenge to the form or administration of the oath or affirmation. In this case, Dwigans failed to preserve this issue for appeal because she did not object to the oath and affirmation at her jury trial, nor did she raise her constitutional claims in district court. District court’s judgment is affirmed.

STATUTES: None

STATE V. HEIRONIMUS

FACTS: Nighttime jawwalking pedestrian was struck by brake pedal on Heironimus’ motorcycle in May 2012. Heironimus did not stop, but turned himself in the next day when he heard about the victim and the injuries sustained. State charged him with leaving scene of an injury accident, failure to report an injury accident, driving on a suspended license, failure to give information following an accident, and illegally displaying his vehicle tag. Four days prior to trial, state amended the complaint to remove word “intentionally.” Heironimus claimed an instruction on mental intent was necessary regarding charges of leaving the scene of an injury accident, failure to report injury accident, and failure to give information. District court denied the request, based on state’s argument that statutes in question imposed absolute liability. On appeal Heironimus claimed: (1) offenses of leaving the scene of an injury accident and failure to give information are multiplicitous; (2) district court erred in allowing state to prosecute without proving intent because knowledge of an accident is an essential element of leaving scene of an injury accident; and (3) conviction for failure to report an injury accident must be reversed because statute under which he was charged was repealed.

ISSUES: (1) Multiplicity, (2) general criminal intent – leaving scene of an injury accident, and (3) repealed statute


STATUTES: None

STATE V. KELSEY

FACTS: Kelsey, sentenced under Jessica’s Law, is serving two concurrent mandatory life sentences for two counts of aggravated indecent liberties with a child under the age of 14, both off-grid sex crimes. Kelsey argues that the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution mandates that people in the state’s custody that are similarly situated must be similarly treated unless there are good reasons to treat them differently. He contends that the law which permits post-conviction DNA testing of biological materials, K.S.A. 21-2512, violates the Equal Protection Clause because it permits testing for those serving sentences for rape or aggravated criminal sodomy, also off-grid sex crimes, but not to offenders convicted of his crimes. The district court summarily dismissed his motion asking for DNA testing.

ISSUES: (1) Jessica’s Law and (2) post-conviction DNA testing

HELD: Court stated that because the law mandates identical sentences for someone who is 18 or older and convicted of aggravated indecent liberties with a child under the age of 14 with those offenders sentenced for rape or aggravated criminal sodomy, it held that K.S.A. 21-2512 does violate the Equal Protection Clause. The two classes of offenders are similarly situated, and there is no rational basis for treating them differently. Court reversed the district court’s summary dismissal of Kelsey’s motion and remanded to the district court to make findings on whether the three threshold requirements of K.S.A 21-2512(a) were met, requiring DNA testing.

DISSENT: Judge Atcheson concurred but wrote separately to challenge Kansas’ equal protection clause analysis that a person must first demonstrate they are “similarly situated” to those receiving the right or benefit.

STATUTE: K.S.A. 21-2512, -3502, -3504, -3506, -4643, -4707

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**Law Library Give Away.** Kansas Reports 1-201 (except vol. 35); 444 P.2d - 758 P.2d (these are the Kansas cases and bring the set up to 1988); Kansas Court of Appeals Reports 1-10 (these are Kan. App. 1st not Kan. App. 2d); Kansas Digest 2d; Am. Jur. Legal Forms; Am. Jur. Pleading and Practice; Nichols Forms; Blashfield Auto Law; Jones on Evidence, vol. 1-4; Missouri Estate Law, vol. 1-2; some hardbound K.S.A.s; and nine bookcases. The bookcases mount to the wall and include trim. Some of the Kansas Reports have seen a hard life. The pocket parts are not up to date. The books and bookcases are located in my garage here in Westmoreland. It would take a truck and trailer to haul off everything. I would prefer to see everything hauled off at one time to some book lover. If you have ever wanted a law library in your home office this would be the set. Again this is completely free. Call or email if you have any questions: Norbert Marek, (785) 458-8452 or (785) 765-2401; mareklaw@yahoo.com.

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Office Sharing for Attorney. Located at 130 N. Cherry St., Ste. 100, in Olathe, which offers quick and easy access to the Johnson County Courthouse. New Tenant renovations that include a café style open kitchen and bar seating, a collaborative area surrounded by large bay windows, a conference room, and reception area. Services available include telephone, Internet, online faxing, scanner, printer, TV, and space for staff person if needed. Call Margot Pickering for more information at (913) 647-9899.

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.

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