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The Journal of the Kansas Bar Association

2015-16

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The politically controversial yet legally significant decisions issued this summer involving gay marriage and school funding have triggered my desire to stand on my soapbox and rant a little about access to justice.

Google “access to justice” and you will find a long list of organizations and bar committees promoting such access. Included among that group is the U.S. Department of Justice, which established the Access to Justice Initiative (ATJ) to address what the agency referred to as “the access-to-justice crisis in the criminal and civil justice systems.” The ATJ mission is to “help the justice system efficiently deliver outcomes that are fair and accessible to all, irrespective of wealth and status.” This definition resonates with me in the debate about our independent judiciary and the funding of our courts because the key terms are “fair” and “accessible to all.”

In my opinion, fair courts are those not driven by a particular political agenda and those not worried about pleasing a particular constituency. Because a fair court is open to listening to all the parties and deciding cases based upon the letter of the law and not popular opinion, the United States judicial system has rendered some controversial decisions. In hindsight most, if not all, of the decisions are lauded as brave and fair, but at the time they were issued, the same may not have been said. We should contemplate our country today without some of those polarizing decisions: *Griswold v. Connecticut*, *Miranda v. Arizona*, *Gideon v. Wainwright*, and *Brown v. Topeka Board of Education*. We might all pick a different set of cases but the point is the same—politically drafted laws and public opinion polls are not always fair and just for all the citizens of our country.

“Accessible to all” requires sufficient judges and court personnel to process and hear legal matters. Access irrespective of wealth and status would require a system where litigants aren’t required to pay for each motion filed or a system that can be accessed without paying an exorbitant filing fee. As the Kansas Legislature continues to push for the judiciary to find ways to fund itself, increasing filing fees will be required. Currently a person earning minimum wage would need to spend half a week’s wages to pay the filing fee for a Chapter 60 case. Not only should our courts be fully funded but access to justice for all also requires the funding of organizations like the Board of Indigent Defense Services and Kansas Legal Services.

The political rhetoric that follows a controversial decision, like “activist judges” or “legislators in robes,” demonstrates the very sentiment that works against fairness in our judicial system. This rhetoric suggests judges must agree with popular opinion or the politician’s opinion of an issue at all times or the judge isn’t acting properly. Is it truly the right standard? Is our goal to let every citizen appear before a judge who will agree with that citizen? This is hardly a realistic view since court cases are generally contested. Of course, I might agree with this standard if all the judges agreed with my opinions, but I’m sure that doesn’t seem very fair to you.

**Like a Lawyer**

My Facebook presence is pretty non-existent. I check it out once every six months or so and over the last five years I’ve probably “liked” two things. But here is what I do know—I like lawyers and it seems to be a good time to remind our neighbors and communities that they like lawyers too. Please consider joining me in finding ways to remind other Kansans how much lawyers contribute in dollars, time, etc., to the community. We kicked off this effort in Topeka. As you know, lawyers deal with lots of briefs. So after a local volunteer mentioned the need to fill the donation bin with “briefs,” the Topeka Bar Association and KBA encouraged members to donate “briefs” to Let’s Help!

**Lawyers are having fun everywhere**

It has been a wonderful month of seeing old friends and meeting new ones. I hope you enjoy seeing some of the activities of your fellow bar members.

**Fredonia**

The Southeast Kansas bar members enjoyed an entertaining ethics presentation by Bethany Roberts and topped the
day off with good food and a pleasant golf game. Thanks to Jill Gillett for adopting me as her golf cart companion for the afternoon.

Wichita

Congratulations to the Wichita Bar Association on reaching its 100th anniversary and hosting a knock out celebration. Champagne, dinner, dancing, and a mini-bar show made this a night to repeat. Executive Director Karin Kirk together with an officer team lead by Jennifer Hill can plan a party for me anytime. There are lots of professional photos online and a few amateur ones included here.

Newton

For those of you who haven’t heard, Judge Richard Walker is retiring from the 9th Judicial District Court. The respect of the lawyers in that district was evident not only from the size of the lunch crowd but also from the boisterous and humorous storytelling that took place. Judge Walker had a wonderful message to share about protecting our judicial system. You should invite him to speak!

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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Stress and the Lawyer: Navigating the New Life of a Lawyer

S

o you did it, you stayed up countless hours, doing thousands of multiple choice questions, and writing what seemed like hundreds of practice essays. You took the bar and you passed! Congratulations, here is your bar number and good luck!

It’s that easy, right? Pass the bar, get a job, and change the world. What many of us don’t realize is the stress that comes along with our profession, the kind of stress you can be told about but until you actually deal with it you can never really know the magnitude of. From dealing with clients who have committed terrible offenses, to arguing for a cause that personally you don’t believe in, practicing law can be stressful and even detrimental to our health. As attorneys we are twice as likely to fall victim to substance abuse. So why is that the case? Why is our profession plagued by this? By nature our profession is high stress, often times our expertise is needed in a situation that can profoundly impact our client’s lives and well-being; a bad day in court could spell financial ruin or a jail sentence for our clients.

So we all understand that this profession we have chosen is stressful, but how do we deal with it in a healthy manner from the beginning, instead of waiting till we realize we have started to deal with the stress in an unhealthy way? There are many ways to keep our minds and bodies healthy, from diet and exercise to simply changing our view of the world, little things that can make a profound difference.

Hopefully you are still reading and haven’t said to yourself “OK, enough of this mumbo jumbo, I have work to do.” Bear with me; I promise there will be at least something I write in the next 700 or so words that will be useful.

So where do we start? What can we do? The first and most simple thing to do is stand up! That’s right, sitting at your desk all day can be detrimental to your health; our bodies are not designed to sit in a chair all day. Research has found that sitting for more than half the day, approximately, doubles the risk of diabetes and cardiovascular problems. Overall, when you combine all causes of death and compare any group of sitters with those who are more active, sitters have a 50 percent greater likelihood of dying. I’m not saying you need to hop up and run around the block every 10 minutes. Perhaps the next call you take . . . stand up, make it a point every once in a while during the day to get up, stretch and walk around the office. You could take it another step further, walk to court if it’s feasible; any activity can assist in a healthy body and mind, which in part allows us to better deal with stress. You will find that these small steps will lead to bigger ones; you may find the urge to start exercising more and more. Exercise is a great way to reduce stress in our lives. Another great way to decompress and deal with stress in our lives is yoga . . . yeah, that’s right . . . yoga. Yoga is an age-old technique that incorporates breathing techniques and stretching to relax the mind and body. Yoga continues to increase in popularity with new classes popping up everywhere; a simple Google search can locate a class nearby. Yoga offers a wide variety of techniques and intensity levels, so it’s very welcoming to many fitness levels.

Of course, it goes without saying that you should consult a doctor before trying any new kind of exercise routine.

So how’s your diet? Not so great, huh? I understand, in a high-pace, stress-heavy job like ours, the time to sit down and make a conscious choice to eat healthy simply doesn’t seem feasible. However, it can be quite easy, if you plan ahead. Healthier food choices aid in improving our health; combine a little exercise with healthier food choices and just like that we feel better, our minds are clearer, and we can approach stress and demands of our careers with a new gusto. “Hold on Justin, are you saying food can help deal with stress . . . that sounds a bit odd.” That is exactly what I am saying, foods like asparagus, avocado, blueberries, spinach, almonds, and oatmeal have shown to have certain vitamins and minerals in them that help us deal with stress. Another great thing about most of those foods is they are easy to find and very portable. Pack them the night before and take them with you to work. A healthy diet and exercise will reduce stress in our bodies and allow us to deal with external stressors as well.

So we have the diet and exercise thing down; our bodies and minds feel better, but there is still a lot of external stress to deal with; the very first and arguably most important factor is being aware of your stress, and notably the feelings and emotions you get when such stressors come creeping. Recognizing those feelings and then dealing with them is of paramount importance when handling stressful situations. Say for example you have a difficult client or opposing counsel to deal with. Trust me, you will encounter both during your time in this profession. So what happens when you encounter this person, do you feel the blood rushing to your face, does your chest get tight? Recognizing these responses before they happen can allow you to deal with them quickly, take a deep breath, smile, and continue on. Later take a step back and look at the whole picture. Why is this person so difficult to deal with? Is it the way they act, their personality, perhaps their personal views or yours that cause you stress when interacting with this person? Recognize what the issue with them is, realize that everyone is a little different; perhaps there is a reason this person is the way they are. By doing this we can take the time to better understand the individual and our feelings toward them. When we take the time to do this, we will see that interacting with these individual becomes much easier.

In closing, life is stressful, and there are things in life we simply cannot control; however, if we approach those things we can control with a healthy and open mind we will better be able to handle the stress of our lives and careers.

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 in many capacities.

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Beware of Ghost (Writing)!

It was a dark and stormy night. A young lawyer’s friend asks for help drafting a complaint to sue his landlord. As a flash of lightning momentarily brightens the dark room, the friend tells the lawyer “I don’t want you to be my lawyer, I just need help writing this document.” With the quick following clap of thunder still hanging in the air, the lawyer responds “sure, let me take care of that for you.” Somehow neither friend nor lawyer are aware of the specters of unethical conduct lurking in the corners.

The story’s plot largely revolves around whether our young lawyer is about to violate Professional Conduct Rule 8.4 which makes it professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit, or misrepresentation” or Rule 3.3 embodying the lawyer’s duty of candor towards the court. Whether a lawyer’s ghostwriting of pleadings for a pro se party violates Rule 8.4 has spooked lawyers and courts alike and has caused some level of disagreement between the American Bar Association and states like Kansas. The American Bar Association Standing Committee on Ethics and Professionalism has found that ghostwriting presents no issues under Rule 8.4(c):

Whether it is dishonest for the lawyer to provide undisclosed assistance to a pro se litigant turns on whether the court would be misled by failure to disclose such assistance. The lawyer is making no statement at all to the forum regarding the nature or scope of representation, and indeed, may be obliged under Rules 1.2 and 1.6 not to reveal the fact of the representation. Absent an affirmative statement by a client, that can be attributed to the lawyer, that the documents were prepared without legal assistance, the lawyer has not been dishonest within the meaning of Rule 8.4(c). For the same reason, we reject the contention that a lawyer who does not appear in the action circumvents court rules requiring the assumption of responsibility for their pleadings. Such rules apply only if a lawyer signs the pleading and thereby makes an affirmative statement to the tribunal concerning the matter. Where a pro se litigant is assisted, no such duty is assumed.

However, as the Committee notes, there is much disagreement among the various state bars.

Federal courts in Kansas have traditionally disapproved of ghostwriting for pro se litigants. In Wesley v. Don Stein Buick Inc., U.S. Magistrate Judge Rushfelt granted the defendants’ motion requiring the pro se plaintiff to disclose whether she had received legal assistance in drafting pleadings. The defendants took issue with the plaintiff’s request that her well-drafted response to their motion to dismiss be construed liberally because she was proceeding pro se. In granting the motion, Judge Rushfelt noted that ghostwriting had not only been “condemned as a deliberate evasion of the responsibilities imposed by Rule 11” but also may involve “violations of professional ethics and contempt of court.”

Likewise, in Duran v. Carris, the United States Court of Appeals for the Tenth Circuit reprimanded an attorney for ghostwriting a pro se brief for his former client without acknowledging his participation by signing the brief. The court noted that the attorney’s conduct had inappropriately afforded the former client the benefit of the liberal construction rule for pro se pleadings, and shielded the attorney from accountability for his actions, and conflicted with the requirement of FRCP 11(a).

Along the same line of reasoning, the Kansas Bar Association’s Ethics Advisory Committee has staked out a position different from the ABA. While the ABA finds no ethical violation where the ghostwriting remains undisclosed, the KBA requires that the ghostwriting be done only after full disclosure to the court. In KBA Legal Ethics Opinion No. 09-01, the Ethics Advisory Committee noted concern that the provision of ghostwriting services (which is ethically permitted under Rule 1.2(c)’s limited scope of representation) implicates the lawyer’s duties under Rule 3.3 . . . . To avoid such ethical trapsdoors, the Committee instructs Kansas attorneys to “clearly” disclose the ghostwriting.

Thus, noting its disagreement with ABA Formal Op. 07-446, the Ethics Advisory Committee requires that “any pleadings or documents prepared by the attorney or with the assistance of the attorney” include the phrase “Prepared with Assistance of Counsel.” However, the document need not disclose the attorney’s name, bar number, address, or other identifying information.

So how does our story end for our endangered young attorney? Thankfully, the rustling in the dark dusty corner made her pause as she neared completion of the draft complaint. She quickly reviewed her ethical obligations and included the necessary disclosures on her friend’s complaint. Her ethical duties satisfied, the specters receded into the darkness. But, she knew they could be conjured again.

About the Author

Joseph P. Mastrosimone is an associate professor at Washburn University School of Law and teaches in its often nationally ranked Legal Analysis, Research and Writing program. He previously served as chief legal counsel for the Kansas Human Rights Commission, and practiced labor and employment law with Stinson Morrison Hecker LLP and Crowell & Moring LLP. He always enjoys a good ghost story.

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Footnotes

1. KRPC 8.4(c). See also Model Rules of Prof’l Conduct 8.4(c).
2. KRPC 3.3(a)(1) (“A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.”).
3. ABA Standing Comm. On Ethics & Prof’l Resp., Formal Op. 07-446, Undisclosed Legal Assistance to Pro Se Litigants (2007) (taking position that pro se litigant must disclose fact that assistance was received but need not disclose the identity of the attorney).
4. Id. at 1-2 n.1-4.
6. Id. at 886 (relying in part on an earlier ABA ethics opinion outlawing the practice of ghostwriting).
7. 238 F.3d 1268, 1271-73 (10th Cir. 2001).
9. Id.
10. Id. at 3.
11. Id.
Meet Your Co-Chairs Q-&-A: Diversity Leadership 2015-16

The KBA elections have brought new leadership to the bar, as well as to bar committees. The KBA Diversity Committee has made significant contributions to the bar in spreading awareness to the legal community about the importance of a culture of inclusion. For the 2015-16 year, Jacqlene Nance and Katherine Goyette will serve as co-chairs of the committee. To get to know your co-chairs a little better, this month’s Diversity Corner is formatted as a Q-&-A:

What have you enjoyed most about being a member of the KBA Diversity Committee?

Jacqlene: As a member of the diversity committee I have enjoyed getting to know other members of the committee and the dedication they bring to diversity issues throughout the state and the legal profession. The committee has worked on visibility issues, networking and social events, all aimed at encouraging current practitioners and graduating students. I have personally gained a couple of fantastic mentors from the committee. Our lively discussions and fun events are always a pleasurable way to participate and learn more about what is going on outside of my immediate community and work.

Katherine: Over the past few years, the committee has had some very thorough discussions of what “diversity” means and why it is important to our bar. I have enjoyed these serious discussions, as well as the social events and networking opportunities organized by the committee. Recently, the Diversity Committee has become more active in co-sponsoring both social and networking events, which has helped foster relationships with other local bar associations. As a young attorney, I think that the committee events have helped me network and meet both young and experienced legal professionals statewide.

What has been your favorite KBA Diversity Committee activity?

Katherine: The committee held a “speed networking” event in Overland Park, in conjunction with the Kansas Women Attorneys Association. The purpose of the event was to “match” up experienced attorneys with young attorneys, provide them a few minutes to talk, and then switch up the pairs. The experienced attorneys included judges, biglaw corporate attorneys, government attorneys, and private practice attorneys. As a young attorney, it was incredibly helpful to have a moment to sit down with these legal professionals and pick their brains about how they got started with their legal profession and what advice they were able to provide me as I continued on with my own legal career. I met many new people at this event, and walked away with many great words of advice.

Jacqlene: My favorite activity recently was the DiCom Tournament which was held on April 1. The bowling tournament drew six diverse teams from around the state. The tournament rotated teams, so as we bowled interesting conversations took place between teams. I was so impressed to see law students interacting with experienced lawyers. There are also “bragging rights” involved; this year’s winners were the KBA Board of Governors and I am looking forward to this event again this year, maybe the Diversity Committee will win!

Why are you interested in diversity issues?

Jacqlene: While in law school I became active in a few affinity organizations and learned about the lack of diversity in the legal profession. I joined the Diversity Committee once I became a member of the bar because I was working in law school admissions and wanted to learn more about the legal community for which I was recruiting students. The mission of the diversity committee, “[t]o help the KBA foster an inclusive, diverse bar association, promote understanding and respect for different points of view, and support the advancement of diversity within the Kansas legal profession and justice system,” is aligned with my own beliefs of the importance of diversity. I continue to be focused on diversity because while there has been more visibility, there must be a sustained commitment as these issues can be swept to the side. Optimistically, I would like diversity to be an unconscious process, but until then we must remain focused on fostering diversity in the profession until the time it is second nature and a standard practice.

Katherine: I’m interested in diversity issues because of my own Asian-American heritage as well as my desire to understand and respect other points of view. Due to the lack of diversity in the legal profession, it is important to me that I stay involved in diversity-focused efforts by the committee to ensure that the bar’s future endeavors continue to stay beyond the one-dimensional diversity discussions of employment and law school admission statistics. Thoughtful discussions of diversity need to look beyond statistics and toward the benefit of understanding these different points of view. Only by recognizing the value of these voices can our bar move forward in promoting the legal profession in Kansas.

What is your favorite activity to do in your free time?

Jacqlene: Triathlons! In 2014, I completed Ironman 70.3 Texas (half-ironman distance) as well as a non-Ironman licensed event, the Redman Triathlon (full ironman distance, 140.6 miles). This year, I’ve completed a few sprint-distance (approximately 15 miles) and Olympics-distance (approximately 32 miles) triathlon races. My final triathlon race this season will be a half-ironman distance (non-Ironman-licensed) race in southeast Denver mid-September.

Katherine: I am a trivia buff! I play competitively at least twice a week, though I can be encouraged to play even more. I also enjoy water activities, especially water Zumba and swimming.

This year the committee will continue to focus on networking, social events, diversity issues, and the diversity corner of the KBA Journal. If you are interested in becoming a member of the Diversity Committee, or in participating in our events, please contact either chair for more information.

About the Author

Jacqlene Nance is an immigration services officer for the USCIS. Previously, she was the director of admissions and scholarships for the University of Kansas School of Law and the associate director of admissions for the University of Connecticut School of Law. Nance received her J.D. from the University of North Carolina Law School in 2006.

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Travel Nightmare, Version XI

The plot of Dan Brown's latest book, “Inferno” revolves around modern day implications of Dante’s 1300-era “poem” – known as the “Divine Comedy” and the painting that it inspired by Sandro Botticelli. Botticelli's depiction of hell is a “map” showing 91 illustrations of what consisted of hell, that, according to Brown's book, had the effect of doubling church attendance. One expert described the painting this way: “Botticelli’s Chart of Hell furnishes a panoptic display of the descent made by Dante and Virgil through the “abysmal valley of pain.”

But had Botticelli been alive today, his painting of hell would have had a much different appearance.

It would be the Rome airport. I know this – two weeks ago I spent a year there one day. It was awful. In fact, Satan may be insulted by the comparison. And you think this is another Keenan attempt at hyperbole, reserve judgment until you’ve finished reading.

The misadventure started out innocently enough, when I traveled to Rome to retrieve, kidnap, remove or, more charitably, meet and return home with my daughter Maggie, who was studying in an art class in a town north of Rome, Civita Castellana.

Our departure date was Friday, July 31, and we climbed in our cab three hours, 30 minutes before our departure. We arrived without any traffic delays, which for Rome, is quite a statement. The driver dropped us off at terminal 1. When I asked the driver to confirm that “this is Delta,” he nodded in a way that, in hindsight, told me – “please leave.” We obliged. As we wandered around looking for anything that said “Delta,” things were complicated by some rather LARGE BAGS I was dragging with clothes that did not belong to me. I finally found an English-speaking man who said “you need to go outside and wait for the terminal 5 shuttle.”

Outside, standing in the sun, I felt my sweat glands open and began to function at a high level. What happened next was a parade of buses that zoomed past us. Like the road crew for a 200 piece band. A group of Japanese tourists eventually joined us and decided they could walk to the next terminal. (More on this later). We saw one bus drive by with the number “5” – and when we waved, he pointed a distance down the sidewalk where another army was gathered. We ran down the sidewalk as that bus pulled to a stop. When we made it there, it was so full, people were standing half in, half out, and not budging. An airport employee was there and said “Another bus is coming!” We obliged. As we wandered around looking for anything that said “Delta,” things were complicated by some rather LARGE BAGS I was dragging with clothes that did not belong to me. I finally found an English-speaking man who said “you need to go outside and wait for the terminal 5 shuttle.”

Inside it was chaos, with long lines and with one short one – the one that said “Delta Medallion.” That was me. Our fortunes were turning.

Bags were checked, but then came another line. One to have your passport reviewed and stamped. Then came a bus to another terminal. At this point I noticed the guy behind me speaking English. We became instant friends. “Does this seem like a nightmare to you?” I asked him. He became very animated. “I’ve attended rock concerts more organized.” We exchanged observations that lightened the mood. Turns out he is a cruise ship comedian – Russ Rivas – and he entertained Maggie and me at a time we needed humor.
And if it seems like this column is running long – you might appreciate how hell felt that day.

So we arrived at the boarding gate, more chaos. They changed the gate. More people moving quickly. At the new gate, I used the men’s room. The bathroom lacked, well, essentials, and when I searched to find what I needed, and started to get, well, comfortable, someone started pounding on the bathroom door. Do you know how to say “get lost” in Italian? I don’t either.

Finally we had our tickets scanned and seemingly were about to board the plane. Wrong. They led us down some stairs and we then climbed into another bus. For those keeping score at home – that’s three bus rides; two while in the terminal, a billion sweat glands in overdrive.

The official flight time was 9 hours 45 minutes but if you add the time we sat on the runway before departure, it was closer to 12 hours. We landed in Atlanta, our connecting flight was canceled, and Maggie and I spent the night sleeping on Hartsfield Jackson airport carpet. Other than that, the flight home was delightful.

I wondered if my experience was unique. Apparently not, based on the website dedicated to travelers reviewing airports: www.airlinequality.com/airport-reviews/rome-fiumicino-airport. Each of these reviews was made in the last 30 days:

• “This airport was a confusing, unpleasant experience.”

• “This airport is the most disorganized and unprofessional airport I’ve been in.”

• “Complete and utter chaos is the best word to describe this airport. Arrived at least two hours early and we waited for the departure gate in section D. Right at the scheduled boarding time, my partner checked the screen only to find that our 16.05 flight to Geneva has disappeared from the screen! No one around to help us at all, so we checked the information computer only to have the operator hang up on us!”

• “Our flight was supposed to leave at 11.20 but we only got on the plane at around 11.40 because the ticket scanning machines were broken at the front. Bus to the plane was packed. Overall, the worst airport I have been to and wouldn’t recommend it.”

• “How can one airport be so bad! I know many airports in many parts of the world and I have felt frustration more than once. Today a flight from Marseille to FCO took less than an hour, after being delayed for an hour. Arrival at FCO was chaos.”

• “Beverages and food really expensive, staff rude, and indifferent to the customer. The air conditioner machines were dripping liquid, delays for the transit when we arrived here.”

• “This is possibly the worst airport in Europe. We passed through yesterday returning from holiday and were treated with disrespect and indifference. Due to flight cancellations we were forced to spend over seven hours here. Firstly upon arrival we were very rudely told to sit outside in what could best be described as cattle pens exposed to constant traffic noise and fumes, and cigarette smoke from airport staff.”

• “This is by far the worst airport experience I have ever had. The staff is rude, impolite and arrogant. They seem to go out of their way to avoid eye contact and therefore having to respond to any questions.”

• “Simply the worst. I require mobility assistance and when I arrived at what I can only describe as an animal pen airside in T1 I was horrified. We were all herded into a box/pen about 3 meters by 1.5 – it was full, smelly and not fit for humans. Avoid at all costs. Do not go unless absolutely necessary.”

When father and daughter arrived in Leawood some 36 hours after our trip had begun, hell no longer mattered; only heaven did.

About the Author

Matthew Keenan has practiced with Shook, Hardy & Bacon LLP, Kansas City, Mo., since 1985.
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Planning: Something Every Lawyer is Good at – Mostly

We plan our opening and closing arguments, our direct and cross examination for trials. We help clients plan for taxes, plan the structure of a new business or plan the acquisition of a new asset or company. We know that the Rules of Professional Responsibility require that we act with diligence and competence. We believe that our clients should always be well taken care of and go to great lengths to be sure that happens.

In our personal lives, we plan our golf strategy, our bridge hand, our parties and cookouts. We plan our weddings and funerals; sometimes even the birth of our children.

So we know we’re good at planning; it is one of those things that lawyers DO. Except when they don’t: don’t plan for their own retirement or disability. With the aging of the legal profession, this is becoming more of an issue. KALAP gets calls and the disciplinary administrator gets calls. No one wants to see a lawyer with a good reputation and long history of service end his or her career under the cloud of an ethics complaint.

Like so many things, we think that won’t happen to us. Well there’s a way to be pretty sure that it won’t, and that is called succession planning. More and more states are considering making it mandatory. South Carolina has, as set out below.

Rule 1.19: SUCCESSION PLANNING

(a) Lawyers should prepare written, detailed succession plans specifying what steps must be taken in the event of their death or disability from practicing law.

(b) As part of any succession plan, a lawyer may arrange for one or more successor lawyers or law firms to assume responsibility for the interests of the lawyer’s clients in the event of death or disability from practicing law. Such designation may set out a fee-sharing arrangement with the successor. Nothing in this rule or the lawyer’s designation shall prevent the client from seeking and retaining a different lawyer or law firm than the successor. The lawyer to be designated must consent to the designation.

(c) A registry shall be maintained by the South Carolina Bar. The successor lawyer(s) shall be identified on the lawyer’s annual license fee statement.

The ABA Center on Professional Responsibility (CPR) has compiled resources related to end-of-career issues confronting lawyers, using the expertise of the Senior Lawyers Committee of the Commission on Lawyer Assistance Programs (CoLAP). The new webpage (www.ambar.org/lawyersintransition) includes information and resources on topics such as succession planning, intervention, regulatory issues, senior/young lawyer opportunities, and more.

Here’s a section from that site:

Succession planning is essential to every lawyer’s practice, proactively protecting clients and colleagues in the event of the lawyer’s disability or death. As highlighted in the resources below, recommended items for an effective succession plan completed in conformity with applicable rules include, but are not limited to:

- Written instructions concerning how and where client information is stored, including bank and other account details (e.g., operating and trust account information);
- Information concerning disposition of closed client files, information about law office equipment leases or other contracts;
- Information regarding payment of current liabilities;
- Instructions to gain access to computer and voicemail passwords; and
- Information detailing how the successor will be compensated.

Most states have one or more rules to protect clients in situations where the attorney is “MIDD” – Missing, incapacitated, deceased, or disbarred. In Kansas, Supreme Court Rules 220 and 221 provide that mechanism. Rule 220 concerns “Proceedings where an attorney is declared or is alleged to be incapacitated.” The Supreme Court can order a mental or physical examination of an attorney to determine whether the attorney is disabled, and upon finding he/she is, order transfer to disability status immediately. An attorney in Kansas may not practice while on disability status but may petition for reinstatement once a year.

Rule 221 provides for “Appointment of Counsel to Protect Clients’ Interests” and allows appointment of same by the administrative judge of the district in which the attorney practiced.

This article is not intended to advocate for mandatory succession planning – that is not part of our KALAP objectives. But it is intended to raise the topic of succession planning in general and to provide links to the resources that are out there. I’m pretty sure there is interest in this area because I get asked about it fairly frequently at CLE presentations. And I would go so far as to say, even if there isn’t interest, there ought to be, for at least two reasons. First, it is an ethical obligation to protect our clients’ interests, which can include providing for their proper care when we are not able to do so ourselves. Second, planning before the fact gives us more control over the process.

KALAP staff and volunteers have experience working with lawyers and law firms to help them close down an attorney’s practice, both when that is done voluntarily or involuntarily. We are also happy to discuss the topic with a lawyer wanting ideas or a guide to resources. But Kansas lawyers are good people and good planners so this is also something you can do by yourself – and for yourself.

About the Author

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

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Microsoft Windows 10

little that comes out of Microsoft has “free” on the price tag but Windows 10 is an exception – of sorts. If your computer is running either Windows 7 or 8.1, you have until July 2016 to upgrade for free to Windows 10. (Windows XP support sunset in April 2014 and it is no longer supported or secured by Microsoft.) Why exactly is Microsoft giving away upgrades?

There may be two answers to the question. One answer is Google and the other is Apple. Google does not sell its products to end users like you. Instead, Google sells what it learns about you to other companies for marketing and research purposes. Apple looks a bit more traditional because they sell hardware and software but a purpose of those pursuits is to recruit users for its media store of movies, games, books, and music. Microsoft needs Windows 10 both to collect user data and to drive sales to its own media holdings.

Comfort of Familiarity

Universality is one of Windows 10’s strategic aims. Microsoft designed it to look and work the same on a laptop as it would on a phone, a tablet, or any other device (i.e., TV set-top box, smart home controller, automotive GPS, or watch). Learn one interface and you know every Windows 10 device. Additionally, Windows 10 makes it much simpler for app developers to port existing Google Android or Apple iOS apps, meaning Microsoft can build its own app Store on the backs of Google’s and Apple’s offerings. It will need that help to catch up to its competitors’ user base.

Users who migrated from Windows 7 to Windows 8.1 often struggled with the changes. The Start Menu disappeared and applications or settings seemed to be lost in a series of tiles or buried in a long list of tiny icons. Rebuilding a usable desktop familiar to users going back to Windows 95 seemed a chore not worth tackling. That is fixed in Windows 10 with the return of the Start Menu. It is a small thing but users demanded it and Microsoft listened. Start Menu brings some new features as well. First, it is resizable and easily customized. Second, it incorporates Windows 8’s tiles that can feed information without actually opening an application. The Weather tile, for example, is right there showing temperature and forecast without opening the Weather application. The Start Menu merges the old and new in interfaces quite nicely.

Some New Features

Just to the left of the standard Start Menu is the Cortana interface. Cortana is the new intelligent personal assistant for Windows 10 and she can make Siri seem downright obtuse. (Full disclosure: Siri and I fight incessantly because she does not understand me or even seem interested in providing me what I want.) My experiences with Cortana show her to be dramatically better at understanding voice commands on the first try, faster, and slightly more capable with features like contextual reminders and web browsing by voice command. She also replaces prior Windows search features to help find files or applications and does so in a blink.

Cortana can learn about you as a user. Default settings enable her to begin recognizing the sorts of things you might want to know based on your cumulative prior interactions, your location, and even what applications you are using when you summon her. The more you use her, the better she adapts to your speech or handwriting and she can begin predicting what you are asking. If you would like, she will pay attention to contacts and note some contextual clues about what you usually discuss so as to be more responsive to commands. Cortana’s adaptability makes her more useful and she begins to feel more personalized, but there is a catch. She is learning everything she can about you for some of the same reasons Google tracks your searches, scans your email, and notes your location. Your habits are an interesting product for marketers and developers and the Microsoft Terms of Service with Windows 10 make clear that your relationship with Cortana may come with some hidden strings. (What personal assistant does not?)

Internet Explorer was replaced with Edge as a default browser and Mail has been dramatically improved. Both are much faster and well integrated with Cortana to allow voice commands. My personal favorite feature of Edge is the option to Make a Web Note. Click that option and a handful of annotation tools appear which allow me to highlight, make handwritten or typed notes, or clippings of sections on the webpage. That feature turns Edge into a useful research browser and the notes and annotations accumulated can be shared with one-click to other applications, users, or computers. I still find myself in Chrome by default but lean toward Edge when putting together a presentation or article.

Verdict = Upgrade to 10

There is little doubt that Windows 10 is worth the upgrade price of zero dollars. It runs faster than Windows 7, is easier to navigate than Windows 8, and offers more features than either. The trade-off is the knowledge that Windows 10 is almost as good as Google at commoditizing your computer use and may hawk Microsoft’s media services almost as shamelessly as Apple does its own. Microsoft may not have been first with features but Windows 10 definitely keeps them in the race.

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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I spent three months of my 2015 summer working on Wall Street overlooking the East River in Manhattan. Before I took the flight out of KCI, I had to say that the entire idea was incredibly daunting. I had been to New York City before and found that it was not exactly my taste, but this was for a relatively short visit. As someone who is part of the LGBT community and immensely passionate about public interest, I could take on the largest city in the United States for a once-in-a-lifetime opportunity to work at Lambda Legal.

The internship itself was great. I was one of six legal interns assisting a rather diverse set of attorneys. The important thing to remember is that there is no “LGBT law,” but rather LGBT individuals having trouble with any area of the law. I researched a wide range of topics, from voter identification statutes to the Kansas Open Records Act to experts on passports to what constitutes a public accommodation under New York Law. My classes at KU Law gave me the tools, and all I needed was direction.

Living in New York City had a steep learning curve. The first day, the subway I was supposed to take was “down” and I was essentially stranded with no idea how to get from the Upper East Side to Wall Street. I ended up taking an expensive cab ride because I did not know how to navigate otherwise, and I did not want to be late my first day. Within a week, however, I was giving directions to tourists looking for Central Park. Obtaining food was another trial. Bi-weekly grocery shopping is not really a thing when you do not have a car to load up a trunk’s worth of bags. A large number of New York City residents have their groceries delivered. AmazonFresh kept me fed most of the time. For the other nights, almost anything could be delivered to my apartment door.

This summer was also a great time to be part of the Lambda Legal staff. The Obergefell decision from the U.S. Supreme Court came just days before New York City’s PrideFest, which we celebrated thoroughly. We were all invited to the Freedom to Marry event at the Cipriani Wall Street ballroom, where I witnessed a stunning speech by Vice President Joe Biden. LGBT rights have taken large strides forward this year, and it was awesome to observe all of that from the front lines.

The attorneys at Lambda Legal were invested in assisting the interns in preparing for the future. All of our research was critiqued with the idea that the pieces could become writing samples. Every week, we had brown bag lunches when the interns were free to question attorneys from across the United States about legal or professional topics. One such lunch specifically addressed how an attorney got into public interest law and what routes students could take to get involved in an organization, such as Lambda Legal. Near the beginning of the summer, we had a welcoming dinner at an attorney’s home. The attorneys were nothing but helpful and awesome for the duration of my stay.

While I am not sad to see New York City behind me, my experience at Lambda Legal has been invaluable and amazing. I have no doubt that I can use my newfound skills to advance my career choices, which include either working for the government or in the public policy arena. Foremost, I learned that following your passions can be exceptionally rewarding, and I look forward to my final year at KU Law.

About the Author

Jessica Frederick is a third-year law student at the University of Kansas School of Law. While attending South Dakota State University, she switched her major several times before settling into English. Although she initially entered KU Law due to its study abroad opportunities and wanted to pursue international law, she quickly became enamored with Media & Public Policy Law.
Members in the News

Changing Positions

Erin Beckerman has become a shareholder at Riordan, Fincher, Munson & Sinclair P.A., Topeka.

Daniel P. Kolditz has been appointed vice president and senior counsel of distribution for Anheuser-Busch Companies LLC, St. Louis.

Jennifer L. Lautz has joined Minter & Pollack Law Firm, Wichita, as an associate.

Deborah K. Mitchell has been appointed by Gov. Sam Brownback to the 18th Judicial District as a district judge.

Zachary D. Poole has joined Wagstaff & Cartmell LLP, Kansas City, Mo.

Kelly J. Rundell has joined Hite, Fanning & Honeyman LLP, Wichita, as of counsel.

Jennifer L. Skliris has joined Hite, Fanning & Honeyman LLP, Wichita.

Mandi J. Stephenson has joined the Stephenson Law Office LLC, Kingman.

Changing Places

Ian M. Clark has moved to 330 N. Main, Wichita, KS 67202.

Roger L. Hiatt has started Hiatt LLC, 1100 Main St., Ste. 2130, Kansas City, MO 64105.


Miscellaneous

Natalie G. Haag, Topeka, has been elected to the Kansas Humanities Council board of directors.
The Kansas Judicial Counsel has appointed the Hon. Patricia Macke Dick, Hutchinson, to serve on the Family Law Advisory Committee.

Moses & Pate, Wichita, has now become Pate & Paugh LLC.

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

James M. Caplinger

James M. Caplinger, 86, died June 28 in Topeka. He was born May 5, 1929, in Hutchinson, the son of Jesse L. and Nellie (Smith) Caplinger. He was a 1947 graduate of Greensburg High School and then he attended Kansas State University and Washburn University, receiving a bachelor’s degree and juris doctorate in 1953. He served as a judge advocate in the U.S. Air Force and upon discharge he returned to Greensburg to practice law.

Caplinger was elected Kiowa County attorney in 1956 and in 1958, Gov. George Docking appointed him securities counsel and assistant general counsel for the Kansas Corporation Commission. In late 1961 he returned to private practice, establishing James M. Caplinger Chtd. and he helped found the State Independent Telephone Association in 1961, where he served as its executive manager for over 50 years.

He was a member of the Greensburg Masonic Lodge; Downtown Topeka Rotary Club; Kansas, Topeka, and American bar associations; and many other associations.

Caplinger is survived by his three children, Sharon Keyes, of Colorado Springs, Colorado, James M. Caplinger Jr., of Topeka, and Mark Caplinger, of Topeka; two brothers, Robert D. Caplinger, of Kansas City, Missouri, and Billy M. Caplinger, of Santa Barbara, California; and seven grandchildren. He was preceded in death by his wife, Shirley; his parents; and a brother, Ernest L. Caplinger.

Manuel B. Mendoza

Manuel B. Mendoza, 84, of Independence, died June 25 after a brief illness. He was born on August 28, 1930, in Independence, the son of Antonio P. and Francisca Mendoza. He graduated from Independence High School in 1950 and then attended Independence Junior College, graduating in 1952, before attending Baker University. He graduated in 1954 with a Bachelor of Science in business administration.

Mendoza then attended Washburn University School of Law, graduating in 1957 with a Juris Doctor. While at Washburn Law, he served in the Army Reserve, eventually rising to the rank of platoon sergeant. After graduation, Mendoza began working for State Farm Mutual Automobile Insurance Co. in 1958 as a field claim representative. He would eventually be promoted to senior counsel at State Farm’s headquarters in Bloomington, Illinois, where he retired in 2001.

He was a member of the ACLU, McLean County AIDS Task Force, Washburn Law board of governors, Baker University President’s Advisory Council, and a lifetime member of the Kansas Bar Association.

Mendoza is survived by his wife, Margot Mendoza; daughters, Noëlle Mendoza, of Bloomington, Illinois, and Lisa Mendoza, of Topeka; and son, Marcos Mendoza, of Austin. He was preceded in death by his parents; and his 15 brothers and sisters.
2015 Outstanding Speakers Recognition

The Kansas Bar Association would like to extend a special thank you to and recognition of the following individuals who gave so generously of their time and expertise in speaking at our Continuing Legal Education seminars from April through August 2015. Your commitment and invaluable contribution is truly appreciated.

John J. Ambrosio, Ambrosio & Ambrosio Chtd., Topeka
Gary Ayers, Foulston Siefkin LLP, Wichita
Mark Bassingthwaighte, ALPS, Missouri, Mont.
Branden Bell, Brown & Ruprecht P.C., Kansas City, Mo.
Hon. Stuart M. Bernstein, U.S. Bankruptcy Court for the Southern District of New York, New York City
Susan A. Berson, Berson Law Group LLP, Overland Park
Andrea Boyack, Washburn University School of Law, Topeka
Kevin Breer, Breer Law Firm, Overland Park
Russell A. Brien, Brien Law LLC, Oskaloosa
David J. Brown, Law Offices of David J. Brown L.C., Lawrence
Mert Buckley, Adams Jones Law Firm PA, Wichita
Tamara Carmichael, Loeb & Loeb LLP, New York, New York
Sean Carter, CLE Netshows, Mesa, Ariz.
Meryl Carver-Allmond, Appellate Defender Office, Topeka
Heather R. Cessna, Appellate Defender Office, Topeka
Arthur Chalmers, Hite Fanning & Hnoneyman LLP, Wichita
Daniel F. Church, Morrow Willnauer Klosterman Church LLC, Kansas City, Mo.
Joseph Colantuono, Colantuono Bjerg Guinn LLC, Overland Park
Dustin A. Cole, Attorneys MasterClass, Longwood, Fla.
Kevin J. Cook, Cook & Fisher LLP, Topeka
David R. Cooper, Fisher Patterson Sayler & Smith, Topeka
Hon. Tom R. Cornish, U.S. Bankruptcy Court for the Eastern District of Oklahoma, Okmulgee, Okla.
Greg Cotton, Sporting Club, Kansas City, Kan.
Jeff Deines, Lentz Clark Deines P.A., Overland Park
Thomas B. Diehl, Ralston Pope & Diehl LLC, Topeka
John R. Dietrick, Creative Business Solutions, Topeka
Patrick Donahue, Disability Professionals, Lawrence
Diana Edmiston, Gaves Irby & Rhoads, Wichita
David P. Eron, Eron Law P.A., Wichita
Kristin L. Farnen, Stinson Leonard Street LLP, Kansas City, Mo.
Evan Fitts, Polsinelli, Kansas City, Mo.
Dave Frantze, Stinson Leonard Street LLP, Kansas City, Mo.
Tracy Fredley, Attorney at Law, Lawrence
David J. Freund, Federal Public Defender, Wichita
Deborah Frye Stern, Kansas Hospital Association, Topeka
Michelle Galloway, Cooley LLP, Palo Alto, Calif.
Kenneth B. Germain, Wood Herron & Evans LLP, Cincinnati, Ohio
Gregory Gerstner, Seigfried Bingham P.C., Kansas City, Mo.
Ellen S. Goldman, Attorney at Law, Overland Park
Webster Golden, Stevens & Brand LLP, Lawrence
Martha Gragg, Hospital Corporation of America, Kansas City, Mo.
Susan Griffen, Finnegans, Henderson, Farabow, Garrett & Dunner LLP, Washington, D.C.
Danielle Hall, Kansas Bar Association, Topeka
Jan Hamilton, Chapter 13 Trustee, Topeka
Emily A. Hartz, Sloan Law Firm, Lawrence
Jerry Hawkins, Hite Fanning & Honeyman LLP, Wichita
Hon. Jerome P. Hellmer (ret.), 28th Judicial District, Salina
Zachary H. Hemenway, Stinson Leonard Street LLP, Kansas City, Mo.
Steven D. Henry, The Henry Law Firm P.A., Overland Park
James R. Howell, Prochaska Howell & Prochaska LLC, Wichita
Deborah Hughes, Office of the Disciplinary Administrator, Topeka
Patrick Hughes, Adams Jones Law Firm PA, Wichita
Kelly G. Hyndman, Sughrue Mion PLLC, Washington, D.C.
Vic Jacobson, Jacobson Ryan L.C., Manhattan
Josh James, Bryan Cave LLP, Washington, D.C.
Eric L. Johnson, Spencer Fane Britt & Browne LLP, Kansas City, Mo.
Lynn R. Johnson, Shamberg Johnson & Bergman Chtd., Kansas City, Mo.
Hon. Janice M. Karlin, U.S. Bankruptcy Court for the District of Kansas, Topeka
Stephen Kerwick, Foulston Siefkin LLP, Wichita
Amanda Kiefer, FHL Bank, Topeka
Kimberly Knoll, Office of the Disciplinary Administrator, Topeka
Elizabeth Kronk Warner, University of Kansas School of Law, Lawrence
Shawn Leisinger, Centers for Excellence, Washburn University, Topeka
Joseph LoRusso, Ralston Pope & Diehl LLC, Topeka
Hon. J. Thomas Marten, U.S. District Court for the District of Kansas, Wichita
T. Bradley Manson, Manson & Karkanb, Overland Park
Charles McClellan, Foulston Siefkin LLP, Wichita
Anne McDonald, Kansas Lawyers Assistance Program, Topeka
Roger A. McCowen, Center for Ag Law and Taxation, Ames, Iowa
Jack Scott McInteer, Depew Gillen Rathbun & McInteer L.C., Wichita
Mira Mdivani, Mdivani Corporate Immigration Law Firm, Overland Park
Joseph N. Molina III, Kansas Bar Association, Topeka
Tish Morrical, Hampton & Royce L.C., Salina
Ronald W. Nelson, Ronald W. Nelson P.A., Lenexa
Hon. Keven M.P. O’Grady, 10th Judicial District, Olathe
Vivien J. Olsen, Prairie Band Potawatomi Nation, Mayetta
Cheryl A. Pilate, Morgan Pilate LLC, Kansas City, Mo.
Larry A. Pittman II, Consumer Law Center of Kansas City, Kansas City, Mo.
Ronald P. Pope, Ralston Pope & Diehl LLC, Topeka
Donald C. Ramsay, Stinson Leonard Street LLP, Kansas City, Mo.
Julian Rivera, Husch Blackwell LLP, Austin, Texas
Hon. Ryan W. Rosauer, 8th Judicial District, Junction City
Alan Rupe, Lewis Brisbois Bisgaard & Smith LLP, Wichita
Dr. Brian Russell, Licensed Psychologist and Attorney at Law, Lawrence
Larry Rute, Associates in Dispute Resolution LLC, Topeka
Rob Schendel, Jack Henry & Associates Inc., Lenexa
Jeremy Schrag, Lewis Brisbois Bisgaard & Smith LLP, Wichita
Kevin P. Shepherd, Kevin P. Shepherd, Attorney at Law, Topeka
Madeline Simpson, Lockton Companies, Kansas City, Mo.
Peter Sloan, Husch Blackwell LLP, Kansas City, Mo.
Wesley F. Smith, Stevens & Brand LLP, Lawrence
Sandy Smith, Bryan Cave LLP, Kansas City, Mo.
Hon. Dale L. Somers, U.S. Bankruptcy Court for the District of Kansas, Topeka
Katherine C. Spelman, K&L Gates LLP, Seattle
Richard Stitt, Polsinelli, Kansas City, Mo.
Matthew Stromberg, Foulston Siefkin LLP, Overland Park
Shelley Sutton, Kansas Continuing Legal Education Commission, Topeka
Kristen Swann, Morgan Pilate LLC, Kansas City, Mo.
Stuart Teicher, CLE Netshows, East Brunswick, N.J.
Hon. Patrick H. Thompson, 28th Judicial District, Salina
Gabriela A. Vega, Vega Acosta Law Firm, Manhattan
Amanda S. Vogelsberg, Henson Hutton Mudrick & Gragson, Topeka
Lynn Ward, Ward Law Offices LLC, Wichita
Lorna Ware, Garden City Group LLC, Lake Success, New York
Molly Wood, Stevens & Brand LLP, Lawrence
Catherine A. Zigtema, Law Office of Kate Zigtema L.C., Lenexa
Angel Zimmerman, Zimmerman & Zimmerman P.A., Topeka
Larry Zimmerman, Zimmerman & Zimmerman P.A., Topeka

The Firm is pleased to announce that Emily A. Donaldson has achieved the National Elder Law Foundation’s designation of Certified Elder Law Attorney (CELA), a highly-regarded and distinguished certification in the practice of Elder Law that will greatly compliment and enhance our existing range of practice areas and specialties.

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Artificial People: Why Corporations Cannot Appear in Court Without a Lawyer

By J. Nick Badgerow
I. Background

Kansas courts have consistently prohibited corporations from appearing in court without a lawyer. One may question why this is, and what justifies a rule that allows an individual person to appear in court on his own behalf, but which then denies that right to a corporate body, an “artificial person.”

The justification is that, because it is an artificial person, a corporation can only act through its authorized agents. Therefore, the law requires it to appear in court only through a lawyer, duly admitted to the Bar, with the education and abilities which qualify that lawyer to appear for others before our courts.

II. A corporation is an artificial person


In State v. Riemers, the North Dakota Supreme Court held that “a corporation is an artificial person and under our past decisions, coinciding with the common law rule, a non-attorney agent may not represent a corporation in legal proceedings.”

In Kentucky Bar Association v. Tussey, the Court held that “a corporation is an artificial person, not capable of performing any act except through the agency of others,” and as such, a corporation may not draw legal instruments or be represented in court through a nonprofessional officer or employee. Similarly, in Wetzel v. Schlenvogt, the North Dakota Supreme Court held:

A corporation is an artificial person that must act through its agents. United Accounts v. Teladvantage, 499 N.W.2d 115, 117 n.1 (N.D. 1993). This Court has firmly adhered to the common law rule that a corporation may not be represented by a non-attorney agent in a legal proceeding. United Accounts Inc. v. Teladvantage Inc., 524 N.W.2d 605, 606-07 (N.D. 1994) (citing Oahu Plumbing & Sheet Metal Ltd. v. Kona Constr. Inc., 60 Haw. 372, 590 P.2d 570, 572 (1979)). This rule is born out of the necessity to have a court system that functions efficiently. Oahu Plumbing, 590 P.2d at 573 (citing Strong Delivery Ministry Ass’n v. Bd. of Appeals, 543 F.2d 32, 33 (7th Cir. 1976)). Attorneys are knowledgeable of the law, the court system, and its rules of procedure, which keep legal matters moving smoothly through the courts. Id. Just as one unlicensed natural person may not act as an attorney for another natural person in his or her cause, an unlicensed natural person cannot act for an artificial person, such as a corporation. Id. at 574.[7]

III. Corporations cannot appear in court pro se

While an individual person is allowed to appear pro se, a corporation (although otherwise a “person”) is not. The key case on this point in Kansas is Atchison Homeless Shelters Inc. v. Atchison County. There, a corporation sought to appeal an order of the district court without the assistance of an attorney.

Except for out-of-state attorneys, the Supreme Court recognizes only four categories of individuals who may appear in the courts of this state: (1) members of the bar who have licenses to practice law; (2) individuals who have graduated from an accredited law school and have a temporary permit to practice law; (3) legal interns, who are law students supervised by members of the bar responsible for the interns’ activities; and (4) nonlawyers, who may represent only themselves and not others. State ex rel. Stephan v. Adam, 243 Kan. 619, 623, 760 P.2d 683 (1988); see State ex rel. Stephan v. Williams, 246 Kan. 681, 690-91, 793 P.2d 234 (1990).

This means, therefore, that corporations can only be represented in Kansas courts by an attorney duly licensed to practice law in Kansas.
Kansas follows the common-law rule that an appearance in court of a corporation by an agent other than a licensed attorney is not proper since a corporation is an artificial entity without the right of self-representation. Such a rule helps to maintain a distinction between the corporation and its directors and employees. See 8 A.L.R. 5th 653, § 3. This rule was tacitly acknowledged in dicta in *U.P. Railway Co. v. McCarty*, 8 Kan. 125, 131 (1871), and *U.P.R.W. Co. v. Horney*, 5 Kan. 340, 347 (1870).7

The Court of Appeals dismissed the appeal in *Atchison Homes*, based on its reiteration that Kansas follows the common-law rule that a corporation's appearance in court by an agent other than a licensed attorney is not proper since a corporation is an artificial entity without the right of self-representation.

Describing the *Atchison Homeless Shelters* decision, the Kansas Supreme Court later observed:

Because corporations are statutory entities that can act only through directors, officers, employees, or agents, the long-time Kansas rule has been that a corporation may not appear in court by an agent who is not an attorney. *U.P. Railway Co. v. McCarty*, 8 Kan. 125, 131 (1871); *U.P.R.W. Co. v. Horney*, 5 Kan. 340, 347-48 (1870).

The Court of Appeals more recently applied this rule in *Atchison Homeless Shelters Inc.*, 24 Kan. App. 2d at 455, 946 P.2d 113. There, a corporation sought to appeal an order of the district court without the assistance of an attorney. The Court of Appeals dismissed the case, reasoning that Kansas follows the common-law rule that a corporation's appearance in court by an agent other than a licensed attorney is not proper since a corporation is an artificial entity without the right of self-representation.8

Later authorities support this conclusion.

It has been the longstanding rule in Kansas that a corporation may not appear in court by an agent who is not an attorney. *Atchison Homeless Shelters Inc. v. Atchison County*, 24 Kan. App. 2d 454, 455, 946 P.2d 113, rev. denied, 263 Kan. 885 (1997). Although we recently modified this rule with respect to matters under the Small Claims Procedure Act in *Babe Houser Motor Co. v. Tetreault*, 270 Kan. 502, 503, 14 P.3d 1149 (2000), we reiterated our approval of the Atchison rule in recognizing that a corporation is an artificial entity without right of self-representation, and further pointed out the administration of justice was efficiently furthered by requiring persons licensed to practice law and familiar with court procedures to represent corporations.9

Similarly, in *State ex rel. Stephan v. Williams*, the Kansas Supreme Court held:

In *Clean Air Transport Systems v. San Mateo County Transit Dist.*, 198 Cal. App. 3d 576, 243 Cal. Rptr. 799 (1988), the California court reasoned that “an unincorporated association resembles a corporation more than it does an individual” and thus the rule that a corporation cannot appear in court without a licensed attorney applies to unincorporated associations. 198 Cal. App. 3d at 578-79, 243 Cal. Rptr. 799. In *State v. Settle*, 129 N.H. 171, 523 A.2d 124 (1987), the New Hampshire court determined that a statute authorizing a party to appear “in his proper person” refers to self-representation and does not permit an individual to represent an incorporated or unincorporated association. 129 N.H. at 176, 523 A.2d 124. The court also referred to “centuries of historical precedent” and the “overwhelming weight of authority to this day” establishing that a corporation must be represented by an attorney and determined that the same rules apply to unincorporated associations. 129 N.H. at 176-77, 523 A.2d 124. See also *James D. Pauls Ltd. v. Pauls*, 633 F. Supp. 34 (S.D. Fla. 1986), where the court held that the general partner of three limited partnerships, who was not an attorney, could not represent the partnerships.10

The same is true even if the corporation has a single shareholder.

A corporation is an artificial person created by law. The corporate identity is entirely separate from the identity of its officers and stockholders. A corporation and even its sole owner are two separate and distinct persons. One person may own all the stock of a corporation, and still such individual shareholder and the corporation would, in law, be two separate and distinct persons.11

Kansas federal courts follow the same rule. A non-lawyer cannot represent a corporate entity in the District of Kansas.12

Any attempt by a corporation to appear without a lawyer constitutes the unauthorized practice of law. See D. Kan. R. 83.5.1 (only attorneys admitted to practice before this court may appear and practice in court, but that does not prohibit an individual from appearing personally on his or her own behalf).

Corporations are permitted by statute, however, to appear in small claims court without a lawyer, where no parties – corporate or otherwise – are allowed to appear with counsel. K.S.A. 61-2707(a) provides:

The trial of all actions shall be to the court, and except as provided in K.S.A. 61-2714, and amendments thereto, no party in any such action shall be represented by an attorney prior to judgment. A party may appear by a full-time employee or officer or any person in a representative capacity so long as such person is not an attorney.13

That is an exception to the general rule that corporations cannot appear in court without a lawyer.

Houser contends that, because C.R. Houser is a full-time employee or officer of the corporation, he properly appeared in small claims court on behalf of the corporation. We agree. Such a decision is consistent with the clear majority of other jurisdictions that have consid-
Artificial People

The courts are open to individual natural persons, and an individual has the right to self-representation in those courts, both civil and criminal, i.e., to appear in propia persona.16 “The right to represent oneself in both civil and criminal matters is basic to our system of justice.”17

Moreover, this right is a fundamental one, derived from the Constitution. “Since the [defendants] have a right to their day in court, they must be afforded the right to be heard either pro se or through counsel in a civil action.”18


Of course, the right is not unlimited, and even a pro se litigant must behave with propriety and decorum.

“[T]he fact that one appears pro se is not a license to abuse the process of the court and to use it without restraint as a weapon of harassment and libelous bombardment when it becomes clear that the courts are being used as a vehicle of harassment by a ‘knowableable and articulate experienced pro se litigant’ the issuance of an injunction is warranted.” (Kane v. City of New York, 468 F. Supp. 586, 590-592 (S.D.N.Y. 1979), aff’d, 614 F.2d 1288 (2d Cir. 1979). See also In re Martin-Trigona, 737 F.2d 1254 (2d Cir. 1984), after remand, 592 F. Supp. 1566 (D. Conn. 1984), aff’d, 763 F.2d 140 (2d Cir. 1985), cert. denied, 474 U.S. 1061, 106 S. Ct. 807, 88 L. Ed. 2d 782 (1986).20
Similarly, a pro se party will be held to the same standards as are applied to a party represented by counsel.

One has the right to appear pro se, but when a person chooses to do so, he must be held to the same standard as if he were represented by counsel. He cannot expect the court or the attorneys for other parties to present his case. He cannot be given an advantage by virtue of his pro se appearance, and he cannot be placed at a disadvantage thereby – other than whatever disadvantage results from his decision to proceed without the assistance of counsel. *Stanton v. Chicago, B.&Q.R. Co.*, 25 Wyo. 138, 165 P. 993 (1917), reb. denied, 25 Wyo. 138, 167 P. 709 (1917); *Suchta v. O.K. Rubber Welders Inc.*, Wyo., 386 P.2d 931 (1963). 21

The same rule applies in Kansas. In *Mangiaracina v. Gutierrez*, the court stated the rule for pro se litigants as follows:

A pro se litigant in a civil case is required to follow the same rules of procedure and evidence which are binding upon a litigant who is represented by counsel. Our legal system cannot function on any basis other than equal treatment of all litigants. To have different rules for different classes of litigants is untenable. A party in civil litigation cannot expect the trial judge or an attorney for the other party to advise him or her of the law or court rules, or to see that his or her case is properly presented to the court. A pro se litigant in a civil case cannot be given either an advantage or a disadvantage solely because of proceeding pro se. 11 Kan. App. 2d 594, 595-96, 730 P.2d 1109 (1986). 22

Thus, while an individual natural person has the right to appear in court in both civil and criminal cases, that person will be held to the same standards as are applied to parties represented by counsel. 23

V. Lawyers have a special franchise

By reason of learning, rules of professional conduct, and judicial oversight, lawyers are allowed to appear in court and to represent their clients.

Article 3, Section 1 of the Kansas Constitution provides:

The judicial power of this state shall be vested exclusively in one court of justice, which shall be divided into one supreme court, district courts, and such other courts as are provided by law; and all courts of record shall have a seal. The supreme court shall have general administrative authority over all courts in this state. 24

K.S.A. 7-103 provides:

The supreme court of this state may make such rules as it may deem necessary for the examination of applicants for admission to the bar of this state and for the discipline and disbarment of attorneys. 25

A constitutional mandate vests the Court with the exclusive power to regulate the Bar. Under Article 3, Section 1 the judicial power is vested in a supreme court, district courts, probate courts, justice of the peace, and such other courts, inferior to the supreme court, as may be provided by law. Under that provision of the constitution, the supreme court stands at the head of the judicial department (*Householder v. Morrill*, 55 Kan. 317, 40 P. 664) and is invested with inherent power arising from its creation, or from the fact that it is a court. Inherent power is essential to its being and dignity, and does not require an express grant to confer it (*Petition of Florida State Bar Ass’n*, Fl., 40 So. 2d 902). . . . It is unnecessary here to explore the limits of judicial power conferred by that provision, but suffice it to say the practice of law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to regulate the practice naturally and logically belongs to the judicial department of the government (*In re Integration of Nebraska State Bar Ass’n*, 133 Neb. 283, 275 N.W. 265, 114 A.L.R. 151). Included in that power is the supreme court’s inherent right to prescribe conditions for admission to the Bar, to define, supervise, regulate and control the practice of law, whether in or out of court, and this is so notwithstanding acts of the legislature in the exercise of its police power to protect the public interest and welfare (*People ex rel. Chicago Bar Ass’n v. Goodman*, 366 Ill. 346, 8 N.E.2d 941, 111 A.L.R. 1; *Integration of Bar Case*, 244 Wis. 8, 11 N.W.2d 604, 12 N.W.2d 699, 151 A.L.R. 586; 5 Am. Jur., Attorneys at Law, § 2). It follows that the power of the supreme court to make reasonable rules for those purposes is not open to question (*Peyton’s Appeal*, 12 Kan. 398; *Farlin v. Sook*, 30 Kan. 401, 1 P. 123; *In re Smith*, 73 Kan. 743, 85 P. 584; *In re Wilson*, 79 Kan. 450, 100 P. 75; *In re Gorsuch*, 113 Kan. 380, 214 P. 794; *In re Hanson*, 134 Kan. 165, 5 P.2d 1088; *State ex rel. v. Perkins*, 138 Kan. 899, 8 P.2d 765; *Depew v. Wichita Association of Credit Men*, 142 Kan. 403, 49 P.2d 1041; *State ex rel. Fitzer v. Schmitt*, 174 Kan. 581, 258 P.2d 228; *Taylor v. Taylor, supra*). 26

By reason of the Court’s inherent oversight of the Bar, including over those who are admitted to practice, lawyers are given a special franchise to appear in Court on behalf of their clients, where they are expected to know and follow the applicable rules. 27

VI. Conclusion

Lawyers are given this special franchise to appear in Kansas Courts, by reason of their education, standards of character and fitness, examination, and standards of ethics and professional conduct. Those distinctions from ordinary citizens authorize lawyers to represent and appear for others in court. Non-lawyers do not necessarily meet the same standards, and are not subject to the same regulations. Thus, when non-lawyers appear in court, they necessarily impose burdens on the court and on opposing counsel by their lack of familiarity with the court’s rules and procedures.
And when an individual attempts to appear in Court on behalf of a corporation or limited liability company, i.e., on behalf of others, that individual – unconstrained and unlettered in the court’s rules of professional conduct and rules of procedure – may well depart from those rules (knowingly or unknowingly). Thus, there is a public policy reason for forbidding corporations from appearing in Kansas courts without a lawyer.

Those public policy reasons were examined in the Wisconsin case of Dutch Village Mall LLC v. Pelletti, where an LLC with a single member attempted to appear in court by that member. First, the court stated that allowing nonlawyers to conduct litigation creates burdens for other parties and for the court, resulting in:

- poorly drafted pleadings,
- inadequate presentations of motions,
- proceedings that are unduly prolonged and numerous, and
- the absence of any ethical responsibilities.

Second, the court in Dutch Village Mall was troubled by the inconsistency between disregarding the entity for the member’s convenience (i.e., avoiding the need for a lawyer to represent it in court), and respecting the entity’s separate existence for other issues (i.e., the LLC’s shield from personal liability for its members). If the defendant successfully counterclaims against the LLC, one posits that the LLC’s members would likely be unwilling to disregard the LLC’s status and to accept personal liability.

Thus, despite imposing on corporations the burden of hiring a lawyer each time they appear in court, there are substantial reasons and justifications for the rule that a corporation cannot appear in court without a lawyer.

About the Author

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

J. Nick Badgerow

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ENDNOTES


4. 476 S.W.2d 177, 179 (Ky. 1972), rev’d on other grounds, Burgard v. Burgard, 827 N.W.2d 1 (N.D. 2013).


7. Id.


9. In re Arnold, 274 Kan. 761, 766, 56 P.3d 259 (2002); see also Depew v. Wichita Retail Credit Ass’n, 141 Kan. 481, 42 P.2d 214 (1935) (injunction is the proper remedy to prevent a corporation from practicing law).


24. Kansas Const. art. 3, § 1.

25. One may question the relevance, propriety, or even the constitutionality of this act, given the exclusive jurisdiction vested in the courts. Kansas Const. art. 3, § 1.


27. Rule 1.1, Kansas Rules of Professional Conduct, Rule 226, Rules of the Kansas Supreme Court.

28. Rule 706, Rules of the Kansas Supreme Court.

29. Id., Rule 707.

30. Id., Rule 709.

31. Id., Rule 226.


33. Id. at 538, citing Jones v. Niagara Frontier Transp. Auth., 722 F.2d 20, 22 (2d Cir. 1983) (“The lay litigant frequently brings pleadings that are awkwardly drafted, motions that are inarticularly presented, proceedings that are needlessly multiplicative. In addition to lacking the professional skills of a lawyer, the lay litigant lacks many of the attorney’s ethical responsibilities.”).

34. Id.
ATTORNEY DISCIPLINE

DISBARMENT
IN RE ROBERT L. BEZEK JR.
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 12,691 – JUNE 30, 2015


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

CIVIL

ADVERSE POSSESSION
RUHLAND V. ELLIOTT ET AL.
CLOUD DISTRICT COURT – REVERSED ON ISSUE SUBJECT TO REVIEW
COURT OF APPEALS – AFFIRMED ON ISSUE SUBJECT TO REVIEW

FACTS: This case arises from a dispute over the ownership of a 5.5-acre tract of real estate in Cloud County. The district court determined that Keith Elliott, who had at one time deeded away the land to his then-wife’s daughter (Ruhland), had regained possession of the disputed tract through adverse possession. The Court of Appeals reversed on the grounds that Keith had only permissively occupied the disputed tract after he deeded it to Ruhland, a fact that defeated any adverse possession claim by Keith or his heirs. Ruhland v. Elliott, 2013 WL 4046605 (Kan. App. 2013).

ISSUE: Adverse possession

HELD: Court held Suzann Elliott, Keith’s heir, failed to rebut the presumption of temporary possession because she pointed to no evidence that Keith explicitly renounced Ruhland’s title by affirmatively asserting a hostile claim of title in himself and bringing this assertion to Ruhland’s attention. Thus, Suzann provided no evidence “operating to convert what appeared to be a subservient and permissive possession into a hostile and adverse one.” Court concluded that Keith’s possession was permissive. Suzann cannot prove the material element of adversity by clear and positive proof, which defeats her claim of adverse possession.

STATUTES: K.S.A. 20-3018; and K.S.A. 60-211, -503, -2101

CHILD SUPPORT AND POST-JUDGMENT INTEREST
CAIN V. JACOX
RILEY DISTRICT COURT – REVERSED
COURT OF APPEALS – REVERSED
NO. 109,079 – JULY 24, 2015

FACTS: Cain appealed from the denial of her motion to recover post-judgment interest on unpaid child support judgments from Jacox after a Kansas child support order had been registered in Texas. The district court denied the motion holding that the doctrine of res judicata barred Cain’s claim. The Court of Appeals affirmed.

ISSUES: (1) Child support and (2) post-judgment interest

HELD: Court held that because the post-judgment interest due and owing on the child support arrearages had never been reduced to an amount certain by the Riley County District Court, SRS was legally unable to pursue the recovery of that amount in Texas during the enforcement proceeding pursuant to UIFSA. And because the substance of the Texas attorney general’s claim in the Texas court was limited by the recovery sought by SRS, the Texas attorney general had no interest or stake in recovering or enforcing any post-judgment interest amounts owed under Kansas law. Court held that Cain, on the other hand, clearly did have such a stake. Given this, Court concluded that Cain and the Texas attorney general did not share an interest that was “really and substantially” the same. There was no privity and the “same party” element of the res judicata test was not met. Court reversed and remanded for further proceedings.

STATUTES: K.S.A. 16-204; K.S.A. 23-2216; and K.S.A. 60-2101
FACTS: On April 17, 2010, a law enforcement officer stopped Dumler for committing a traffic violation, which led to his arrest for driving under the influence (DUI). The officer transported Dumler to the sheriff’s office and provided Dumler with the implied consent notices before requesting that he submit to a breath alcohol test. One of the implied consent notices informed Dumler that he had the right, after the completion of testing, to consult with an attorney and secure additional testing. The officer also read Dumler his Miranda rights, which, of course, include the right to an attorney. Even though Dumler made repeated requests to confer with an attorney before testing, the arresting officer acknowledged that he never gave Dumler an opportunity to confer with an attorney. Dumler did not repeat his request for an attorney or request additional testing after his breath test failure. The arresting officer provided Dumler with an officer’s certification and notice of suspension of driving privileges and apparently placed him in a holding cell, where he remained for an hour or so before posting bond and being released. The Kansas Department of Revenue (KDR) suspended Dumler’s license. Both the district court and the Court of Appeals majority affirmed the KDR’s license suspension based on the timing of Dumler’s requests to consult with an attorney. Because Dumler did not ask to consult with an attorney after he failed the breath test, he had not invoked his statutory right to an attorney and, accordingly, that right was not violated. Judge Atcheson concurred.

ISSUES: (1) DUI and (2) right to attorney

HELD: Court held there is no bright-line rule requiring a person to invoke his or her statutory right to counsel after the completion of breath or blood alcohol testing, so long as the request pertained to post-testing consultation. Court stated that rather than focusing on the subject matter of the desired consultation, the district court should have determined whether Dumler was requesting a post-testing consultation. Court stated that a person has no right to consult with counsel before deciding whether to take the requested alcohol testing. But after the test, a person has the unrestricted right to consult with an attorney. Given that the district court apparently applied an incorrect legal standard on the question of whether Dumler’s post-testing right to counsel was violated, a remand would be in order. Upon remand, the district court shall determine whether Dumler was invoking the right to consult with an attorney after testing that the arresting officer specifically advised him that he possessed. Court held that if Dumler made such an invocation, then suppression of the alcohol testing result would be the proper remedy.

STATUTES: K.S.A. 8-1001, -1004, -1012, -1020; and K.S.A. 1001
ISSUE: Royalty obligation and allocation of expenses under marketable condition rule.

FACTS: Plaintiff class of mineral rights owners (Fawcett) claimed underpayment of royalties under oil and gas leases entered into between 1944 and 1991. At issue was whether the lessee-operator, OPIK, may take into account deductions and adjustments identified in third-party purchase agreements when calculating royalties. Plaintiffs claimed OPIK was responsible for costs incurred by third parties processing the natural gas before entering the interstate pipeline. OPIK and amici argued the formula-based purchase agreements were structured to allow OPIK and royalty owners to jointly share expenses involved in securing higher “downstream” market values as gas gets closer to consumer. District court granted summary judgment to the class for as-yet undetermined amount of unpaid royalties, reasoning OPIK owed Fawcett a duty to make gas marketable free of cost and OPIK could not avoid responsibility for those costs by contracting with a third party to incur them. Court of Appeals granted interlocutory review and affirmed, finding royalty must be paid on pre-deduction contract prices (OPIK’s “gross proceeds”). 49 Kan. App. 2d 194 (2013). Review granted on issue of whether costs and adjustments taken by third-party purchasers are shared. Court of Appeals was reversed, and district court’s judgment on issue subject to review was reversed and remanded.

STATUTES: K.S.A. 20-3018(b); and K.S.A. 60-2101(b), -2102(c)

Criminal

STATE V. BARBER

CHEROKEE DISTRICT COURT – AFFIRMED

COURT OF APPEALS – AFFIRMED

NO. 106,911 – JULY 10, 2015

FACTS: Barber was convicted of aggravated battery and child abuse involving his 2-month-old daughter for injuries consistent with shaken baby syndrome. The Court of Appeals affirmed Barber’s convictions and sentences.

Appellate Practice Reminders . . .

From the Appellate Court Clerk’s Office

Appellate Practice Resources

Appellate practice can be daunting and is different from practice at the trial court level. However, there are numerous resources to assist the appellate practitioner. Two of these resources will be detailed below.

Make sure you have the latest edition of the Rules Adopted by the Supreme Court of the State of Kansas, commonly known as the “Blue Book.” It is available for purchase from the Kansas Supreme Court Law Library. The current price is $25.

On the Kansas Supreme Court website, www.kscourts.org, the Kansas Appellate Practice Handbook can be found. This handbook is located under the Appellate Clerk tab as Appellate Handbook. Here is the direct link: http://www.kscourts.org/appellate-clerk/appellate-handbook/chapters.asp.

This handbook contains numerous practice tips, is easy to read, and Chapter 12 is a great source for appellate forms.

Requesting Additional Pages for Briefing

It is important to give yourself plenty of time if you expect to request additional pages for your brief. The motion to exceed a page limitation must be filed prior to submission of the brief. Further, the motion must include a specific total page request; in other words, the motion cannot merely request more pages. See Rule 6.07(e) [2014 Kan. Ct. R. Annot. 51]. A best practice is to review your brief in draft form to see if it will exceed the page limitation. If so, tender a motion that indicates the specific number of additional pages needed. If the motion is granted, the motion will set a new brief due date.

For further information, call the Clerk’s Office at (785) 296-3229 and ask to speak with Heather L. Smith, Clerk of the Appellate Courts, or Jason Oldham, Chief Deputy Clerk of the Appellate Courts.
ISSUES: (1) Admission of evidence, (2) jury instructions, (3) prosecutorial misconduct, (4) acceptance of verdict, (5) cumulative error, and (6) criminal history

HELD: Court affirmed by concluding: (1) the trial court properly admitted testimony under K.S.A. 2010 Supp. 60-455 of prior instances when Barber had shaken daughter; (2) the trial court did not err in giving a jury instruction that limited the jury’s consideration of evidence admitted under K.S.A. 2010 Supp. 60-455; (3) the prosecutor committed misconduct during her closing arguments but the error did not affect the jury’s verdict; (4) Barber failed to preserve his claim that the trial court improperly accepted the jury’s verdict under K.S.A. 22-3421; (5) there was no cumulative error in this case; and (6) Barber’s criminal history score did not need to be proven to a jury in order for it to affect his sentence.

DISSENT: Justice Luckert dissented and would find the trial court erred in instructing the jury how it could consider prior evidence of shaken baby syndrome.

STATUTES: K.S.A. 60-404, 455; K.S.A. 21-3414, -3609; and K.S.A. 22-3421

STATE V. COX
RENO DISTRICT COURT – AFFIRMED
NO. 112,387 – JULY 8, 2015 (MOTION TO PUBLISH, OPINION FILED APRIL 10, 2015)

FACTS: The state appealed the district court’s decision granting Cox’s motion to suppress evidence. Prior to trial, Cox moved to suppress all evidence stemming from a law enforcement officer’s search of her bag found in her friend’s car when she was not there. Cox had been charged with multiple drug felonies. The state challenges Cox’s standing to contest the search, that the officer had implied consent to search the bag based on the totality of the circumstances, and the district court erred in applying the exclusionary rule because the officer acted in good faith in searching Cox’s bag.

ISSUES: (1) Search and seizure and (2) motion to suppress

HELD: Court held Cox clearly maintained a legitimate expectation of privacy in the bag she readily identified as her own. Thus, Cox had standing to contest the search of the bag. Next, the Court held the record lacked any indication that Cox’s consent to the search of her bag was unequivocal, specific, and freely given. Because it cannot fairly be said that Cox consented to the search of her bag, the district court did not err in suppressing the evidence found in the bag. Last, the Court stated this was not a case where the officer was relying in good faith on a search warrant later found to be invalid or on a statute later declared unconstitutional. Although the officer’s motivation for opening Cox’s bag may have been benign, the fact remains that he violated Cox’s constitutional rights by searching her bag without a warrant and without her consent. This case presents a situation when the exclusionary rule should be applied in order to deter officers from making the same type of mistake in the future. Thus, the district court correctly applied the exclusionary rule to suppress the evidence found in the bag. All the evidence stemming from the search of the bag was properly suppressed as fruit of the initial illegal search.

DISSENT: Judge Pierron dissented and would hold that the officer’s actions were reasonable and that no violation of the Fourth Amendment occurred. Judge Pierron stated there was no reason to apply the exclusionary rule.

STATUTE: K.S.A. 8-1001

STATE V. REED
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 107,957 – JULY 10, 2015

FACTS: Reed was convicted of first-degree felony murder arising from shooting death of victim. Prison terms were imposed during sentencing, but district judge allowed defense more time to address restitution. While restitution still pending, Reed filed notice of appeal. (1) State argued appeal was premature because restitution issue still open. Reed claimed: (2) district court erred in failing to instruct jury that it must make specific finding that underlying felony of aggravated battery was distinct from the homicide to avoid merger of the two offenses; (3) insufficient evidence that underlying crimes of aggravated battery and possession of cocaine did not merge; (4) district court should have instructed on second-degree unintentional murder and involuntary manslaughter as lesser included offenses of felony murder; (5) district court erred in refusing to give requested voluntary intoxication instruction; (6) district court erred in admitting hearsay evidence of victim as dying declaration or excited utterances, and violated Confrontation Clause; and (7) cumulative error denied him a fair trial.

ISSUES: (1) Appellate jurisdiction, (2) merger of aggravated battery and felony murder, (3) sufficiency of evidence for alternative means, (4) lesser included offense instruction, (5) voluntary intoxication instruction, (6) admission of victim’s out-of-court statements, and (7) cumulative error


Reed’s instruction-based challenge lacked merit. No Kansas case demonstrates that question of whether predicate felony is distinct from homicide is question of fact for jury rather than question of law. Court does not reach merit, as matter of law, whether aggravated battery in this case was so distinct from homicide alleged as to not be an ingredient of the homicide, but under facts of case, notes that Reed’s shooting of victim was unquestionably distinct from the beating.

Reed failed to challenge sufficiency of evidence in support of his alternative underlying felony argument. Issue is deemed waived or abandoned.

Reed’s lesser included offenses claim was defeated by State v. Todd, 299 Kan. 263 (2014), finding that amendment of felony-murder statute to eliminate lesser included offenses applied retroactively.

Voluntary intoxication instruction was not supported by evidence that established only mere consumption of alcohol by Reed and codefendant.

Reed’s trio of appellate hearsay arguments were preserved for appellate review. On record, district judge’s decision to allow testimony about victim’s out-of-court statements as dying declarations was not arbitrary, fanciful, or unreasonable.

No need to discuss Reed’s argument regarding Confrontation Clause or Kansas statute on excited utterances.

The cumulative error doctrine does not apply when multiple errors have not been identified.
STATE V. SWINT
FORD DISTRICT COURT – AFFIRMED IN PART AND VACATED IN PART
COURT OF APPEALS – AFFIRMED
NO. 107,516 – JULY 2, 2015

FACTS: Swint was convicted of aggravated indecent liberties with a child and attempted aggravated indecent liberties with a child. For the aggravated indecent liberties conviction, life prison term without possibility of parole for 25 years was imposed and lifetime post-release supervision. Concurrent 155-month imprisonment and lifetime post-release supervision imposed for attempted aggravated indecent liberties conviction. In unpublished opinion, Court of Appeals vacated the lifetime post-release supervision, but affirmed the convictions and remaining sentence, finding in part that Swint failed to preserve claim related to victim’s admitting lying about her allegations against Swint, that Swint failed to make adequate proffer of the excluded evidence, and that his appellate arguments relating to admissibility of the evidence were different from those raised in district court. On appeal, Swint claimed: (1) district court erred by excluding evidence that victim allegedly admitted lying about her allegations against Swint and had asked a cousin to fabricate other claims that Swint had sexually abused the cousin; (2) state failed to present evidence supporting both alternative means of committing aggravated indecent liberties; (3) prosecutorial misconduct during closing argument denied Swint a fair trial; and (4) the hard 25 sentence was cruel and unusual punishment under Kansas and U.S. constitutions. Court of Appeals affirmed.

ISSUES: (1) Excluded evidence, (2) alternative means, (3) prosecutorial misconduct, and (4) cruel and unusual punishment

HELD: Issue of victim’s alleged prior inconsistent statement was not preserved for appeal. Swint adequately proffered evidence about victim asking a cousin to lie, but failed to identify error in panel’s finding that Swint abandoned arguments made to district court, and in panel’s refusal to consider Confrontation Clause issue for first time on appeal.


Prosecutor made one comment that improperly bolstered victim’s credibility and appealed to jurors’ sympathy, and prosecutor violated longstanding rule against appealing to jurors’ sympathies. Given direct evidence supporting jury’s guilty verdicts, lack of prosecutorial ill will, and misconduct’s brevity, the panel’s finding of harmless error was affirmed.

Applying three-part test in State v. Freeman, 223 Kan. 362 (1978), Swint’s hard 25 sentence did not violate Section 9 of Kansas Bill of Rights or Eighth Amendment of U.S. Constitution. Contrary to panel’s finding that Swint waived or abandoned Eighth Amendment proportionality claim, the issue was adequately presented for appellate review.

STATE V. THOMAS
JOHNSON DISTRICT COURT – AFFIRMED
NO. 110,585 – JULY 24, 2015

FACTS: Jury unanimously found Thomas guilty of aggravated robbery and first-degree murder, but verdict form indicated they were unable to reach a unanimous verdict on either a theory of felony murder or a theory of premeditated murder. On appeal Thomas claimed: (1) district court erred in instructing jury it could convict on first-degree murder based on combined theories of premeditated and felony murder; (2) prosecutor’s election in closing argument to rely solely on felony-murder theory foreclosed jury’s reliance on a combined theory, and legally nullified the first-degree murder conviction; and (3) district court erred in refusing to suppress items seized pursuant to invalid search warrant obtained with statements made by Thomas in violation of his Miranda rights.

ISSUES: (1) First-degree murder jury instructions, (2) functional election of alternative means, and (3) motion to suppress

HELD: Thomas’ argument that the two theories of premeditated and felony murder should have been considered separate and distinct crimes was defeated by plain-language of first-degree murder statute, longstanding precedent, and the evidence. District court’s instruction and verdict form in this case were legally and factually appropriate.

During closing argument a prosecutor cannot, as a matter of law, functionally elect to have the jury ignore a legal theory which the court has instructed the jury that it may use to convict the defendant on the charged crime. Jury was not precluded from convicting Thomas of first-degree murder based on both alternative means of felony and premeditated murder.

District court’s denial of motion to suppress was affirmed. Under facts of case, the affidavit contained sufficient evidence to support a finding of probable cause, even without Thomas’ un-Mirandized statements. Court does not decide impact of United States v. Patane, 542 U.S. 630 (2004), on this case because if there was any Fifth Amendment violation in the use of an un-Mirandized statement in a search warrant affidavit, the error was harmless.

STATUTES: K.S.A. 2014 Supp. 21-5402(d); K.S.A. 21-3401, -3402, -3421, -3423(1)(d), -3436; and K.S.A. 22-3414(3), -3414(4)
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COURT OF APPEALS

CIVIL

HABEAS CORPUS
IN RE TREATMENT OF ELLISON
SEDGWICK DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 112,256 – JULY 24, 2015

FACTS: In June 2009 the state petitioned for Ellison’s involuntary commitment under the Kansas Sexually Violent Predator Act (KSVPA). District court dismissed the case in March 2014 and ordered Ellison’s release, finding Ellison’s four year stay in jail awaiting trial violated his constitutional right to a timely adjudication of the state’s petition. State appealed.

ISSUE: Unconstitutional delay in adjudication and commitment under KSVPA

HELD: Ellison was constitutionally entitled to a timely adjudication of the state’s petition. The multi-factor test in Barker v. Wingo, 407 U.S. 514 (1972), provides an appropriate model for measuring the procedural due process right to a timely adjudication of a civil commitment petition under KSVPA. Here, district court did not render adequate findings to support its determination that Ellison was deprived a due process right to timely adjudication of the petition. There is no dispute the delay was presumptively prejudicial, which satisfied the gatekeeping requirement under Barker factors. District court erred in treating presumptive prejudice alone as a legally sufficient ground to grant relief. Reversed and remanded for more specific findings tailored to the Barker considerations. Comments on application of the Barker factors on remand were provided.

STATUTES: K.S.A. 2014 Supp. 59-29a02(a), -29a04, -29a06, -29a06(a), -29a06(f); K.S.A. 59-20a01 et seq., -29a03; and K.S.A. 60-1501

HABEAS CORPUS – POST-CONVICTION RELIEF
MANCO V. STATE
GEARY DISTRICT COURT – AFFIRMED
NO. 112,194 – JULY 10, 2015

FACTS: Manco was convicted in 1992 of indecent liberties with a child and aggravated criminal sodomy. Some 20 years later he filed a third K.S.A. 60-1507 motion concerning victim’s recantation and trial counsel’s ineffectiveness in switching trial strategies without notice to Manco. District court denied the motion as successive and untimely. On appeal Manco claimed the restrictions in K.S.A. 60-1507(c) and (f) impose unconstitutional limitations on K.S.A. 60-1507 motions for a writ of habeas corpus.

ISSUE: Constitutionality of K.S.A. 60-1507(c) and (f)

HELD: Manco’s constitutional claims fail. K.S.A. 60-1507(c) and (f) do not suspend a prisoner’s right to seek habeas corpus relief, but instead are reasonable limitations to stop abuse of the remedy. Manco made no argument or showing of exceptional circumstances to allow a successive motion for habeas corpus relief under K.S.A. 60-1507(c) and Supreme Court Rule 183(c)(3). Nor did he present any evidence that manifest injustice would result from application of time limitation in K.S.A. 60-1507(f).

STATUTE: K.S.A. 60-1507, -1507(a), -1507(c), -1507(f), -1507(f)(2)

MUNICIPALITIES – TAXATION – HOME RULE
HEARTLAND APARTMENT ASS’N V. CITY OF MISSION
JOHNSON DISTRICT COURT – REVERSED AND REMANDED
NO. 111,521 – JULY 2, 2015

FACTS: The city of Mission collects a transportation user fee on all improved real estate, using it for public street maintenance. Fee is billed and collected with annual Johnson County ad valorem property taxes. For unpaid amounts, city can charge late fees and place lien on real estate. Only real property exempt from all property or ad valorem taxes under K.S.A. 79-201 is exempt from paying the fee. Two non-profit landowner associations challenged legality of the fee. District court granted summary judgment to city, concluding that while the transportation user fee is a tax lawfully adopted through ordinary ordinance under city’s home rule powers, it is not an excise tax prohibited under K.S.A. 12-194. Heartland appealed, contending the fee is an illegal excise tax. The city cross-appealed, ruling that the fee is a tax.

ISSUES: (1) Tax or fee and (2) home rule authority

HELD: Cases from other jurisdictions considered by the district court shed little light on this dispute. Applying the definition of “tax” and “fee” in Executive Aircraft Consulting Inc. v. City of Newton, 252 Kan. 421 (1993), the transportation user fee is a tax. It is an annual forced contribution from all improved real estate owners that is used for the maintenance of a governmental service available to the general public. Mandatory stormwater and sewer fees were distinguished from this transportation user fee. Court declined city’s invitation to create a hybrid involuntary fee.

Home rule authority in Kansas was reviewed. Statutes dealing with prohibition of municipal excise taxes before and after 2006 amendments were examined. Ruling on that point in Callaway v. City of Overland Park, 211 Kan. 646 (1973),
is no longer controlling. With broader prohibition of excise taxes now in effect, it is clear beyond a substantial doubt the transportation user fee is an excise tax or a tax in the nature of an excise and the city exceeded its home rule authority. The transportation user fee enacted by city of Mission is an excise tax banned by law and is therefore void.

STATUTES: K.S.A. 12-137, -194, -808, -1394, -3104; K.S.A. 79-201; and K.S.A. 1971 Supp. 79-4424, -4424(a)

CRIMINAL

STATE V. BERNEY
SEDGWICK DISTRICT COURT – REVERSED
AND REMANDED
NO. 111,407 – JULY 10, 2015

FACTS: Berney was convicted of theft after two or more prior convictions. He claimed he took tip jar with consent of bartender who wanted to pay Berney for drugs using those funds. Bartender disputed that claim. During trial, detective stated he found Berney’s photo for lineup from Berney’s mug shot. On appeal Berney claimed clear error in district court’s failure to instruct jury that evidence of where the detective got Berney’s photo. Berney also claimed district court erred in not granting Berney’s request, made shortly before trial, for appointment of new counsel.

ISSUES: (1) Clear error in jury instructions and (2) appointment of new counsel

HELD: Evidence before the jury presented a credibility contest between testimony of Berney and that of victim, and no strong evidence other than victim’s testimony undermined Berney’s version of events. On facts of this case, where state presented evidence that Berney had previously been arrested, district court’s failure to give a limiting instruction was clear error.

The district court made appropriate inquiry into Berney’s request for new counsel, and addressed each of Berney’s concerns. There was no abuse of discretion in denying Berney’s request.

CONCURRING (Leben, J.): Wrote separately to explain his understanding, based on State v. Trujillo, 296 Kan. 625 (2013), that State v. Williams, 295 Kan. 506 (2012), did not substantially change the Kansas test applicable in determining whether there was clear error in jury instructions. Under the test applied in federal courts, Judge Leben would also find plain error in this case.


STATE V. LAPointe
JOHNSON DISTRICT COURT – DISMISSED
NO. 112,019 – JULY 17, 2015

FACTS: LaPointe was convicted in 2004 of aggravated robbery and aggravated assault. Given LaPointe’s criminal history, 245-month sentence was imposed. In 2014 LaPointe filed a motion for DNA testing. District court granted the motion, based on the equal protection ruling in State v. Cheeks, 298 Kan. 1 (2013). State appealed as a matter of right on a question reserved.

While appeal was pending, DNA test results proved favorable to LaPointe, but the district court refused to grant a new
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trial or other relief to LaPointe. District court determined the post-conviction DNA evidence was not so important to the case that there was a reasonable probability that the new evidence would result in a different outcome at trial or sentencing. LaPointe’s separate appeal from that decision was separately docketed and was not pending before this panel.

ISSUE: Jurisdiction for state's appeal

HELD: Question-reserved appeal is only available after a final judgment. When district court grants motion for DNA testing under K.S.A. 2014 Supp. 21-2512, statute provides for additional proceedings in district court if DNA testing is favorable to the defendant. One possible outcome is an order for a new trial, which is neither a final order nor an appealable nonfinal order. Neither the statute providing for state appeals as matter of right, K.S.A. 2014 Supp. 22-3602(b), nor statute providing for interlocutory appeals by the state, K.S.A. 2014 Supp. 22-3603, provides jurisdiction for this appeal. Appeal was dismissed.


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