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The Journal of the Kansas Bar Association

2015-16
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2015-16
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KBA Officers & Board of Governors Elections

It's not too early to start thinking about KBA leadership positions for the 2016-17 leadership year.

The KBA Nominating Committee, chaired by Gerald L. Green, of Hutchinson, is seeking individuals who are interested in serving in the positions of Vice President, Secretary-Treasurer, and KBA Delegate to the ABA House of Delegates.

Officers

- **President:** Natalie G. Haag, 2015-16; Stephen N. Six, 2016-17
- **President-elect:** Stephen N. Six, 2015-16; Gregory P. Goheen, 2016-17
- **Vice President:** Gregory P. Goheen, 2015-16; Bruce W. Kent, 2016-17
- **Secretary-Treasurer:** Bruce W. Kent, 2015-16; open
- **KBA Delegate to the ABA House of Delegates:** Linda S. Parks; open

Interested candidates should send detailed information to Jordan Yochim, KBA Executive Director, at 1200 SW Harrison St., Topeka, KS 66612-1806, or at jeyochim@ksbar.org by **Friday, January 15**, for distribution to the Nominating Committee. Candidates seeking an officer position may be nominated by petition bearing 50 signatures of regular members of the KBA, with at least one signature from each governor district.

Board of Governors

Candidates seeking a position on the Board of Governors must file a nominating petition, signed by at least 25 KBA members from that district, with Jordan Yochim by **Friday, February 19**. If no one files a petition, the Nominating Committee will reconvene and nominate one or more candidates for open positions. The five KBA districts with seats up for election in 2016 are:

- **District 1:** Incumbent Christi L. Bright **is** eligible for re-election. Johnson County.
- **District 2:** Incumbent Hon. Sally D. Pokorny **is** eligible for re-election. Atchison, Brown, Doniphan, Douglas, Franklin, Jackson, Jefferson, Leavenworth, Miami, Nemaha, Osage, Pottawatomie, and Wabaunsee counties.
- **District 5:** Incumbent Dennis D. Depew **is not** eligible for re-election. Shawnee County.
- **District 7:** Incumbent J. Michael Kennalley **is not** eligible for re-election. Sedgwick County.
- **District 9:** Incumbent David J. Rebein **is not** eligible for re-election. Clark, Comanche, Edwards, Finney, Ford, Grant, Gray, Greeley, Hamilton, Haskell, Hodgeman, Kearny, Kiowa, Lane, Meade, Morton, Ness, Pawnee, Rush, Scott, Seward, Stanton, Stevens, and Wichita counties.

- **Young Lawyer Delegate to ABA:** Term expires in 2017.

*A new Governors seat created by the growth in membership in District 5.*
Kansas Lawyers Rock

As the KBA president I have been provided the opportunity to visit local bar associations and other sister bars the past few months. What a great opportunity! Kansas lawyers are working hard for clients, donating time and money to good causes while still finding some time to enjoy friends and family.

Johnson County Bar Association

Have you attended a Johnson County Bar Association meeting lately? You might want to wear a helmet if your experience mirrors mine. As the photographs document, there were some inside golf shots taken during the meeting as a promotion for a bar-sponsored fundraising activity. I was close enough to the golfers to avoid a direct hit but those who elected to sit at the back of the room weren’t as lucky. Ron Nelson was present for a special shout out for his assistance to the KBA on drafting legislation and educating legislators. As always, catching up with friends and meeting new ones made my day and I got a free lunch in the process!

Southwest Kansas Bar Association

If you haven’t visited Dodge City to attend the Southwest Kansas Bar Association annual meeting, I recommend you consider doing so. The firm of Rebein Bangerter Rebein P.A. was a wonderful host to the speakers and special guest. The event kicked off with a delicious spread of food at the Boot Hill Saloon, including a chance for some of the more urban folks to expand their palates and taste some calf fries. Dinner, of course, led to dancing with entertainment by Chief Judge Marten’s band. No, this wasn’t a black tie kind of event. Cowboy boots and hats were the norm, so it was easy to relax and feel right at home. As you might guess, Chief Justice Nuss fit right in! A full day of CLE followed the fun. It is great to see how communities, like Dodge City, are using old buildings for new purposes. The train depot station was a great location for the presentations. David Rebein engaged Justice Caleb Stegall in an enlightening interview about his background and work on the Supreme Court. All the details for this event were fabulous, even down to the cookies that looked just like Chief Justice Lawton Nuss and Judge J. Thomas Marten. Even though I swore I wasn’t going to be like my kids and take photos of my food … these cookies were photo worthy. Congratulations to the newly elected officers and award winners.

Wichita Bar Association

Wichita held its annual Judges Day at the end of September. Somehow, I always manage to miss the biking, running, and golfing activities while making it to the eating and drinking portions of the day. Oh well, life is hard. This was another good night of catching up with friends. WBA President Holly Dyer passed out awards for the events earlier in the day and we all enjoyed anniversary cake.

Lawyers Invest in Our Community

Dupree & Dupree hosted and participated in October 2015: The Law Unpeeled – an open legal forum for the Wyandotte County community. In additional to getting some general education on particular legal topics, event participants are able to consult for 15 minutes, free of charge with a licensed attorney. Just one of the many examples of lawyers giving back.

Supreme Court in Garden City

If you missed the opportunity to see the Kansas Supreme Court in Garden City, you should read the press coverage. What a wonderful opportunity for Kansans to learn more about the third branch of government!

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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Dealing with the political views in the workplace

We’ve likely all dealt with it, office banter, chatter at the water cooler, whatever you may call it, it’s present in many, if not all places of employment. People talk at work about lots of things – family, vacation plans, what happened on the last episode of their favorite show. Many of those things are quite mundane, but what happens when that simple chatter becomes more than that, when people become offended, when office moral suffers?

We see this many times in the form of conversations concerning political viewpoints. My grandfather used to always say that his views, and who he voted for, were his business, and discussing those views was a sure-fire way to lose friends and start fights. However in this day, with social media, blogs, and the ability to comment on news stories, anyone with a computer can become an anonymous political commentator. This can and many times does flow into the workplace as well. It so happens we are knee-deep in a rather divisive political time, so we need to recognize when this can become an issue in the workplace, and more importantly how to deal with it.

Political speech is one of the most hotly contested and protected forms of speech. We have a right to voice our opinions, but do we have the right to be free from consequences when problems arise because of the manner and place in which we express those views?

Forbes magazine previously ran an article addressing this issue with an interesting example:

Shortly after Missouri Rep. Todd Akin made his combustible comments about how women subject to “legitimate rape” were unlikely to get pregnant, a couple of office workers at a large energy company got into a heated discussion about whether Rep. Akin’s views had any merit. The two disagreed so vehemently, they nearly came to blows. Alarmed about the disruption, the employer called Steven Hurd, a partner at the New York law firm Proskauer in its labor and employment law department. Could the company fire the employees, or was their political discussion protected by the First Amendment’s guarantee of freedom of expression?

Hurd’s response: the employer had the right to fire the disruptive employees. In fact, Hurd urged the firm to let the workers go, because their loud argument could cause another kind of legal problem: A female employee sensitive about sex discrimination could feel that a supervisor who agreed with Rep. Akin was hostile to women, which could open up the employer to a hostile work environment sex discrimination suit. In addition, the employer had a written policy that explicitly discouraged discussions of flammable political topics like abortion. The employer promptly terminated both employees.

But what about free speech? While our right to free speech does allow us to speak our minds, it does not allow us to be free from consequences of that speech. Private employers, it seems, get more leeway in this regard than public employers. Private employers can create policies that limit or abolish political speech, because such speech can interfere with the workplace and lead to a hostile work environment. Public employers do not have as much freedom in that regard. Public employees being employees of the government have more protections against the limiting or abolishing of political speech. In the same Forbes article, the author quoted a statistic regarding political speech policies of private employers, “during the last presidential election, a quarter of employers had a written policy on political activities, some of which include restrictions on political chatter at work. Another 20% had unwritten policies and about 5% of organizations with a policy said they meted out discipline for noncompliance within the year leading up to the survey.”

So what do you do if this has become an issue? If you have no policy addressing it, perhaps you should make it clear that even if such views are allowed in the workplace they cannot, and will not, be allowed to interfere with work or morale in the office. Be aware if such things are happening. While a supervisor might be free to voice a controversial view on women’s rights for example, he will not be free from repercussions if that view gives rise to a claim of sexual discrimination in the future, or a view on immigration results in a racial discrimination charge. Be smart about what you say; know when and where is appropriate to voice your views. Many times the workplace is not the best setting. Be respectful of others’ views, and hopefully they will be respectful of yours.

About the YLS President

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

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Footnote

I was shocked to find out recently that two of my colleagues have changed the correct pronunciation of their given names, because of their Indian origins. It wasn’t for the benefit of their judge; in fact, their judge had gone out of his way to politely ask the correct pronunciation of their names so that he could ensure that he wasn’t misrepresenting them to the jury and the court. “Why not have people call you by the correct pronunciation of your name?” I asked. Their responses were the same: “I want to appear less foreign in front of the jury. The way you thought my name was pronounced is what I consider to be the ‘Americanized’ version of how it appears to read. Most Americans would have difficulty pronouncing my name the way it is supposed to sound.”

I’ll have to admit that because the syllables they were using to correctly pronounce their names weren’t syllables that exist in the English language, I was unable to correctly pronounce their names—just as they had predicted. That made me incredibly conflicted; I don’t feel as though they should have to change the way they identify themselves—their identity—solely because I’m having troubles with pronunciation. It also makes me sad that it is a reality for them that their names actually require an Americanized pronunciation in order to appear less foreign in front of jurors. Finally, I also find myself calling the kettle black, so to speak, because I used to be called by my given Korean name in preschool, elementary school, middle school—and it was only in high school that I made the decision to switch to “Katherine,” my legal American name, solely to avoid ridicule of my Korean name’s pronunciation by my schoolmates.

What’s really in a name? According to an Economist article last year,1 the Americanization of names began (obviously) for migrants in the 1930s. Interestingly enough, the article suggests that having a name difficult to pronounce can set you back 14 percent in annual income earnings, and may be disadvantageous as a job applicant (if in a pool with other job applicants with American names). The type of people most likely to Americanize their name is explained by The Economist writer C.W. London:

The most boring explanation is one concerning “imperfect information”: Only some migrants realised the benefit of Americanisation. But the authors find little evidence for that. Instead, they show that migrants facing the greatest barriers to occupational mobility were most likely to Americanise and reaped the highest returns from doing so. People who name from more “exotic” countries, or who could not migrate to better jobs, benefited more from Americanisation than better-off migrants. These migrants had to jettison their individual identity for labour-market success.

About the Author

Katherine L. Goyette is a deputy district attorney with the Tenth Judicial District Attorney’s Office in Pueblo, Colorado. She received her J.D. from Washburn University School of Law in 2010 and her LL.M. in elder law from the University of Kansas School of Law in 2012.

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Footnotes
State Your Thesis

Introduction

Legal readers want the “beans” spilled up front—not to wait for pages and pages to learn the author’s conclusion and best supporting points. Law is a profession, an art, and a social science. As with any good analytical writing, the writer’s thesis should be clear from the outset. The rest of the memo or brief is the author’s demonstration of proof of that legal hypothesis, using reasoning based on rules, analogy to precedent, policy, and storytelling.

The examples below are based upon a breach of contract action for the failure of a seamstress to deliver a wedding dress on time, leading to a disruption of the wedding and emotional harm to the bride.

Components

The thesis consists of two parts: prediction and rationale. If they occur in the same sentence, they are connected by the word “because.” If the thesis is stated in multiple sentences, the first sentence is often the prediction, and the next sentences state the rationale in logical progression.

Prediction

In objective analysis, such as internal legal memoranda, the prediction uses the language of probability, not possibility. Compare two predictions:

• Ms. Jones will not likely recover damages for her emotional injuries.

• Ms. Jones possibly will not recover damages for her emotional injuries.

Notice how the second example gives the reader very little confidence that the prediction is based on any kind of evidence. In a memo, the reader expects at least a 51 percent level of confidence.

In persuasive briefs, letters, settlement statements, and so on, the thesis adopts a more confident tone of advocacy for the client, but still states a prediction that the client will prevail:

• Ms. Jones is entitled to damages for emotional harm because the seller understood that time was of the essence, and the risk of emotional harm formed an implicit term of the agreement.

Rationale

The rationale is the most difficult to write because it requires the reader to crystallize the application of law to facts into just a few words. For this reason, although some lawyers might draft the thesis first, it always requires substantial revision later, after application of the law to client facts is finished. When constructing the rationale, common pitfalls include:

• Stating the governing rule as the rationale, e.g., “because damages for emotional distress generally are not available in an action for breach of contract.”

• Stating a circular rationale, e.g., “because the facts in this case satisfy the elements.” (In other words, “The elements are satisfied because the elements are satisfied.”)

• Stating the decisive facts, but without the decisive legal terms, e.g., “because Ms. Jones should not have agreed to purchase the wedding dress without any prior viewings and fittings.”

A better example follows, with the prediction in bold type, the operative legal terms in italics, and the determinative facts underlined: “Ms. Jones will not likely recover damages for her emotional injuries. She unreasonably relied on the seller’s assurances that the dress would be ready mere hours before the wedding ceremony, without any of the prior fittings or viewings that are customary in the tailoring industry.”

In persuasive legal writing, the tone again shifts to confidence, but the need for both operative legal terms and decisive facts remains the same:

• Ms. Jones is entitled to damages for emotional harm because the seller understood that time was of the essence, and the risk of emotional harm formed an implicit term of the agreement.

Distinction from the Conclusion

The thesis differs from the conclusion in subtle ways. The thesis is written to preview the prediction and rationale for a reader who is probably unfamiliar at least with the narrower, specialized rules, with most of the case law, and especially with any implicit rules the author has gleaned from the subtext of legal authorities. The end conclusion can presume more knowledge on the part of the reader, and functions more to refresh the reader’s memory, connect various earlier conclusions, and emphasize the best aspects of the rationale. The writer should never merely repeat the thesis verbatim for the conclusion. And for thornier issues, the writer should not also feel satisfied with a generic conclusion, for example, the all-too-familiar “For the foregoing reasons, the motion must be granted.”

About the Author

Tonya Kowalski is a professor of law at Washburn University School of Law, where she teaches Legal Analysis, Research, and Writing, along with courses on indigenous peoples’ human rights, and tribal law and government. She also teaches legal writing courses overseas and has conducted courses for international law students, practitioners, and professors in both India and Georgia.

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A New Scholarship and Meet Your Trustees

**Special Diversity Scholarship Established**

At its September Trustees meeting, the Foundation voted to grant a special Diversity Scholarship to a third-year law student from the two Kansas law schools as proposed by the KBA Diversity Committee. A $500 merit scholarship will be given to law students of diversity as selected by the KBA Diversity Committee. Those recipients will then become student members of the KBA Diversity Committee and participate in the committee's activities.

Subsequent to the Trustees meeting, Capitol Federal Foundation has agreed to fund these scholarships for the next five years going forward. This is a wonderful opportunity to draw diverse students into the Kansas Bar Association and encourage them to stay in Kansas and remain active in the organizations!

Meet Some of Your Kansas Bar Foundation Officers and Trustees

- **Laura Ice**, president, serves as deputy general counsel of Textron Financial Corp. in Wichita. At TFC, she is responsible for managing TFC’s aircraft and golf equipment finance transactions worldwide. “I became involved with the Kansas Bar Association as the KBA’s representative on the Board,” Ice said. “I am excited to be serving as president this year, and I hope to encourage more KBA members to become Fellows so that we can further expand our good works.”

- **Todd Thompson**, president-elect, practices in Lawrence with a five person firm of Thompson Ramsdell Qualseth & Warner P.A. He limits his practice to civil matters, a substantial portion of which is litigation. Thompson has enjoyed the practice of law and says that he “views participation in the Kansas and American bar foundations as a Fellow as a fundamental part of his professional and social contracts.”

- **Hon. Evelyn Z. Wilson**, secretary-treasurer, is a district judge in Shawnee County. She serves as chief judge and also handles a felony criminal case assignment. “I’m very grateful for the support provided by attorneys to the judiciary — especially when rules or custom make it difficult for the judges to speak,” said Wilson. “Through my participation and support of the Foundation, I feel I can give back a little, and also support worthy law-related causes.”

At its June 2015 meeting, the KBF elected the following new Trustees, each serving a three-year term:

- **District 3 (Southeast Kansas): Eric Rosenblad**, who said “I have had the privilege of being an attorney with Kansas Legal Services for more than 30 years, serving disadvantaged residents of Southeast Kansas with their general civil legal matters. I know first-hand the challenges of equal access to justice for all Kansans. I appreciate the Foundation’s efforts to address both needs of individuals, as well as more broad-based educational, equality, and accessibility concerns. Law Student scholarships play a vital role in developing tomorrow’s leadership for our profession. Kansas lawyers have always played an important role in our society and the Foundation is a great way to show that.”

- **District 5 (Shawnee): Rich Hayse** is in private practice of counsel to the Morris Laing firm in its Topeka office. He focuses his practice on estate planning, real estate, business organizations, and representation of banks, small businesses, and professionals. Hayse is pleased “to be able to work with other trustees of the Foundation to find ways to increase funding and thus enlarge the scope of those who can be supported and encouraged by the Foundation.”

- **District 11 (Wyandotte): Susan Berson** has more than 20 years’ experience in federal and state tax matters. She advises clients in various industries and professions about tax matters. Her practice includes serving as a certified mediator and a FINRA Dispute Resolution Program arbitrator. “I am pleased to donate to the Foundation because it does so many wonderful things for Kansans and our profession. To have some small part in furthering the Foundation’s mission is an honor that I’d encourage other Kansas lawyers to pursue. I’m grateful for the opportunities that I have had as a Kansas lawyer, and I look forward to participating on the Foundation’s Board of Trustees.”

Returning Trustees

- **At-large: Melissa D. Skelton** is currently practicing in Seattle, working as the legal affairs advisor at Seattle City Light, the electric utility in Seattle. She said, “I am fortunate to remain on the Board of the Kansas Bar Foundation during my time in Washington, because I strongly believe in the importance of the Board’s work in improving the public’s understanding of and confidence in the legal system. As a fellow of the KBF, I can dedicate my resources and abilities to communities in need.”

- **District 1 (Overland Park): Amy E. Morgan** is a commercial litigation attorney with Polsinelli P.C. She said, “Supporting the Foundation as a Fellow puts charitable dollars to work in our communities. In addition, serving as Trustee for the Foundation offers the opportunity to help serve as a steward of those charitable funds. I have enjoyed identifying worthy scholarship recipients as a member of the Scholarship Committee, selecting organizations that receive funding as a member of the IOLTA Committee, and ensuring that the Foundation’s funds are properly invested as a member of the Investments Committee.”

- **District 2 (Lawrence): Terrence Campbell** practices law with the firm of Barber Emerson L.C. He said, “I agreed to become a Fellow and later serve on the Board because of my commitment to pro bono and community service activities. Earlier in my career, I served directly on court-appointed criminal panels as a service to the bar and to disadvantaged clients. Although I continue to serve in that capacity on federal appellate court matters, I no longer handle court-
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Eric L. Rosenblad
Pittsburg
Susan G. Saidian
Wichita
Melissa D. Skelton
Redmond, Wash.
Sarah E. Warner
Lawrence
Young Lawyers Representative
Jeffrey L. Carmichael
Wichita
Kansas Association for Justice Representative
Patrice Petersen-Klein
Topeka
Kansas Women Attorneys Association Representative
Nathan D. Leadstrom
Topeka
Kansas Association of Defense Counsel Representative
Sara S. Beasley
Girard
Kansas Bar Association Representative
Charles E. Branson
Lawrence
Kansas Bar Association Representative
Dennis D. Depew
Topeka
Kansas Bar Association Representative

EXECUTIVE DIRECTOR
Jordan E. Yochim
Topeka
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MANAGER, PUBLIC SERVICES
Anne Woods
Topeka
awoods@ksbar.org

appointed criminal matters at the trial level. So I believe service on the Kansas Bar Foundation is an appropriate and productive activity in furtherance of my desire to give back to the state and the bar in the service of those less fortunate.”

• District 7 (Wichita): Amy Fellows Cline represents individuals and businesses in disputes arising out of oil and gas, employment, construction and consumer protection matters. She said, “I donate my time and funds to the Foundation because it is important for lawyers to collectively show our support for the many law-related causes backed by the Foundation (particularly Kansas Legal Services), not only because I personally believe in such causes, but also because it is good PR for our profession.”

• District 7 (Wichita): Jeff Carmichael has spent his career with the law firm of Morris, Laing, Evans, Brock & Kennedy with a practice that has included personal injury work on behalf of injured victims, business and probate litigation. He serves on the Board as a way of giving back to the profession. Carmichael said, “The Kansas Bar Foundation provides an opportunity to aid not only the members of the Kansas bar but also to impact the lives of a broad range of people through the grants, gifts, and scholarships given out by the Kansas Bar Foundation each year. The Kansas Bar Foundation can have a significant and real impact on the lives of the people we interact with and represent and being able to participate in that process is rewarding and well worth the time.”

• District 8 (Hutchinson): Brad Dillon has a general practice in his hometown of Hutchinson with the Gilliland & Hayes firm. He joined the KBF Board to learn more about its activities and programs.

About the KBF President
Laura Ice currently serves as deputy general counsel of Textron Financial Corp. in Wichita, where she is responsible for managing its aircraft and golf equipment finance transactions worldwide. In 2015 Ice began her term as president of the Kansas Bar Foundation.

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

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

KLS may be able to help with extraordinary litigation expenses when the interest of justice requires it.

Visit http://www.ksbar.org/probono for more information.
It’s Time to Talk About the “Rat” Rule

Many of us familiar with Rule 8.31 call it the “Rat Rule” because we think it requires us to “rat out” a friend or colleague. If we observe another lawyer engaging in behavior that . . . “constitutes misconduct . . . (we) shall inform the appropriate professional authority.”

And that usually means attorney discipline, wherever it is housed and whatever it is called. For most practicing attorneys, the thought of having an ethics complaint may verge on terrifying, so the thought of visiting that on someone else gives us pause. As well it might; it is not something to be done lightly.

But I ask you to look at the Rule from another perspective and consider whether it might not be the action that would help the attorney the most. Indeed, in one oral argument before the Kansas Supreme Court some months ago, the respondent attorney said as much. He said getting the disciplinary complaint turned out to be the best thing that happened to him because he had been spiraling into a deep depression and the wake-up call he got, along with the help he sought, stopped that descent. He said he believes he’s a better attorney today because of that experience.

So my reason for talking about the “rat rule” relates more to concern about the well being of the individual lawyer. If a lawyer does have the beginning of a condition that could lead to ethical, malpractice or serious health problems down the road, then the earlier it is addressed, the easier it is to resolve the condition and avoid potential disaster. Say you noticed changes in a mole on a colleague’s arm and you knew that could be a pre-cancerous condition. Would you hold back and not say anything because you don’t want to cause him trouble, or have her get upset with you for bringing it up? How would you want a colleague to handle it if the situation were reversed and you were the one with a pre-cancerous lesion or mole? One scenario is to say: “Oh, it’s nothing,” or “It’ll probably get better on its own” – and then we find it’s not nothing, but something, perhaps even life threatening.

But another scenario is different. Our friend or colleague appreciates it being pointed out and seeks medical help. Later he reports that the doctor said he caught it early and it can be cured or controlled.

The same can often be said for common conditions in the legal profession. It is much easier to stop the progression of addiction or depression in the earlier stages. We all know it is much harder to change habits and attitudes that are long standing. And, as an illness progresses, some of the consequences also get much worse so why not head them off early? Yes, it can be time consuming and expensive to get medical attention and at times our practice might even suffer temporarily. And there is the stigma still associated with addiction and mental illness. So when confronted with information that seems to require a report to the appropriate authority, we consider all these negatives and label them “trouble” and tell ourselves that we don’t want to get our friend in trouble. But trouble is relative. Many, many years ago I was involved in the investigation of a local attorney but nobody seemed to have any information. He subsequently stole about $400,000 from his trust account and went on a cocaine infused spree. Later, when I asked someone why he hadn’t spoken up, he said he didn’t want to get the guy in trouble. Of course we don’t know for sure that the catastrophe could’ve been averted but he never even got the chance to try.

The first and foremost reason for Rule 8.3 is that as a self-regulating profession, we must in fact and deed, be willing to police ourselves. If the court or the public believes that the legal profession can’t or won’t regulate itself, the next step would be to have others do it. And most of us prefer the opportunity to regulate from within.

Rule 8.3(c) does make provision for participation in a Lawyer Assistance Program, AA, and similar entities, as does S.C. Rule 206(l) Immunity. Lawyers are relieved of the duty to report when they learn of misconduct through participation in one of those programs. They are also relieved of the duty when it is in conflict with Rule 1.6, which provides for attorney-client confidentiality.

Although none of us likes to think so, any one of us could succumb to an illness that, if untreated, could lead to an ethical lapse. If that happened, we could very well need a friend to take some action that would help us recognize that illness and seek assistance. Often, more serious trouble can be averted. If we look at Rule 8.3 from this perspective, a “rat” could turn out to be our best friend.

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.

mcdonalda@kscourts.org

Footnote

1. In Kansas Rule 226, which sets out the Kansas version of the ABA Model Rules, 8.3 says: 8.3 Maintaining the Integrity of the Profession: Reporting Professional Misconduct:

(a) A lawyer having knowledge of any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney under these rules shall inform the appropriate professional authority.
Gadget Guide

ew methods of accessing investment capital online from small investors has started driving some truly interesting (and often odd-ball) gadget and gizmo design. Sometimes, the products actually make it to market and start making their way to mainstream vendors. Other ideas can look so bad in the pitch that you wonder if the designers have ever met a human or spoken to a trusted lawyer-advisor. Regardless, the holidays approach and it is time to put together a wishlist.

Several of the items on this list are currently “vaporware.” They exist as an idea and have gathered the funding the designers believe they will need from trusting vendors. There is, however, no guarantee some of them will ever see a formal product launch. You pays your money and takes your choice.

The appearance of any item on this list does not constitute an endorsement of the product or its creators. This list is presented for purely educational purposes.

**OAXIS InkCase.** This phone case adds an e-ink screen to the back of your iPhone or Android device. Use it for live dashboard notifications that save precious battery or even as an e-book reader easier on your eyes and less likely to disrupt sleep. ($70-100 at shop.oaxis.com)

**Light L16 Camera.** The L16 is a smartphone-sized camera that aims to capture photos rivaling a much bulkier DSLR. The magic is in 10 different image sensors that fire simultaneously to fuse together an image of up to 52 megapixels. Onboard editing software is also included. (A whopping $1,699 at light.co)

**HP Envy 34c.** You likely spend hours staring at a monitor so why not make it a beautiful one with as much real estate as possible? The Envy 34c is a glorious 34-inch wide screen offering 3440 x 1440 resolution and onboard directional sound from 6-watt speakers. Product page at [http://bit.ly/1LkcJVI](http://bit.ly/1LkcJVI). ($899 at amazon.com)

**Tempescope.** This desktop weather device actually shows you the forecast for tomorrow. If rain is coming, there will be actual water falling like rain inside the acrylic box. If clouds are in the forecast, then the box fills with clouds. Be ready to assemble it yourself. ($199 at tempescope.com)

**Trinity Portable Wind Turbine.** You may have seen the portable solar chargers that attach to briefcase or golf bag to provide a charge to phones and gadgets. This is a wind-powered version. Its batteries come to full charge in three to four hours of 10 mph wind and can provide hours of recharge to a smartphone. Alternative power continues to scale down to consumer levels. ($399 at janulus.com)

**Infento Constructible Rides.** Remember Erector and Meccano? This is bigger and better. Various kits provide construction rails, gears, axles, and wheels to create myriad bikes, trikes, wagons, and sleds. The perfect toy to encourage future wrench heads. Be warned – it is a crowd-funded product that still has several steps to go before it reaches production and our own colleagues may shut it down before it ever reaches shelves. ($300-600 at infentorides.com)

**Ringly.** It’s a small(ish) ring with an onyx, lapis, or emerald gemstone that connects to your phone by Bluetooth. When a phone call, text, or status is inbound, a small light on the ring illuminates and it vibrates. It is the most discreet phone notifier available and probably not even noticeable from the bench. ($195-260 at ringly.com)

**Leaf.** The times, they are a changin’. Leaf is a completely self-contained, automated grow system for cannabis plants. The desktop box grows two plants at once with integrated watering, grow lights, and nutrient packs (load like printer ink cartridges) specifically tailored to cannabis production. Monitor the whole thing from a smartphone app, including a live HD camera feed of the little sprouts. Science fairs will never be the same. ($1,500 at getleaf.com)

**Auquor House Hydrant.** A frozen sillcock is more than an annoyance – it is an expensive repair and potential water damage inside the home. The House Hydrant eliminates that problem entirely and makes connecting garden hoses a breeze. The Hydrant sits flush against the house and hoses are simply plugged in like a power cord. No soft brass threads to strip or ball valves that wear out. ($50 at aquorwatersystems.com)

**Epson EcoTank Printers.** Imagine a printer that only needs an ink refill every two years. Epson thinks they have you covered with their EcoTank printers. The business-grade models can provide 6,500-20,000 color pages before a refill and at lower per page cost than color laser. Product page at epson.com/EcoTank/. ($300-1,200 for printers and $20-100 for ink at amazon.com)

**Wocket Smart Wallet.** Carry just one payment card that is programmable from a small, electronic wallet. Tap the MasterCard button and the card is programmed to swipe as a MasterCard. Re-insert the card and tap Visa and it will swipe as a Visa. A small screen also allows you to store and choose which barcode customer card you want displayed for scanning. Encrypted and secured with PIN or biometric voice recognition. ($179 at wocketwallet.com)

**Flapit.** Need to know how many likes your Facebook post got or how often you got a retweet? Flapit is a physical flip counter that displays your social media “score.” See each like counted and hear it register – in real time! ($300 at flapit.com)

**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 Committee.

[kslpm@larryzimmerman.com](mailto:kslpm@larryzimmerman.com)
My DOL Job

This summer, I have been working for the Department of Labor in the Employee Benefits Security Administration (EBSA) as an assistant investigator. My duties include auditing private employer health insurance and pension plans in order to ensure compliance with the Employee Retirement Income Security Act (ERISA). Does “audit” sound like fun? No. But does ERISA sound like fun? You tell me.

Judges have often expressed their frustrations with ERISA in their opinions. Judge Joseph McLaughlin of the 2nd U.S. Circuit Court of Appeals in 1993 went so far as to say, “With understated irony, the Supreme Court has described the ERISA section at issue here as ‘not a model of legislative drafting.’ In truth, it is a veritable Sargasso Sea of obfuscation” (readers, I’m sure, will not need to be reminded that the Sargasso Sea is said to be the only sea on Earth with no coastline in sight; trapped by Atlantic currents on all sides, it is home to the North Atlantic Garbage Patch and seaweed said to be so thick that it trapped and destroyed trans-Atlantic ships).

ERISA was passed in 1974 in order to avert a rehash of the unfortunate events surrounding the bankruptcy of Studebaker Corporation, an automobile manufacturer that went belly-up in 1967. In 1963, Studebaker Corp. closed its manufacturing plant in South Bend, Indiana. It was discovered that the pension fund for the plant had been corruptly mismanaged, and employees would not be receiving the pensions they had been promised. Since Studebaker was going bankrupt, there wouldn’t even be anyone to sue. Congress responded, and passed ERISA that required employers to document, report, audit, and also created a federal agency (that’s us!) that would spot check pensions and health insurance plans to ensure that payments were being made correctly.

However, Congress passed ERISA with several very odd, shall we call them “quirks.” First, ERISA was bestowed with what has been called the most sweeping pre-emption clause ever enacted by Congress: “… shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.” Since most pension cases are a matter of “I’ll work for you, you pay me, and deposit money into my pension plan,” it would seem that state contract law is the natural way to settle these disputes … but ERISA has preempted those laws. Now, the only way to hold an abusive or negligent employer accountable for mismanaging a pension or health insurance plan is through the remedies of ERISA.

Second, since ERISA will inevitably be decided by federal courts, the judges tend to be less plaintiff friendly—particularly unfortunate for plaintiffs because ERISA plaintiffs are usually broke after having to pay for some large medical expense or losing their job. This strikes me as an asymmetric preference for defendants that seems misplaced in a law that was intended to protect the interests of employees, but I’m just a law student.

Third, ERISA requires that plan administrators create an appeals process for an employee if the employee’s claim is denied. The Supreme Court has applied to this provision the traditional trust law principle that only an arbitrary and capricious decision by the administrator can be overturned by the Court (the administrator is the employer, if they don’t want to pay they’ll just deny the claim; but the courts can only overturn that decision if it was arbitrary and capricious? Even a clearly erroneous decision, for instance that headaches are not a symptom related to playing football in the NFL, cannot be overturned on appeal?).

Finally, ERISA has abolished all punitive damages for violations of ERISA, allowing only reimbursement and lost opportunity damages when trust or contract law might have allowed larger recoveries in order to disincentivize breach. The net effect of these quirks is that a statute that seemed to have been passed so as to be a legal weapon for employees has actually become an effective legal shield for employers.

So, that brings us to my job. The EBSA has 10 regional offices that employ over 400 investigators. In 2014, the EBSA restored $600 million to private employer benefit plans. ERISA may not be an employee friendly law, but luckily the EBSA is an employee friendly administration. As I’m sure the reader is aware, it’s not always obvious what is happening behind the curtain of a 401(k), nor is it obvious whether an employer’s health plan meets the requirements of the Mental Health Parity Act (MHPA) and Minimum Essential Coverage (MCE). Those are not problems that your average person wants to spend a lot of time thinking about, including well-meaning employers and recently wronged employees. For their sake, my job is to navigate the sea of obfuscation and sort out the garbage patch from the seaweed from the ships worth saving. Luckily for me, I’m a law student and a federal employee: metaphor (and acronym) is kind of what I do. ■

About the Author

Jacob Wilson is a second-year law student at the University of Kansas. He is a veteran of the U.S. Air Force, working in OSHA Compliance/Disaster Response, and has spent time teaching high school physics.

A previous version of this article was published on the KU Law Blog (blog.law.ku.edu).
Members in the News

Changing Positions

Suzanne E. Billam has joined Baker Sterchi Cowden & Rice LLC, Kansas City, Mo., as litigation associate.

Grant A. Brazill has joined Morris, Laing, Evans, Brock & Kennedy Chtd., Wichita.

T Chet Compton has joined Fleeson Gooing Coulson & Kitch LLC, Wichita, as an associate.

Jacob A. Conard has been appointed as Columbus city prosecutor.

Robert J. Frederick has been appointed as a 25th Judicial District judge, Garden City.

Jacob D. Kling has joined Fairbanks Law P.A., Goodland.

Joslyn M. Kusiak has joined the law practice with William J. Kelly, Independence, which will now be named Kelly & Kusiak Law Office LLC.

Katherine E. Malotte has joined the Civil Litigation and Employment Law Division of Joseph, Hollander & Craft LLC, Wichita.

Norbert Marek Jr. has been hired as city attorney by Marysville City Council, Westmoreland.

Sarah A. Morse has joined Goodell, Stratton, Edmonds & Palmer LLP, Topeka, as an associate.

Ann M. E. Parkins has become partner at Wise & Reber L.C., McPherson.

Lisa M. Robertson has become the new Topeka city attorney.

Joseph A. Schremmer has joined Depew Gillen Rathbun & McIn- teer L.C., Wichita, as an associate.

Weylin T. Watson has become an associate at Gilmore & Bell P.C., Kansas City, Mo.

Miscellaneous

David K. Duckers, Jerry Fiscus, and Chiquita R. Wilson have been named new members of the Ethics Commission for the Unified Government of Wyandotte County/Kansas City, Kan.

E. Lee Kinch, Wichita, has been selected to serve as the new Kansas state Democratic chair.

Peter L. Peterson, Salina, has been elected to the Rose Hill Bank board of directors.

Jonathan W. McConnell, Wichita, has been commissioned as a Kentucky Colonel by Kentucky Gov. Steve Beshear.

Bradley J. Prochaska, Wichita, has been honored with the Dan Cullen Award by Birth Trauma Litigation Group of the American Association for Justice.

Samantha F. Sweley, Council Grove, was inducted as a new member of the Council Grove Rotary Club.

Todd N. Thompson, Lawrence, has become a fellow of the American College of Trial Lawyers.

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.
Do You Know What the KBA Has to Offer?

When you think of the Kansas Bar Association, maybe you think about a fun gathering with colleagues to play golf, bowl, or swap war stories. Or maybe you think about fresh, local CLE programming that is presented by the people you practice with every day. Or maybe you don’t think about the KBA at all, because you don’t think that it’s relevant to either you or your practice. But do you really know all that the KBA has to offer? Even seasoned members may not realize all of the products and services that are benefits of membership. Here are a few highlights:

**Section Membership**

Did you know that if you register during a normal pricing period your KBA registration includes one free section membership? The KBA has sections for every area of practice imaginable. Do you practice alternative dispute resolution? There is a section for you. There is a section for members interested in understanding more about Indian law. And there is an extremely active young lawyers section that offers both professional and social opportunities for the newest Kansas lawyers.

Not only does your section membership give you access to practice-specific CLE and publications, it also includes an online hub for members. This private online home allows you to find contact information for section members, post questions, and find a section calendar. Even if nothing else about the KBA appeals to you, the benefits of section membership are worth the price of admission.

**Affiliate Benefits**

Are you interested in online legal research? Would you like to save money by refinancing your student loans? Would it help your practice to have some online practice management software? And the important question, did you know that all of these things come included with your KBA membership? You may know about the KBA’s Casemaker legal research program, which improves every year. Not only can you use Casemaker at no additional charge, you can arrange training on how to best use the program’s features.

While Casemaker has been around for several years, the KBA’s Board of Governors consistently finds new ways to make your membership valuable. This year, they have two exciting new partnerships to promote. The first, Credible, helps lawyers find the best student loan repayment option through refinancing, specialized payment programs, or deferment or forgiveness. And the second exciting addition to the roster of KBA member benefits is MyCase, a web-based law practice management software that allows you to use the same program for time tracking, billing, and client communication.

**LOMAP**

LOMAP stands for Law Office Management Assistance Program, and it was created to help KBA members better organize and operate their practices. LOMAP offers no-cost, confidential assistance with practice management for both seasoned attorneys and brand new law school graduates. This is your place to find out the things they don’t teach in law school such as starting and running a law firm, marketing, client relationships and communication, and technology. It’s also the place to go if you want to close your law firm or transfer ownership. You can meet at the Kansas Law Center in Topeka, or the director of Law Practice Services will come to your office. There is a lending library of books available for members to check out and review.

By using the LOMAP service, a KBA member can find out how to budget, time keep, and set up a trust account. There is information about risk management, including professional liability insurance. And there is assistance with file management and document retention. And all of this comes confidentially with no additional cost. This is a phenomenal service that more than justifies the cost of a membership.

There is great value in knowing the people you practice with in your community, and the KBA offers lots of opportunities for in-person interaction with other lawyers. But if that doesn’t interest you, the KBA also offers products and services that can enhance your practice, save you money, and keep your office running smoothly. The KBA is big enough for all types of lawyers, and we’d love to have you, too.

**About the Author**

Chelsey Langland is the co-chair of the KBA Membership Committee. She earned her Bachelor of Arts in philosophy from Grinnell College (Iowa) and her juris doctorate from Washburn University School of Law. She spent nine years working in the chambers of Judge Christel Marquardt on the Kansas Court of Appeals, and for the last seven years, she has been the motions attorney for the Kansas Court of Appeals. Yes, you can have more time to file your brief.
A General Practitioner’s
Guide to Representing
Immigrants

Part 1:
How to Address a Client’s
Immigration Status
December 2, 2015 (Noon – 1 p.m.)

The first session will address how to
determine and understand an immigrant’s
status as well as an attorney’s legal and
ethical obligations toward immigrant clients.

Part 2:
Common Issues in General
Practice Areas of Law
December 3, 2015 (Noon – 1 p.m.)

This session will examine in more detail the
common issues that immigrants face in non-
immigration areas of law.

Presented by:
Michael Sharma-Crawford
Scott A. Girard
Sharma-Crawford Attorneys at Law LLC
Kansas City, Missouri

Each webinar approved for
1.0 nontraditional CLE credit
hour in Kansas.

Register:
http://www.ksbar.org/cle
The KBA Awards Committee is seeking nominations for award recipients for the 2016 KBA Awards. These awards will be presented in June at the KBA Annual Meeting in Wichita. Below is an explanation of each award and a nomination form found on the next page. The Awards Committee, chaired by Sara Beezley, of Girard, appreciates your help in bringing worthy nominees from throughout the state of Kansas to the committee’s attention! **Deadline for nominations is Friday, March 4.**

**Distinguished Service Award.** This award recognizes an individual for continuous long-standing service on behalf of the legal profession or the public, rather than the successful accomplishment of a single task or service.

- The recipient must be a lawyer and must have made a significant contribution to the altruistic goals of the legal profession or the public.
- Only one Distinguished Service Award may be given in any one year. However, the award is given only in those years when it is determined that there is a worthy recipient.

**Phil Lewis Medal of Distinction.** The KBA's Phil Lewis Medal of Distinction is reserved for individuals or organizations in Kansas who have performed outstanding and conspicuous service at the state, national, or international level in administration of justice, science, the arts, government, philosophy, law, or any other field offering relief or enrichment to others.

- The recipient need not be a member of the legal profession or related to it, but the recipient's service may include responsibility and honor within the legal profession.
- The award is only given in those years when it is determined that there is a worthy recipient.

**Professionalism Award.** This award recognizes an individual who has practiced law for 10 or more years who, by his or her conduct, honesty, integrity, and courtesy, best exemplifies, represents, and encourages other lawyers to follow the highest standards of the legal profession.

**Outstanding Young Lawyer.** This award recognizes the efforts of a KBA Young Lawyers Section member who has rendered meritorious service to the legal profession, the community, or the KBA.

**Outstanding Service Awards.** These awards are given for the purpose of recognizing lawyers and judges for service to the legal profession and/or the KBA and for recognizing nonlawyers for especially meritorious deeds or service that significantly advance the administration of justice or the goals of the legal profession and/or the KBA.

- A total of six Outstanding Service Awards may be given in any one year.
- Recipients may be lawyers, law firms, judges, nonlawyers, groups of individuals, or organizations.
- Outstanding Service Awards may be given to recognize: Law-related projects involving significant contributions of time; Committee or section work for the KBA substantially exceeding that normally expected of a committee or section member; Work by a public official that significantly advances the goals of the legal profession or the KBA; and/or Service to the legal profession and the KBA over an extended period of time.

**Pro Bono Award.** This award recognizes a lawyer or law firm for the delivery of direct legal services, free of charge, to the poor or, in appropriate instances, to charitable organizations whose primary purpose is to provide other services to the poor. In addition to the Pro Bono Award, the KBA awards a number of Pro Bono Certificates of Appreciation to lawyers who meet the following criteria:

- Lawyers who are not employed full time by an organization that has as its primary purpose the provision of free legal services to the poor;
- Lawyers who, with no expectation of receiving a fee, have provided direct delivery of legal services in civil or criminal matters to a client or client group that does not have the resources to employ compensated counsel;
- Lawyers who have made a voluntary contribution of a significant portion of time to providing legal services to the poor without charge; and/or
- Lawyers whose voluntary contributions have resulted in increased access to legal services on the part of low and moderate income persons.

**Distinguished Government Service Award.** This award recognizes a Kansas lawyer who has demonstrated an extraordinary commitment to government service. The recipient shall be a Kansas lawyer, preferably a member of the KBA, who has demonstrated accomplishments above and beyond those expected from persons engaged in similar government service. The award shall be given only in those years when it is determined that there is a recipient worthy of such award.

**Courageous Attorney Award.** This award recognizes a lawyer who has displayed exceptional courage in the face of adversity, thus bringing credit to the legal profession. Examples of recipients of this type of award in other jurisdictions include a small town lawyer who defended a politically unpopular defendant and lost most of his livelihood for the next 20 years, an African-American criminal defense attorney who defended two members of the white supremacist movement, and a small town judge who lost his position because he refused the town council's request to meet monetary quotas on traffic offenses. This award will be given only in those years when it is determined that there is a worthy recipient.

**Diversity Award.** This award recognizes an individual who has shown a continued commitment to diversity; or a law firm; corporation; governmental agency, department, or body; law-related organization; or other organization that has significantly advanced diversity by its conduct, as well as by the development and implementation of diversity policies and strategic plans, which include the following criteria:

- A consistent pattern of the recruitment and hiring of diverse attorneys;
- The promotion of diverse attorneys;
- The existence of overall diversity in the workplace;
- Cultivating a friendly climate within a law firm or organization toward diverse attorneys and others;
- Involvement of diverse members in the planning and setting of policy for diversity;
- Commitment to mentoring diverse attorneys, and;
- Consideration and adoption of plans to continue to improve diversity within the law firm or organization, whereas;
- Diversity shall be defined as differences of gender, skin color, religion, human perspective, as well as disablement.

The award will be given only in those years when it is determined there is a worthy recipient.
KBA Awards Nomination Form

Nominee's Name ____________________________________________________________

☐ Phil Lewis Medal of Distinction  ☐ Diversity Award
☐ Outstanding Service Award  ☐ Professionalism Award
☐ Outstanding Young Lawyer Award  ☐ Pro Bono Award/Certificates
☐ Distinguished Government Service Award  ☐ Courageous Attorney Award
☐ Distinguished Service Award

Please provide a detailed explanation below of why you have nominated this individual for a KBA Award. Attach additional information as needed.

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

Nominator's Name ________________________________
Address _______________________________________
________________________________________________________________________
Phone __________________________ Email ________________________________

Return Nomination Form by Friday, March 4, 2016, to:
KBA Awards Committee
1200 SW Harrison St.
Topeka, KS 66612-1806
Kansas Adopts the Uniform Bar Exam

In February 2016, Kansas will, for the first time, administer the Uniform Bar Exam (UBE). In so doing, Kansas joins Missouri, Colorado, and a growing number of other jurisdictions that have opted for the test in recent years. The move from a Kansas-specific exam to the UBE will have implications for how law students prepare for the exam, the type of support law schools can give their students in their preparation efforts, as well as students’ practice and career options.

What is the UBE?

The UBE is drafted by the National Conference of Bar Examiners and has three components: the Multistate Bar Exam (MBE), the Multistate Essay Exam (MEE), and the Multistate Performance Test (MPT). The components count for 50 percent, 30 percent, and 20 percent, respectively, of an applicant’s overall UBE score. The first day of the two-day exam period consists of the MEE and the MPT. The MBE is administered on the second day.

The MBE is the familiar, multiple-choice portion of the bar exam, which has been long used by all states (except Louisiana) as a component of their respective bar exams. It is a six-hour, 200-question exam that tests knowledge of Civil Procedure, Contracts, Constitutional Law, Criminal Law and Procedure, Evidence, Property, and Torts. In addition to testing substantive knowledge in the listed subjects, the MBE challenges applicants to read carefully and critically, and to employ core legal reasoning and problem-solving skills.

The MEE consists of six 30-minute essay questions that may cover any of the MBE topics listed above and, in addition, may test applicants in the areas of Business Associations (Agency and Partnership; Corporations and Limited Liability Companies), Conflict of Laws, Family Law, Trusts and Estates (Decedents’ Estates; Trusts and Future Interests), and the Uniform Commercial Code (Secured Transactions).

The MPT is arguably the most innovative component of the UBE. There are two 90-minute MPTs given with each administration of the UBE. The MPT is, in essence, a closed-universe problem in which applicants are assigned a task (e.g., writing a memo, brief, letter, or similar document) and given a set of legal and factual sources with which to complete that task. Applicants might be asked to analyze the preclusive effect of a state agency’s decisions; draft an alternative dispute resolution statement for a client in a slip-and-fall case; or advise a judge on the admissibility of certain proffered evidence in a criminal trial. As described by the NCBE, “The MPT is designed to test an examinee’s ability to use fundamental lawyering skills in a realistic situation and complete a task that a beginning lawyer should be able to accomplish.”

Students preparing for the MBE must learn the relevant substantive knowledge and perfect their multiple choice technique, preferably by completing and reviewing a substantial number of practice questions. Preparation for the MEE similarly requires facility with the substantive law and the ability to express legal analysis clearly and concisely in written form. The MPT, by contrast, does not require students to memorize substantive law, but instead to follow directions, produce professional work product under time constraint, and grasp and resolve a novel legal and factual scenario.

The advantages of score portability

The biggest effect of UBE adoption for examinees is of course score portability. In short, once an applicant obtains a UBE score in one jurisdiction, she can transfer that score to other UBE jurisdictions if: (1) her score is high enough (UBE jurisdictions set their own pass scores, ranging from 260 to 280); (2) she passes character and fitness in the new jurisdiction; and (3) she pays any applicable fees.

To obtain a portable UBE score, candidates must sit for all portions of the UBE in the same UBE jurisdiction and in the same administration. Basically, all UBE jurisdictions enter into an agreement to give full faith and credit to the UBE scores generated in other UBE states. Thus, an examinee who scores the required minimum score for any state they are interested in practicing in can transfer their score to that state and be admitted to practice. In order to make this work, the NCBE provides bar examiners from each UBE jurisdiction with scoring guidance and training to ensure consistent grading from state to state. Graders are trained to use “calibration sessions” in order to ensure that grades remain uniform from one grader to the next and from state to state.

Are there downsides to Kansas’ adoption of the UBE?

Most of the push-back generated by mass adoption of the UBE is based on the claim that the states will lose autonomy by giving up state-specific exams. However, states still have a great deal of control over admissions to practice in their respective jurisdictions. States adopting the UBE retain the ability to independently decide who may sit for the bar exam and who will be admitted to practice; determine underlying educational requirements; make all character and fitness decisions; set their own policies regarding the number of times applicants may retake the bar examination; make ADA decisions; score the MEE and MPT; set their own pre-release regrading policies; assess candidate knowledge of jurisdiction-specific content through a separate test; accept MBE scores earned in a previous examination or concurrently in another jurisdiction for purposes of making local admission decisions if they wish; set their own passing scores; and determine how long incoming UBE scores will be accepted.

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Conclusion

On the whole, the UBE will provide Kansas with a rigorous examination that tests core substantive knowledge and essential lawyering skills, while enhancing the ability of Kansas attorneys to practice in multiple jurisdictions.

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Hope for the Hopeless: Discharging Student Loans in Bankruptcy

By Kurtis Wiard
After spending years pursuing their juris doctor degree and often graduating with the commensurate student loan debt, attorneys can typically empathize with clients who are burdened with student loans. Bankruptcy attorneys, in particular, understand their clients’ bleak prospects for discharging student loans all too well. One of the most oft-cited policies of the Bankruptcy Code (Code) is to provide honest but unfortunate debtors with a “fresh start” by eliminating or restructuring their debts. But over the years, Congress has pieced together a long list of discharge exceptions. While some—such as domestic support obligations—reflect sound policy decisions, other exceptions are so highly detailed and narrow that they smack more of effective lobbying efforts.

In the early 1970s, a few highly publicized cases where recent graduates filed for bankruptcy and discharged their student loans shortly before beginning lucrative careers prompted lawmakers to except certain student loans from discharge. Several years later, a congressionally-established commission published a report confirming that—despite those isolated cases—there was never a rash of recent graduates who abused bankruptcy proceedings by unloading their student debts shortly after graduation. Regardless, the damage was done, and the Code excepts most student loan debt from discharge unless doing so “would impose an undue hardship on the debtor and the debtor’s dependents.” The courts, however, have struggled for nearly 40 years to determine what Congress intended when it drafted that phrase.

The topic of student loan dischargeability has gained recent import because of broader concerns regarding how the national student loan debt is affecting the economy and potentially hindering its recovery. In 2015, the total student loan debt ballooned to $1.2 trillion and the average student loan debt associated with obtaining a bachelor’s degree exceeded $35,000. Economists fear that student loans will have the same negative impact on the economy as did the housing bubble, and many experts question whether the risk of a college degree is worth the reward. Since the 1970s and the subsequent narrowing of possibilities for student loan discharge, judges and legal commentators have criticized the Code’s treatment of student loans. The Code’s rather unforgiving standard, combined with the crushing debt incurred by an increasing number of mostly young Americans, has given rise to the claim that it is effectively impossible for the vast majority of debtors to discharge their student loans. Admittedly the standard is high, but discharge is still possible for honest but unfortunate debtors who can demonstrate that there are reasonable and relevant factors outside their control.

The Dischargeability Standard

Currently, the Code excepts a debtor’s student loan obligation from discharge unless doing so would impose an “unjust hardship on the debtor and the debtor’s dependents.” The obligation also extends to any cosigners. Before 1976, the Bankruptcy Code treated student loans like all other unsecured debt, permitting debtors to regularly discharge them along with their credit card debt. Initially, debtors only had to demonstrate an undue hardship if the debt had first become due within five years of filing a petition for relief. In 1990, the waiting period was extended to seven years, but Congress abolished the waiting period altogether in 1998. In a similar vein, Congress originally excepted only government-backed loans from discharge, thereby permitting debtors to discharge their private student loans. But in 1984, Congress added various private student loans to the discharge exception. Essentially, all qualified student loans today are subject to the undue hardship standard.

Although Congress has limited the situations in which debtors can discharge their student loans over the past 40 years, it has not seen fit to better define what it meant by the vague concept of “undue hardship.” That has left to the courts the difficult task of fashioning the most equitable test. The Johnson test, one of the earliest standards, required courts to ask highly subjective questions, such as whether the debtor had been negligent or irresponsible in maximizing income, minimizing expenses, and searching for employment as well as whether the education financially ben-

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W. Thomas Gilman, Wichita
Robert K. Weary Award: J. Eugene “Gene” Balloun

J. Eugene “Gene” Balloun is a partner in the firm of Shook, Hardy & Bacon. He grew up in Russell, Kansas, where he was a state championship debater, graduating as valedictorian of his class. He went on to Kansas University, completed a degree in Business Administration in 1951, and then attended law school. He finished first in his law school class in 1954, spent several years in the Air Force as a JAG officer, and was discharged as a Captain. Gene practiced briefly in Russell, then Great Bend, and has spent most of his career practicing commercial litigation with Shook, Hardy & Bacon. His practice has included more than 100 jury trials, and he has represented clients in more than 100 cases before the Kansas Supreme Court and the Kansas Court of Appeals.

Gene has tried to give back to the community through pro bono work. When a Johnson County high school removed a controversial but award winning book, Annie on My Mind, from the school library, Gene and his then law partner, Judge Dave Waxe, represented the students in Federal Court. They filed an action to protect the students’ First Amendment rights. Following the trial, the Court ruled in favor of the students, ordered the book returned to the library, and awarded attorneys fees. Gene, Dave and Shook Hardy & Bacon donated the fees to create the First Amendment Foundation whose mission is to better educate high school students concerning constitutional rights. The Foundation has presented programs to several thousand high schools students, including presentations and discussions with Justice Sandra Day O’Connor and Professor Laurence Tribe of Harvard University. Gene also prosecuted an action in Federal Court in Missouri to force the state to improve the foster care system, and was one of the plaintiffs in a similar case filed in Kansas.

Gene and his wife, Sheila Wombles, became foster parents almost 30 years ago. They cared for 29 children, and adopted 2. Gene then began doing pro bono adoptions for foster parents adopting foster children. At Sheila’s suggestion, he and his firm began accepting the State paid fees for these adoptions, and used them to create a scholarship fund for foster and adoptive children. Gene has completed more than 1,000 pro bono adoptions, and the scholarship fund has awarded more than 500 scholarships totaling over $625,000. With the help of local lawyers, he has completed adoptions throughout the state. Gene has received pro bono awards from Shook Hardy & Bacon, the Kansas Bar Association and the American Bar Association. His pro bono work with children has been featured in the American Bar Association Journal and the Kansas City Star.

Gene’s contribution and service to the profession has been honored with the Distinguished Alumnus Award from the University of Kansas Law School; the Distinguished Service Award from the Kansas Bar Association; the Whittaker Award by the Lawyers Association of Kansas City; the Justinian Award by the Johnson County Bar Association; and the William Kahrs Lifetime Achievement Award by the Kansas Association of Defense Counsel. He has been listed in The Best Lawyers in America for more than 30 years, and was named one of the top 50 lawyers in Kansas City by KC Magazine. Gene was elected a Fellow of the American College of Trial Lawyers.

Gene is a Kansas Bar Foundation Silver Fellow and served on the KBF Board of Trustees from 1993 to 1999. He is a member of the board of directors of Kansas Appleseed, EmberHope, and Midwest Foster Care and Adoption Association.

Gene has enjoyed a variety of outdoor activities over the years, including skiing, hiking, camping, sailing, white-water rafting, canoeing and piloting small aircraft.
Student Loans in Bankruptcy

Many later courts opted for the Bryant poverty test, which simply granted a discharge if the debtor lived at or below the federal poverty line. Currently, courts use two different tests: the totality of the circumstances test and the Brunner test.

In 1987, the Southern District of New York created the more widely accepted test in Brunner v. New York State Higher Education Services Corp. (In re Brunner). Under the Brunner test, debtors must prove three elements to discharge their student loan debt: (1) they cannot currently make payments on the loan while also maintaining a minimal standard of living for themselves and their dependents; (2) the hardship will likely continue for a significant portion of the loan’s repayment period; and (3) the debtors have attempted to repay the loan in good faith. Nine circuits, including the Tenth Circuit, have adopted the Brunner test.

But the test’s wide acceptance is deceiving because there are significant disagreements between the circuit courts on how to apply the Brunner test. For instance, a district court in the Eleventh Circuit chastised a bankruptcy court for incorporating the Tenth Circuit’s version of the Brunner test and applying Brunner “in a manner that will promote the Bankruptcy Code’s ‘fresh start’ principle,” stating that the approach “stands in stark contrast to the position taken by the Eleventh Circuit” that found no Congressional intent to rely on “unfounded optimism.” Lastly, under the good faith portion of the test, the Polleys court warned lower courts not to confuse the element with an opportunity to impress their own views on a debtor’s past decisions.

Ultimately, the panel found that Polleys’ debt was dischargeable primarily because of her extensive emotional health issues that made it difficult for her to maintain steady employment. Significantly, the court was not concerned that the debtor had never made a payment on her student loans because there was evidence that she consolidated the loan, entered into deferral programs, and tried to negotiate with the student loan creditors before filing for bankruptcy. In sum, the Polleys court was well aware of Brunner’s criticism, so it went to great lengths to instruct lower courts on how to equitably apply the test.

Meeting the Undue Hardship Standard in Kansas

From a client’s perspective, convincing a bankruptcy court to discharge student loans can feel like a demeaning process. Adding insult to injury, those who most need to discharge their student loans can rarely afford the expense to litigate the matter in a separate adversary proceeding. From a legal perspective, convincing a court to discharge a debtor’s student loans is a similarly daunting task, albeit less humiliating. The silver lining may be, however, that by virtue of the circumstances leading to bankruptcy, most debtors can satisfy the first element of the Brunner test. As such, case law in the District of Kansas regarding the second and third elements is the most important to practicing attorneys. In meeting those standards, the case law speaks most to two factors: a debtor’s late age and mental health. While mental health is a salient factor in meeting the Brunner test, a debtor’s late age, standing alone, has not been dispositive to most courts.

A. Debtors’ Age

Debtors often cite how old they will be at the point they could repay the loan to bolster their claim that the hardship will likely continue for a significant portion of the loan’s repayment period. Yet, a debtor’s age at the time of payoff, standing alone, has been deemed insufficient to demonstrate that the hardship will continue for a significant time. In Mandala v. Educational Credit Management Corp. (In re Mandala), a 54-year-old wife and a 56-year-old husband filed chapter 13 bankruptcy, seeking to discharge nearly $56,000 in student loans the wife incurred while attending college at the age of 36. At time of trial, she taught language arts full-time at a middle school, earning about $34,000 annually. Her husband was permanently disabled and suffered from spinal stenosis, a steadily degenerating condition; he received approximately $9,000 in disability benefits each year. The debtors emphasized that to retire the debt, they would have to make monthly payments of $315 until the wife was 70 years old (a time when she would no longer be employed).

The bankruptcy court found that simply because a debtor may have to repay student loans into retirement, standing alone, is not enough to satisfy the second element of the Brunner test:

“[T]he fact that this obligation will persist into Patricia’s late age is the result of her choosing to return to school on borrowed money at the age of 36. The fact that this Court should not ‘impose its own values on
a debtor’s life choices should not completely insulate Patricia from the consequences of her choice to attend school later in life in hopes of taking up a profession. Indeed, had Patricia not had the financial ability to attend Friends [University] and obtain her teaching degree, she and Jerome might be in far more desperate straits than they are now. That student loan payment periods may progress beyond a borrower’s retirement age, standing alone, should not skew the second Brunner test against lenders.42

On the other hand, factors relating to retirement were important in Johnson v. Sallie Mae Inc. (In re Johnson).43 A 38-year-old husband and 36-year-old wife filed chapter 7 bankruptcy while owing a combined $83,000 in student loans.44 Neither the debtors nor their three children suffered from any mental or physical disabilities.45 At the time of trial, the husband was working as a substitute teacher, coach, and referee, which provided a meager income.46 The wife, who never completed her degree, worked for the Department of Veteran Affairs as a billing supervisor, earning approximately $39,000 per year.47

The bankruptcy court ultimately found that requiring the debtors to repay the loan would impose an undue hardship.48 Importantly, the court was concerned with the fact that the husband had needed to borrow from her retirement account to simply meet the family’s regular monthly expenses.49 It also noted that preventing the debtors from contributing reasonable funds to a retirement plan “contradicts the public policy reflected in the Congressional encouragement of self-sustained retirement.”50 The court also focused on the fact that the debtors consolidated their loans, made small voluntary payments, cooperated with the student loan creditors, and were not attempting to discharge their student loans shortly before “embarking on lucrative careers in the private sector.”51

Although the court in In re Johnson was sympathetic to the debtors’ late age, the majority of courts appear to agree with the analysis in In re Mandala.52 Courts usually see a debtor’s age at the time of payoff as an issue within the debtor’s control. As such, it would be wise for debtors seeking to discharge their student loan debt to lean more heavily on those factors that are outside of their control, such as health issues.

B. Debtors’ Mental Health

One of the most often recurring factors debtors point to in student loan discharge cases is their poor mental health. This is unsurprising since several studies have found that socioeconomic status and debt-to-income ratio are routinely linked with poor mental health.53 The Tenth Circuit addressed the role of a debtor’s mental health in Polleys and commented, “although a permanent medical condition will certainly contribute to the likelihood of a debtor earning enough money to repay her student loan debt, it is by no means necessary if the debtor’s situation is already bleak.”54

Debtors who suffer from both physical and mental ailments are even more likely to obtain a discharge.55 In Innes v. Kansas (In re Innes),56 the District Court of Kansas affirmed the bankruptcy court’s order discharging nearly $62,000 in student loan debt. The debtor had endured many difficult circumstances, including a prosthetic leg and bipolar disorder, the latter of which he was successfully controlling without medication.57 In Junghans v. William D. Ford Federal Direct Loan Program (In re Junghans),58 a single mother with three children sought to discharge student loans she incurred while attending school to obtain a paralegal degree, which she never completed. Although she had been diagnosed with clinical depression, she did not have enough money to pay for the counseling and prescribed medication.59 She also suffered from shingles, which she similarly could not treat due to a lack of funds.60 The Bankruptcy Court ultimately granted her a discharge.61

However, health conditions are not always determinative. In Buckland v. Educational Credit Management Corp. (In re Buckland),62 a 45-year-old husband who had been unemployed for a year and a half, and a 47-year-old wife who had been unemployed for nearly two years, sought to discharge the husband’s student loan debt of nearly $75,000. The husband had lost his job because he was unable to maintain his duties as a firefighter while the debtors cared for their teenage daughter who fought cancer for 18 months and eventually passed away. The wife claimed that she suffered from physical ailments, including back problems she sustained while working as a nurse’s aide.63 Although the wife had suffered significant stress since her daughter’s death, the bankruptcy court found that she was employable because of a letter from her doctor stating that “she will hopefully be able to return to work in the future,” a recent determination denying her disability benefits, her admission that she had sought work notwithstanding her ailments, and two hand-written notes from the debtors’ schedules stating that they had hoped to find work soon.64

Another issue to consider is how much proof debtors must assert to establish a mental disability or disorder, especially considering the added costs of providing such evidence by an already impoverished debtor.65 In Norris v. Educational Credit Management Corp. (In re Quares),66 the debtor went to great lengths to prove that she suffered from severe psychological problems. Two of the debtor’s treating physicians testified that the debtor had been diagnosed with bipolar disorder, dissociative disorder, and post-traumatic stress disorder.67 They also testified that they did not believe she could work at the time and were unsure if she would ever be able to work because of her mental disorders.68 The court was impressed with that evidence and relied heavily on those findings when it determined that her situation was likely to continue for a significant portion of the repayment period.69 Similarly, the debtor in Polleys established a long history of mental illness, which included at least one involuntary commitment and one attempted suicide.70

Although no court in the District of Kansas has directly addressed the level of proof debtors must provide to satisfy the second prong of the Brunner test, case law from other jurisdictions provide some guiding principles. At a minimum, debtors must provide some corroborating evidence of a long-term medical condition if relying on impaired health to establish a continuing hardship.71 But there is not a per se rule that debtors must provide expert testimony.72 Rather, it appears that debtors can satisfy their burden by introducing an authenticated letter from their treating physician—a reasonable compromise between costly expert testimony and question able self-serving statements.73 Even then, documentation of a
mental condition may be insufficient if it does not provide the bankruptcy court with an extended prognosis.74

Recent Attempts to Amend the Bankruptcy Code

Much as public outrage spurred Congressional action in the 1970s, recent stories of those denied student loan discharges have prompted legislators to propose changes to the Bankruptcy Code. On March 10, 2015, President Obama issued a presidential memorandum titled the Student Aid Bill of Rights, which has the force and effect of an executive order.75 Among its many instructions, the memorandum directs the U.S. Department of Education to establish a new online platform where students can lodge complaints about student loan lenders.76 It also calls for greater regulation of student debt collectors and directs several agency heads to review current bankruptcy laws and propose changes.77

Over the past several years, Sen. Richard Durbin has repeatedly introduced the Fairness for Struggling Students Act.78 The bill seeks to remove private student loans from 11 U.S.C. § 523(a)(8) thereby permitting them to be discharged like any other unsecured debt.79 The change would not affect government-backed student loans, which compose 90 percent of all student loans. His most recent bill—the Fairness for Struggling Students Act of 2015—garnered the support of President Obama as well as 13 fellow senators.80

Other bills are more ambitious. In January 2015, several Democrats introduced a bill that would simply remove all student loans from the list of excepted debts thereby treating student loans like all other general unsecured debts.81 In light of the current political makeup of Congress, however, the chances of such a sweeping measure’s passing appears slim. Another recent bill—the Student Loan Borrowers’ Bill of Rights Act of 2015—also seeks to remove loans from the list of debts that are non-dischargeable.82 That bill, however, also seeks to reinstate the six-year statute of limitations for collecting on both private and government-backed student loans.83 A more politically viable option would be to reinstate a statute of limitation in bankruptcy that would permit a debtor to automatically discharge student loans after a particular length of time, such as 15 or 20 years. Such an amendment would account for fears of recent graduates wiping away their student loan debt on the eve of lucrative careers. It would also provide equal treatment to debtors who decide to incur student loans later in life.84 Lastly, it would justify a stringent application of the Brunner test, which a bankruptcy court in the District of Kansas recently criticized as “an unfortunate relic,” noting it was formulated at a time when there was an automatic discharge period.85

Conclusion

As the debate on student loans rages, bankruptcy attorneys should not immediately assume that their clients cannot discharge their student loans. Instead, in litigating an adversary proceeding seeking to discharge such loans, attorneys should stress factors beyond their clients’ control, such as their poor mental or physical health. In the coming years, Congress may elect to amend the Bankruptcy Code to account for debtors most heavily burdened with student debt. Until then, however, bankruptcy attorneys must carefully weigh whether attempting to discharge their clients’ student loans is worth the expense of additional litigation. ■

About the Author

Kurtis Wiard graduated from Washburn University School of Law, cum laude, in 2014. During law school, he served as the notes editor for Volume 53 of the Washburn Law Journal. In his third year of law school, Wiard was named the American College of Bankruptcy’s Distinguished Bankruptcy Law Student for the Tenth Circuit and was awarded the American Bankruptcy Institute’s Medal of Excellence. He currently works as a research attorney for Judge David Bruns of the Kansas Court of Appeals.

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17. See Amanda M. Foster, All or Nothing: Partial Discharge of Student Loans Is Not the Answer to Perceived Unfairness of the Undue Hardship Exception, 16 WIDENER L.J. 1053, 1068 (2007).


20. Only the First and Eighth Circuits follow the totality of the circumstances test. While for a long time only the Eighth Circuit followed the test, the First Circuit Bankruptcy Appellate Panel recently criticized the Brunner test for its lack of “textual foundation” and opted for the totality of circumstances test. Bronson v. Educ. Credit Mgmt. Corp. (In re Bronson), 435 B.R. 791, 800 (B.A.P. 1st Cir. 2010); Andrews v. S.D. Loan Assistance Corp. (In re Andrews), 661 F.2d 702 (8th Cir. 1981).

21. 46 B.R. 752 (Bankr. S.D.N.Y. 1985); aff’d, 831 F.2d 395 (2d Cir. 1987).

22. Id. at 756.


25. 356 F.3d 1302, 1309 (10th Cir. 2004).

26. Id. at 1304-05.

27. Id. at 1305. She also claimed that her employer terminated her because the employer believed she asked for too much help. Id. 28. Id.

29. Id. at 1309. Somewhat paradoxically, the court later praised the Brunner test for incorporating the totality of the circumstances within its elements. Id.

30. Id. at 1309-10.

31. Id. at 1310.

32. Id. for example, a common issue that courts grapple with under the good faith portion of the Brunner test is whether debtors act in bad faith by having children after incurring student loans, thereby voluntarily increasing their expenses. See, e.g., Harvey v. Educ. Credit Mgmt. Corp. (In re Harvey), No. 11-23142, 11-1958, 2013 WL 4478926, at *4 (Bankr. D. Colo. Aug. 20, 2013) (stating that asking such a question “urges the Court to invade the [debtor’s] privacy and impose [the creditor’s] values on the [debtor’s] life choices”); Cota v. U.S. Dept. of Educ. (In re Cota), 298 B.R. 408, 417 (Bankr. D. Ariz. 2003) (noting that the debtor “did not agree to waive his right to procreate when he incurred the Student Loan Obligation”).


34. Id. at 1311-12.

35. See Ron Lieber, Last Plea on School Loans: Proving a Hopeless Future, N.Y. Times (Aug. 31, 2012), at A1, http://www.nytimes.com/2012/09/01/business/shedding-student-loans-in-bankruptcy-is-an-uphill-battle.html?pageadver=tab&tc=0. The article recounts a story of a debtor who had a history of hospitalization for mental illness but testified that she did not suffer from depression at all because “[s]he was so mortified about her situation that she was committing perjury on the stand.” Id. (internal quotation marks omitted)

36. See Fed. R. Bankr. P. 7001(6) (requiring the filing of an adversary proceeding for actions “to determine the dischargeability of a debt”).

37. The U.S. Bankruptcy Court for the District of Maine recognized a debtor’s age as an important factor in Ackley v. Sallie Mae Student Loans (In re Ackley), 463 B.R. 146, 150 (Bankr. D. Me. 2011). Although both the debtors’ age and health were at issue, the bankruptcy court emphasized that the debtors would be 61 and 63 once they paid off their student loans.
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loans. Id. The court also noted that the husband's monthly Social Security disability payments of $1,600 accounted for almost half of the debtors' income. Id. at 148.
39. Id. at 215-16.
40. Id. at 216.
41. Id. at 219.
42. Id. at 222. See also Goulet v. Educ. Credit Mgmt. Corp., 284 F.3d 773, 779 (7th Cir. 2002) (reasoning that a debtor must have believed he had future earnings potential because he returned to graduate school at age 45); Mo. Student Loan Program v. Houshamd (In re Houshamd), 320 B.R. 917, 921-22 (Bankr. W.D. Mo. 2004) (finding that a 64-year-old debtor who incurred student loan at the age of 48 was not entitled to a discharge merely because he was at the usual age of retirement).
44. Id. at *1. The original balance of the loans that were incurred in the 1990s was $45,000.
45. Id.
46. Id. at *2.
47. Id. at *3.
48. Id. at *5-10.
49. Id. at *9, n. 31.
50. Id. See 11 U.S.C. § 522(b)(3)(C) (permitting a debtor to exempt certain retirement funds from the bankruptcy estate even if the debtor's state declines to adopt the federal bankruptcy exemption scheme).
52. See Liposky v. U.S. Dept of Educ. (In re Liposky), No. 09-03076, 2010 WL 1333103, at *7 (Bankr. E. Va. 2010) (“In view of the strict requirements for an undue hardship determination, neither age nor prospect of retirement, standing alone, are considered ‘additional circumstances’ indicating a limitation on a debtor’s ability to maintain a ‘minimal standard of living’ under the second Brunner test”); Educ. Credit Mgmt. Corp. v. Waterhouse (In re Waterhouse), 333 B.R. 103, 112 (W.D.N.C. 2005) (holding that incurring loans at the ages of 37 or 38 and then using age as “grounds to avoid repaying the loans” is improper); But see Ackley v. Sallie Mae Student Loans (In re Ackley), 463 B.R. 146, 150 (Bankr. D. Me. 2011) (considering the debtors’ ages—58 and 60 years old—and ailments and noting that both will adversely affect “their employability beyond retirement age”).
54. In re Polleys, 356 F.3d at 1311.
55. Hancock, supra note 53, at 162.
56. 284 B.R. 496, 510-11 (D. Kan. 2002). Since Innes is a pre-Polleys case, the court was unsure whether the Tenth Circuit would adopt the Brunner or the totality of the circumstances test. Id. at 503. Although the court stated that it would apply the Brunner test, it also stated that it would “borrow any other relevant consideration identified” in prior Sixth and Eighth Circuit cases that apply the totality of the circumstances test. Id. at 503-04. Therefore, attorneys should be cautious in relying heavily on the Innes case.
57. Id. at 501.
59. Id. at *4.
60. Id.
61. Id. at *9.
63. Id. at 887.
64. Id. at 891-92.

The United States Bankruptcy Court for the District of Kansas gives notice of Proposed Local Rules of Practice and Procedure.

The Proposed Local Rules amend the present Local Rules as recommended by the Bench and Bar Committee of the United States Bankruptcy Court for the District of Kansas with the approval of the Court.

Interested persons, whether or not members of the bar, may submit comments on the Proposed Local Rules addressed to the clerk of the United States Bankruptcy Court for the District of Kansas at 401 N. Market, Room 167, Wichita, Kansas 67202. All comments must be in writing and must be received by the Clerk no later than Noon on December 24, 2015, to receive consideration by the Court.

Copies of the Proposed Local Rules will be available for review by the bar and the public from November 24, 2015, through December 24, 2015, at:

- Wichita Clerk’s Office
  204 U.S. Courthouse
  401 N. Market
  Wichita, KS 67202

- Topeka Clerk’s Office
  490 U.S. Courthouse
  444 SE Quincy
  Topeka, KS 66683

- Kansas City Clerk’s Office
  259 Robert J. Dole U.S. Courthouse
  500 State Ave.
  Kansas City, KS 66101


Copies of the Bench and Bar Committee Minutes, at which most of the proposed changes were discussed, are also available at www.ksb.uscourts.gov.
VIETNAM: Eight Who Served
by Matthew Keenan
Historians have labeled the Korean War as the forgotten war. That’s what the U.S. News and World Report declared in 1951, giving it a moniker that remains today. Yet I think that label may be more appropriate for another war: Vietnam. For a war that influenced and, in many ways, dramatically changed everything from culture, politics, policy-making – few people today under the age of 50 appreciate how it changed the lives of those who fought it. This for a war that inspired thousands of books about it, and impacted cities and universities close to home, like KU.

Michael Herr, a former war correspondent in Vietnam said it best, “All the wrong people remember Vietnam. I think all the people who remember it should forget it, and all the people who forgot it should remember it.”

But perhaps the public’s awareness of the Vietnam era and appreciation for those who fought it is now changing. With the 40th anniversary of the fall of Saigon, historians are busy revisiting the history. PBS recently aired “The Last Days in Vietnam,” directed and produced by Rory Kennedy. Described by critics as a masterpiece, and a documentary triumph, at the box office it earned a meager $500,000. But then it was nominated for an Academy Award for best Documentary, and aired on PBS and received more attention. One critic described it this way: “A remarkable piece of work that should be seen by everyone who thinks they know everything about the Vietnam War.”

And central to the war, like seemingly all wars, were teenagers – 18, 19, and 20 year olds. In this month’s Journal, we profile eight who served in that time. They have more in common than responding to the country’s call in the 1960s and 1970s. When they returned, each one attended law school, then served their communities in countless ways, including becoming active in the Bar Association, serving as elected leaders in the state Legislature and in some cases, remaining active in the Reserves.

Here are their stories.

Mike Farley
Navy Intelligence, assigned to interview returning POWs

Military Experience
U.S. Navy
- September 1968 – January 1970: Enlisted Reserve Program Kansas City, Missouri, Reserve Center
- April 1970 – August 1973: Selected into Air Intelligence Officer Program, Aviation Officer Candidate School, NAS Pensacola, Florida, Commissioned, Ensign; June 1970: Intelligence Officer Training
- September 1973 – July 2000: Intelligence Reserve Program, member of a series of drilling reserve units
- Two cruises aboard USS Constellation October 1971 – July 1972: Combat Cruise to Western Pacific, Gulf of Tonkin; January 1973 – August 1973: Cruise to Western Pacific, Gulf of Tonkin
- Rank at retirement: Captain (O-6)

Legal Experience
- University of Kansas School of Law, Juris Doctor, 1974
- Johnson County District Court Judge, Olathe

John Gerstle
Finding hostility upon returning to KU in 1970

Military Experience
U.S. Army
- Rank at discharge: E-5

Legal Experience
- University of Kansas School of Law, Juris Doctor, 1973
- Criminal litigation practice, 40 years, Olathe
- Johnson County Bar President, 1998

“I joined the squadron in January 1971 and drove from Kansas City to Central California in January 1971 in a horrendous blizzard. I was the person in the squadron who was responsible for the day-to-day briefing and training and preparation of missions, debriefing of missions, and several other responsibilities. So, they were all intelligence related.

“While I was on active duty, toward the latter part of the Vietnam War, and it had become very clear that the war was winding down, there was substantial diplomatic effort to try to end the conflict and ease our way out of that situation. And along with that, we were going to receive the return of the POWs who had been captured, kept in captivity in North Vietnam. And over the period of time before my first cruise, I had some training exercises on becoming ready to be an escort and debriefer for POWs who would be returned. So, I had a set of general orders that allowed me to travel anywhere in the world, keep anybody off an airplane, if my mission required that I use the asset. And just try generally to be ready for their return.

“One of the POWs I was assigned to return had been – he was a young man, he was married, and he had a fight with his wife the day before he deployed on a cruise and was shot down about the first mission. He had told his wife that he never wanted to see her again. She had stayed with him in spirit for six and a half years. And so it was identified as a special case. I was walking down the hallway in the hospital at Clark Air Force Base where these guys were, encountered a POW. So, I am walking down the hallway with this fellow and the more conversation I am having with him; just as we parted company, he looked at me and he said, ‘You know, all these years we wondered what it would be like to return.’

“And that comment after all these years just blew me away. Because I knew that I did not know his experience. I never experienced that, what he had done for six and a half years, and he wasn’t a normal guy and he wasn’t super human either. But the experience was an absolutely unique experience and would be something that I have to understand and he would too from the other side.”
Vietnam

Paul Rieckoff, Olathe

Did a two year tour in Vietnam, and a two to six week tour in South Korea. Mailed a letter home, that was the extent of my involvement.

Julie Dechant, Olathe

I was stationed in Okinawa, Japan, and worked for the United Nations Command. I don’t think that was the most important thing that 
 happened during my time there, but it was a significant part of my military experience.

Bill Jeffries, Overland Park

I served in the Army from 1967-1969 and was stationed in South Korea. I enjoyed my time there, but looking back on it now, I wish I could have done more to help the local community.

Military Experience

U.S. Army

- Rank at discharge: 1st Lieutenant USA infantry
- Three-time Purple Heart recipient
- Vietnam Cross of Gallantry
- Combat infantry badge
- Three bronze stars (two for Valor)

Legal Experience

- Washburn University School of Law, Juris Doctor, 1972
- Grimshaw & Rock, criminal law (defense), Olathe

I got married about three weeks before I went to Vietnam. Why, I don’t know. I mean it probably doesn’t make sense to most people. But, nevertheless, we did. I got to Vietnam – I flew on a commercial jet. They opened the door and the first thing that hits you is the heat and the humidity. It was right before the monsoon starts. We spent a day or two there and then we went to – soon after the 4th Infantry Division we had some orientation for about a week and then we went out and were assigned to a new unit. I got off the helicopter and the monsoon had started and – captain came in and introduced himself and said this is your platoon and introduced them and then said grab your shovel, home is where you dig it. And that was that. And we lived in bunkers most of the time.

Anyway, it worked out for me and I ended up going to law school. I think when you are that young – I was 22 when I went in and 23 when I got out – I had been responsible for a lot of people, and you feel that responsibility. You are responsible for every decision – better try to make good decisions, but you feel a kinship with it. So, that’s what you take to law school. You try and treat your clients the same way you treated your troops. They are yours. You represent them. You do what is necessary to try to help them – can’t help them all. But you do what you can and that’s what I did. You take to law school.

Law school was kind of disconcerting because you know I felt pretty good about why I had gone and served my country and all that – and Vietnam was very unpopular war and soon as they were out, if anybody figured out that you had been, especially if you had been a combat soldier, they would call you baby killer and they would spit on the sidewalk and stuff. And so you didn’t talk about it. You just didn’t do it. Because that was how unpopular it was. So, I never said anything to anybody for years.”

Mick Lerner

Deployed to Korea, not Vietnam. North Korea capturing the USS Pueblo broke the calm

Military Experience

U.S. Army/Reserves

- August 1966 – August 1968: Army
- 1968 – 1972: Reserves
- April 1967 – April 1968: Stationed in the 7th Infantry Division headquarters in Korea
- Rank at discharge: First Lieutenant

Legal Experience

- Boston University School of Law, Juris Doctor, 1971
- The Lerner Law Firm, commercial litigation, Overland Park

“Back in 1966 when I graduated from college, everybody was going into the military because of the draft and because of Vietnam. And I went into the ROTC program at Stanford, and the day before I graduated I was commissioned a second lieutenant. At that time with the Vietnam War going on, 15 percent of the young officers were sent to South Korea and the rest mainly to Vietnam. I happened to be in the group that went to South Korea. We had 20,000 troops in South Korea to try to deter the
North Koreans from invading and they were constantly threatening to do that.

“I was the Division Transportation Officer, on the commanding general’s staff. I was way out of my depth, yet I learned a little bit about transportation. The main challenge I ever faced during my entire tour was on the night of January 23, 1968, when the USS Pueblo, an intelligence gathering ship for the United States, was attacked and captured by the North Koreans. Washington told us to get ready, we are going to war. And so I was sitting in the officer’s club having a drink after dinner, 65 cents is what the drinks cost at the time in the Officer’s Club, I got word that the General wanted me to see him. And I thought I would finish my drink and then go over. Before I could finish my drink, the General had sent his jeep for me and he had collected me to come to the Division Tactical Operation Center. And he told me we are going to war. The North Koreans are going to invade and that’s what the Pentagon had been warning us about.

“The next day we learned of the capture of Lloyd Bucher, the commander and his 82 crewmen and, even though on high alert, we were never forced to utilize the transportation plans. That was a great comfort to me because being so naïve and inexperienced, I’m sure that would have been utter chaos when I moved the whole division through the small Korean villages to get south of Seoul.”

Steven Ray McConnell
Combat Infantry, Leader Third Platoon, A Company, 11th Infantry

Military Experience
U.S. Army Infantry
• September 1969 – July 1971
• September 1969 – December 1969: Fort Benning, Georgia; Infantry Officers Basic Corps
• December 1969 – September 1970: Fort Campbell, Kentucky; Served as a training officer
• October 1970: Left Fort Campbell for South Vietnam. Assigned to 1st Brigade 5th Infantry Division (Mechanized)
• February 1971: Became Leader of Third Platoon A Co. 1st Battalion, 11th Infantry
• March 1971: Lead Platoon into bush country to search and destroy enemy
• July 1971: DISCHARGED from Fort Campbell
• Purple Heart, Combat Infantryman’s Badge, Vietnam Campaign Medal
• Vietnam Service Medal with One Campaign Star, One Overseas Service Bar, National Defense Service Medal, Expert Badge (M-16)

Legal Experience
• University of Missouri School of Law, Juris Doctor, 1974
• McConnell & McMahon, Overland Park

“While in Quang Tri, which is a province in the North Central Coast of Vietnam, I took the LSAT. I received an early discharge to start law school at UMKC in August 1971. On my last day of combat, I was leading a team of about six or seven of us on the Ho Chi Minh trail in and out of Vietnam and Laos.

“Upon a hilltop ahead of us, we observed enemy mortars firing on the 1st ARVN Division [South Vietnam Army] as they were invading Laos. I climbed a few feet up a tree to call a fire mission on the hilltop. We were just off a trail hiding in the bamboo and foliage.

“The Army’s artillery bombarded the hill per my instructions and as I walked the artillery shells closer to us, I could feel the debris it was causing and the shock waves. We could also hear the North Vietnam Army screaming and running down the trail to get away.

“Eventually after a few fire missions, my artillery cut me off and I hear a voice on the radio saying, ‘Lieutenant’ this is Captain ‘somebody’ of the USS ‘some battleship,’ ‘May I be of assistance, I have been monitoring your radio communication?’

“I responded, ‘Yes, sir, I would like a battery 3.’ He said, ‘You want me to fire three of my biggest guns three times on the position you previously gave your artillery?’ I said, ‘Yes, sir.’ He replied, ‘Here it comes, good luck.’ I said, ‘Roger, out.’ Those shells shook the earth and made me reel in the tree.

“I have recently learned that the Navy’s shells were about the size of a Volkswagen.

“We heard more NVAs running and screaming. We went up the hill, saw a booby trap, blew it and all hell broke loose. The enemy was everywhere. I had two Cobra gunships on my radio strafing the enemy. They were shooting at us, and we were shooting at them. I got shot in the neck. My men dragged me and two others to a Medivac chopper that took us to Quang Tri for treatment.

“I was unconscious during part of the time I was being dragged, but regained consciousness when the chopper lowered the cable and seat. I reached for it and one of my squad leaders sat on the seat opposite me and held me on the way up. He returned to the ground the same way.

“The enemy was still shooting at us and the choppers during this time. None of my men were killed, but my Colonel and his pilot were killed, my Company Commander was wounded and my Forward Observer was also wounded, as they were all in the same helicopter.

“The only thing we fought for in Vietnam was the guy next to us and this proves it.”
Military Experience

U.S. Army

- June 1968 – August 1971: Active Military Duty
- Graduate of the U.S. Army Command and General Staff College
- Rank at retirement: Colonel (O-6) from U.S. Army Reserve in 1994

“I served with the 199th Light Infantry Brigade in Vietnam as a Counterintelligence Officer and continued to serve my entire career in both active and reserve capacities as a Counterintelligence and Strategic Intelligence Officer specializing in area studies and foreign armor systems studies. I carried both a military intelligence (9666 and 36B) MOS and an infantry officer (11B) MOS.”

Legal Experience

- Washburn University School of Law, Juris Doctor, 1975
- Kansas State University, Bachelor of Arts, Political Science, 1968
- General Practice, family law, Overland Park
- Kansas Department of Social and Rehabilitation Services, General Counsel, Topeka, 1988 – 1991
- Kansas State Senator, 2008 – 2012
- Kansas State Representative, 2001 – 2008
- Overland Park City Council, 1981 – 2005

“I graduated from Kansas State University in the ROTC program in 1968 and was the first in my Army ROTC class to receive orders for Vietnam. My wife, Donna, and I were married and shortly thereafter I departed for infantry training at Fort Benning, Georgia. Upon completion of that training, I was sent to the Intelligence School at Fort Holabird, Maryland. After a 30-day leave, I departed for Vietnam and my next assignment.

“My father was a career Army warrant officer. He and my brother who served in the U.S. Marine Corps preceded me in Vietnam. We all served there within three years. My father was assigned to the upper peninsula of Michigan as an intelligence agent upon his return from Vietnam and it was there that I left my wife so that she could be afforded military benefits at KI Sawyer AFB during my absence. My father had met and married my mother when they were both serving in the military at what is now Fort Drum, New York. Yes, my mom was a World War II veteran as well, and proved to be a strong and supportive military wife who endured those three years of her three men serving in the war in Vietnam.

“It was May 1969. I reported for duty in Vietnam and was assigned to the 199th Light Infantry Brigade in III Corps, central Vietnam just north of Saigon with Brigade HQ in Long Binh.

“One day while serving as executive officer of the military intelligence detachment I received a call from the Red Cross office next door requesting that I come over for a visit. One of the two men in the office asked me to sit down and have a cup of coffee. ‘Lieutenant,’ he asked, ‘were you expecting anything at home?’ I had been busily preparing for an upcoming military operation and the intelligence functions so my focus was a bit distracted. ‘No,’ I replied. But all of a sudden it dawned on me and I changed my answer. ‘Yes,’ I said. ‘Good,’ he replied, and ‘Congratulations. You are a new Dad!’ My wife had given birth to a wonderful son whom we named Craig, and here I was sitting in front of the Red Cross in Vietnam to get the news. Dr. Bowes lived across the street from my parents at the air force base in Michigan and had reported Mother and child were both doing fine. And my military mom was there to help my military wife through the event in my absence.

“I served my full year with the infantry as an intelligence officer. My duties centered around the collection of information about the enemy and involved visits with Vietnamese villagers, officials, religious figures, and captured prisoners, as well as numerous other types of intelligence operations in support of infantry operations.

“...There were many stories that I could relate as could any of us who served in Vietnam. All of us had families. Mine happened to be a military family and we all served. It is who we were. When the time came for me to return home, my coming home was like a lot of other returning veterans. There were no parades and fanfares, no bells and whistles. I flew from Vietnam to Travis Air Force Base in California, took a cab to the San Francisco airport, and flew to Kansas City. To get to Manhattan at 10:30 that night, there was only one small four-seat airplane going so I took it. At the Manhattan airport I called my wife and said, ‘Honey, I’m home, and I will be there in a few minutes in a cab.’ I knocked on the door; she opened it, gave me a big hug and a kiss and asked if I would like to see our son. Yes! I was home, and it was about family!”

Tom Ruzicka
Army Infantry, 1968, then National Guard

Military Experience

Army Infantry

- May 1968 – September 1969
- Rank at discharge: 2nd Lieutenant Infantry

Legal Experience

- University of Kansas School of Law, Juris Doctor, 1972
- Hubbard Ruzicka, Kreamer & Kincaid, commercial litigation, Olathe

“I graduated from KU in May 1966. I was admitted to law school. At the time I decided I would rather, I think, have a career as a commercial airplane pilot. I had got my commercial instrument ticket and scheduled to start a flight training program with TWA, a Flight Engineer Program. And on April 4, 1968, Martin Luther King was shot and we were activated in Kansas City, Kansas, for riots. Following that, I was activated to Fort Carson, Colorado, on May 12. It was a big change from being a pilot, flying airplanes.”
“I then went to Fort Benning, Georgia, for infantry officer’s basic course. From there came Vietnam. When I arrived in Vietnam, I was a second lieutenant; our area was west of Saigon. My work, as I say, as a second lieutenant, had about 35 people that I was responsible for – that meant you normally would have about 28 to 32.

“We broke it up into three squads. Our mission was primarily during the day to go out, follow the companies – what we were looking for so we went through the villages. We didn’t really have much North Vietnamese army. We had Viet Cong (VC) issues. At night, we, I spent five-six nights a week – and we would get out in our night ambushed – the purpose of which was to control the countryside. To prevent the VC from, if you would, presenting rockets and other things. To control the countryside. The biggest problem we had was primarily booby traps – I lost two boys in booby traps.

“I left Vietnam September 1, 1969, was in Lawrence on September 6, 1969 – that was when I started law school.

“We had the Student Union burn about the 25th of October 1969. I was in charge of the Lawrence National Guard Detachment at the time. When I came back – $200 a month in addition to my GI bill, that was nice money, so I was in charge of that and then when the Union burned, we got active – we were called up again.

“Chancellor Chalmers canceled all finals first part of May 1970.”

John Solbach

**Military Experience**

**U.S. Marine**

- Age 18, 1966
- August 1966 – July 1969
- Vietnam: January 1967 – February 1968
- MOS – 0311. Lima Company, 3rd Battalion, 3rd Marine Division
- Rank at discharge: Sergeant (E-5)

**Legal Experience**

- Washburn University School of Law, Juris Doctor, 1977
- Solbach Law Office, Lawrence
- Kansas State Representative, 1979 – 1993
- Ethics Commission, 1997 – Present


“I knew if I didn’t go, somebody else would have to go in my place. I had four younger brothers. I ended up in this remarkable unit that would become legendary. Capt. W. Ripley, company commander, joined the unit in early January. Each time he led us in combat, when the shooting began, he knew what he was doing. He was remarkable. He took care of us. We were an effective combat unit. There was something remarkable about him as a leader.

They didn’t want to tip off the enemy as to where we were headed. We walked up jungle trails – I remember there were little pools of blood all the way up. Leeches would get on the Marine’s legs, fill themselves with blood, drop off, and the next Marine would step on them. I was carrying a 70-pound pack board and another 20-30 pounds in gear.

“The jungle, most of the time, was very thick you could only go through it using machetes and it was hot. A number of men collapsed of heat stroke and had to be medevaced. The best place to travel was up and down streambeds because they were clear. The jungle was so thick that when it started to rain, it would rain for 20 minutes before the first drop would get through the canopy to you. And then when it stopped raining, it would continue to rain for 20 minutes until the rain would all filter through the trees.

“I stayed in the field for virtually all of my 396 days (we fought large, well-trained, well-equipped, and well-led northern Vietnamese army units). Though we prevailed in every combat engagement, the cost was high. The battalion that I served in had an average field strength of 600 men, 137 were killed during my tour and more than 900 were wounded (some wounded and the dead were replaced as were those who left under normal rotation).

“Being in combat and seeing what war is, after my tour I believed that surely we would never ever go to war again. . . if people understood what I understood about war, the sacrifices of men engaged in conflict on both sides. War is a very poor way of resolving disputes. But we sometimes forget. However, this country was founded on a Constitution, a Bill of Rights, our laws, and court decisions. There are five little magic words in the Constitution, ‘according to the common law,’ that reach back and incorporate everything from the 12th century in English law.

“Those provide us with a blueprint on how to peacefully resolve disputes. As a lawyer, I have had a great opportunity to utilize that. When political, legal, and diplomatic institutions break down, we may go to war. These institutions are meant to keep us and allow us to live in peace. That’s what lawyers’ work affirms.”

**About the Author**

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

mkkeenan@shb.com
ATTORNEY DISCIPLINE

INDEFINITE SUSPENSION
IN RE WENDELL BETTS
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 113,578 – OCTOBER 16, 2015

FACTS: This is an original proceeding in discipline filed by the Office of the Disciplinary Administrator against the respondent, Betts, of Topeka, an attorney admitted to the practice of law in Kansas in 1981. Betts’ ethical issues involve his criminal conduct against his wife, DUI, and other drug crimes. The Kansas Supreme Court had previously put Betts on probation and also censured him.

HEARING PANEL: On October 29, 2014, the Office of the Disciplinary Administrator filed a formal complaint against the respondent, alleging violations of the Kansas Rules of Professional Conduct (KRPC). The respondent filed an answer on November 21, 2014. A hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on February 26, 2015, where the respondent was personally present and was represented by counsel. The hearing panel determined that respondent violated KRPC 8.4(b) (2014 Kan. Ct. R. Annot. 680) (commission of a criminal act reflecting adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer); 8.4(d) (engaging in conduct prejudicial to the administration of justice); and 8.4(g) (engaging in conduct adversely reflecting on lawyer’s fitness to practice law). The hearing panel unanimously recommended Betts’ license to practice law be suspended for a period of two years.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator recommended that Betts’ license to practice law be suspended for a period of two years.

HELD: Court found that clear and convincing evidence established the charged misconduct. Court recognized the recommendations of the hearing panel and the disciplinary administrator, but held that, given respondent’s disciplinary record and the nature of his current problems, a more severe discipline than recommended by the panel should be imposed: he should be indefinitely suspended effective as of the date of his administrative suspension, September 18, 2013; that respondent undergo a Rule 219 reinstatement hearing; and that at the reinstatement hearing, the respondent should be required to establish the six requirements set out by the panel in the final hearing report. A minority of the Court would impose a less severe discipline.

TWO-YEAR SUSPENSION
IN RE JARED WARREN HOLSTE
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 113,970 – OCTOBER 9, 2015

FACTS: Holste, of Atwood, is an attorney admitted to the practice of law in Kansas in 2005. Holste’s disciplinary matters involved his representation in civil and criminal matters and using his capacity as Rawlins County attorney to threaten criminal action as a means to force settlement in a civil lawsuit. The uncontested findings demonstrated Holste committed multiple acts of professional misconduct, specifically: (1) using his office as Rawlins County attorney to threaten felony criminal charges against a civil litigant as a means to force settlement of a civil suit; (2) failing to provide the court in an ex parte proceeding with all material facts known to respondent that would have enabled the tribunal to make an informed decision about the entry of default judgment; (3) creating a concurrent conflict of interest between his civil client and his prosecutorial responsibilities as Rawlins County attorney; and (4) initiating a civil action against an individual without a factual basis for doing so.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator recommended that Holste be censured by the Kansas Supreme Court. The disciplinary administrator found the mitigating factors to be compelling and warranted a reduction in the discipline.

HEARING PANEL: A panel of the Kansas Board for Discipline of Attorneys held a hearing on April 2, 2015, at which the respondent appeared personally and through counsel. The hearing panel determined that respondent violated KRPC 1.7(a) (2014 Kan. Ct. R. Annot. 531) (conflict of interest); 1.11(c)(1) (2014 Kan. Ct. R. Annot. 558) (successive government and private employment); 3.1 (2014 Kan. Ct. R. Annot. 602) (meritorious claims and contentions); 3.3(d) (2014 Kan. Ct. R. Annot. 612) (candor toward tribunal); 4.4(a) (2014 Kan. Ct. R. Annot. 641) (respect for rights of third persons); 8.4(d) (2014 Kan. Ct. R. Annot. 680) (engaging in conduct prejudicial to the administration of justice); and 8.4(e) (statement or implication of an ability to influence improperly a government agency or official). The hearing panel unanimously recommended that Holste be censured by the Kansas Supreme Court—finding Holste’s remorse warranted a lesser punishment—and suggesting that Holste investigate membership with the Kansas County and District Attorneys Association for CLE and networking opportunities.

HELD: Court found the evidence before the hearing panel established the alleged misconduct by clear and convincing evidence. Court commented that the courts have long recognized that prosecuting attorneys have broad discretion in deciding whether to charge someone with a crime. Court stated that Holste’s misuse of that power by attempting to effect a civil litigation settlement by threatening criminal prosecution was especially egregious. Court suspended Holste for a period of two years, but allowed him to file for early reinstatement after six months following completion of an 18-month probation plan.

ORDER OF REINSTATEMENT
IN RE GARY W. LONG II
NO. 13564 – SEPTEMBER 24, 2015

(2014 Kan. Ct. R. Annot. 403), on March 6, 1998, this court disbarred petitioner from the practice of law in Kansas. See In re Long, 264 Kan. 2, 957 P.2d 1105 (1998). Following a hearing, a hearing panel of the Kansas Board for Discipline of Attorneys recommended to the court that petitioner’s license to practice law be reinstated, conditioned on petitioner’s first taking and passing the Kansas bar examination. After careful consideration, the court accepted the recommendation of the hearing panel. Petitioner took and passed the July 2015 Kansas bar examination.

HELD: Long is reinstated to the practice of law in Kansas conditioned upon his compliance with the annual continuing legal education requirements and upon his payment of all fees required by the clerk of the appellate courts and the Kansas Continuing Legal Education Commission.

CIVIL

CHILD SUPPORT AND SOCIAL SECURITY DISABILITY INSURANCE BENEFITS

IN RE MARRIAGE OF STEPHENSON

ATCHISON DISTRICT COURT – REVISED AND REMANDED WITH DIRECTIONS

COURT OF APPEALS – REVERSED

NO. 109,121 – OCTOBER 9, 2015

FACTS: This appeal presents an issue of first impression: whether a child-support obligor, who became disabled and applied for Social Security disability insurance (SSDI) benefits for himself and his dependents, may be reimbursed or receive a credit for past child-support payments. The obligor in this case argued that his children received duplicative payments, both of which satisfied his child-support obligations for the period between his application for and the approval of the SSDI derivative benefits: One payment came directly from the obligor as the child support became due and the second occurred when the Social Security Administration (SSA) paid the SSDI derivative benefits that had accumulated while his application was being processed. Both the district court and a divided Court of Appeals determined that the disabled obligor was not entitled to a credit, a reimbursement, or an offset. In re Marriage of Stephenson & Papineau, 49 Kan. App. 2d 457, 308 P.3d 1270 (2013).

ISSUES: (1) Child support and (2) Social Security disability insurance benefits

HELD: Court reversed the district court and the Court of Appeals. Court held that a district court may—but does not necessarily have to—grant a credit to a child-support obligor who is current on child support when a lump-sum payment of accumulated SSDI derivative benefits duplicates the obligor’s support payment. A credit, if granted, may be used to offset other support obligations imposed by the court on the obligor. Alternatively, the district court might adjust an obligor’s support obligations, require reimbursement of the duplicative payments from funds that are discrete from SSDI benefits, or fashion some other equitable remedy permitted under applicable federal statutes and regulations. Because the district court in this case did not recognize the extent of its discretionary powers, Court remanded for further proceedings.

STATUTES: No statutes cited.

CONDEMNATION AND DAMAGES

KANSAS CITY POWER & LIGHT CO. V. STRONG ET AL.

JOHNSON DISTRICT COURT – AFFIRMED

NO. 110,573 – AUGUST 28, 2015

FACTS: In January 2012, Kansas City Power & Light Co. (KCPL) condemned a power line easement bisecting two tracts of undeveloped agricultural land in southern Johnson County. The land was owned by the trusts for Daniel and Evelyn Strong (the Strongs). The easement occupied approximately 12 out of a combined 460 acres. Court-appointed appraisers awarded the Strongs $96,465 in damages. The Strongs appealed. At trial, the jury awarded the Strongs $1,922,559 as compensation for the taking. KCPL then appealed directly to this court pursuant to K.S.A. 2014 Supp. 26-504. KCPL asserts three claims of error below. First, KCPL claims the district court erred in denying its repeated motions to exclude or strike the expert testimony evidence offered by the Strongs. KCPL argued below, and reprises the argument on appeal, that the evidence was inadmissible pursuant to K.S.A. 26-513(e). Next, KCPL alleges the district court improperly permitted the Strongs’ experts to testify pursuant to an alternative, nonstatutory “development approach” without first laying a foundation that development of the property was imminent. Finally, KCPL claims the district court erred in admitting evidence regarding a 2004 option contract the Strongs entered into with a developer.

ISSUES: (1) Condemnation and (2) damages

HELD: First, Court held the Strongs’ evidence was admissible and sufficient to support the jury’s post-taking value determination. Court stated that the Strongs’ expert, Lambie, testified that his opinions were those of a professional developer and hypothetical buyer asked to evaluate the Strongs’ property for purchase. That evidence was relevant to the jury’s consideration of the adjustment factors permitted by K.S.A. 26-513(d) and laid the proper foundation for the testimony of the Strongs’ true valuation expert—Smith. Court held the jury determined that the post-taking remainder—the second statutory variable—had a value somewhere between the valuations properly offered and admitted into evidence by the two parties. Second, Court rejected KCPL’s argument concerning the viability of the “development approach” to compensation awards and whether it was applied in this case. Last, court held the admission of an options contract was proper. Court stated that the evidence was introduced to show that a developer was interested in developing the property into a single family residential subdivision—so interested that he paid an undisclosed sum to obtain an option to purchase the property. That fact was both material to the existence of the factors set forth in K.S.A. 26-513(d) and at least somewhat probative in that it tended to support the existence of such factors.

STATUTE: K.S.A. 26-513

NEGLIGENCE – LEGAL MALPRACTICE – LIMITATIONS PERIOD

MASHANEY V. BOARD OF INDIGENTS’ DEFENSE SERVICES

SEDGWICK DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS

COURT OF APPEALS – AFFIRMED IN PART AND REVERSED IN PART


FACTS: Jury convicted Mashaney of aggravated indecent liberties with a child and aggravated indecent liberties. Court of Appeals affirmed in unpublished opinion. Mashaney later filed a K.S.A. 60-1507 motion alleging ineffective assistance of counsel at trial (Sweet-McKinnon) and direct appeal (Girard-Brady). District court summarily denied the motion. Court of Appeals reversed and remanded for evidentiary hearing. Case returned to trial calendar after district court conducted hearing and granted the K.S.A. 60-1507 motion in April 2011. In December 2011, Mashaney entered Afford plea to attempted aggravated battery and aggravated endangering a child, and state dropped the original charges. Between his plea and sentencing, Mashaney filed legal malpractice action against Sweet-McKinnon, Girard-Brady, and Board of Indigents’ Defense Services (BIDS) on claims similar to ineffective assistance claims in the K.S.A. 60-1507 motion. Sweet-McKinnon and Girard-Brady filed motion for
judgment on pleadings, arguing that Mashaney was estopped from pursuing negligence claim because Alford plea prevented him from proving actual innocence, and because the legal malpractice claim was not timely filed. District court granted that motion, and granted BIDS' motion to dismiss because BIDS lacked capacity to be sued. Mashaney appealed. Court of Appeals panel held BIDS lacked capacity to be sued, the legal malpractice claim was timely filed, and Alford plea precluded suit. Petition and cross-petitions for review granted.

ISSUES: (1) Suit against BIDS, (2) statute of limitations, and (3) actual innocence

HELD: BIDS, as a subordinate government agency created within in Kansas executive branch, lacks the capacity to be sued. District court's dismissal of BIDS is affirmed.

Mashaney's action was timely filed. Competing exoneration case law in other states was reviewed. Court held that a Kansas criminal defendant is "exonerated" for purposes of accrual of a civil legal malpractice claim against counsel on the date that a court grants relief from the conviction on the basis of ineffective assistance of counsel. That relief may come as the result of a K.S.A. 60-1507 motion or some other procedural mechanism in the district court or in an appellate court.

Proof of actual innocence is not required to pursue the legal malpractice claim in this case. Portions of panel's dissenting opinion were reviewed with approval. District court's dismissal of Sweet-McKinnon and Girard-Brady, and panel's affirming of that dismissal, were reversed.

CONCURRENCE (Stegall, J.): Wrote separately to caution that this decision does not decide what role a criminal defendant's actual guilt might play in a subsequent civil legal malpractice lawsuit. Did not endorse court's "full-throated approval" of portions of panel's dissenting opinion. Raised questions to be resolved by a future case.

STATUTES: K.S.A. 22-4501 et seq., -4519(a), -4520, -4522(a); and K.S.A. 60-513(a)(4), -513(b), -1507

SCHOOL FINANCE AND MOTION TO INTERVENE
GANNON V. STATE
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 113,908 – SEPTEMBER 25, 2015

FACTS: Shawnee Mission School District No. 512 (U.S.D. 512) appealed from the district court panel's denial of its March 2, 2015, motion to intervene in Gannon v. State, No. 2010-CV-1569 (Shawnee Cty. Dist. Ct. April 20, 2015) (Order on U.S.D. 512's Motion to Intervene). The plaintiffs in the underlying "school finance" case—currently on appeal to this court in Case No. 113,267—continue to oppose U.S.D. 512's entry into that litigation. The state, former Secretary of Administration Jim Clark, and State Treasurer Ron Estes generally do not object to U.S.D. 512's participation. The panel denied the motion to intervene under the standards for both intervention as a matter of right and permissive intervention. It concluded (1) U.S.D. 512's interests were adequately represented by the state and (2) the motion was untimely.

ISSUES: (1) School finance and (2) motion to intervene

HELD: Initially, Court found U.S.D. 512's interests regarding equity were not aligned with the plaintiffs' and therefore concluded that the plaintiffs did not adequately represent U.S.D. 512's interests. However, Court stated that even if U.S.D. 512 did not know its interests would not be adequately represented at trial in the summer of 2012, it at least should have known when Gannon was released in March 2014 that its interests might not be adequately represented in the remedy stage. Court concluded that the motion to intervene one year later was untimely.

STATUTE: K.S.A. 60-224

WILLS – TRUSTS – ATTORNEY AND CLIENT – ATTORNEY FEES
CRESTO V. CRESTO
JOHNSON DISTRICT COURT – AFFIRMED
COURT OF APPEALS – REVERSED
NO. 108,547 – OCTOBER 9, 2015

FACTS: Steve and Therese ("children") filed undue influence actions under statute and common law to challenge Cresto's 2008 last will and trust which effectively disinherited children and left all property to third wife (Kathleen) and her children. A 2004 estate plan had been drafted by a Kansas attorney (White) and 2008 documents were drafted by an Indiana attorney (Hacket), who was paramour to Kathleen's daughter. The Kansas attorney (Logan) reviewed the 2008 documents with Cresto and Kathleen. In a consolidated bench trial, district court declared the 2008 will and trust null and void based on common-law claim of undue influence, finding Logan through actions of Hackett had exerted undue influence over Cresto's preparation and execution of the 2008 documents, and Kathleen had not overcome the presumption of suspicious circumstances. District court also denied children's motion for attorney fees to be paid from Cresto's estate. Kathleen appealed the undue
influence ruling. Children cross-appealed the denial of attorney fees. Court of Appeals reversed in unpublished opinion, making its own assessment of Logan’s credibility and finding his testimony established that Cresto was properly counseled regarding the 2008 estate plan. Children’s petition for review granted.

ISSUES: (1) Common law undue influence challenge to testamentary documents, (2) evidence of suspicious circumstances, (3) rebuttal of presumption of undue influence, and (4) attorney fees transferred.

HELD: The common-law claim of undue influence is reviewed, including “suspicious circumstances doctrine.”

District court’s findings of suspicious circumstances are reviewed under facts of case, finding substantial competent evidence that children established enough clear and convincing evidence to create a presumption of undue influence. Panel’s rejection of district court’s assessment of Logan’s credibility, and its own assessment that Logan’s testimony was credible and trumped all other evidence favoring children’s allegations of suspicious circumstances, was erroneous.

Appellate courts are not to reassess witness credibility. Court declined to nullify trial court’s disbelief of defense evidence regarding Logan’s counsel, thus would not disturb district court’s ruling that Kathleen failed to carry burden of rebutting the presumption of undue influence. Court of Appeals was reversed. District court’s holding that the 2008 estate plan documents were invalid was affirmed, which thereby resurrected the 2004 testamentary documents.

There was no abuse of trial court’s discretion in refusing to award attorney fees under K.S.A. 581-1004. Argument for fees under K.S.A. 59-1504 was not raised. And no compelling reason was shown to award fees under common fund doctrine which is normally applied in class action cases.

STATUTES: K.S.A. 58a-406(b), -1004, 59-501(a), -505, -605, -606, -1504; and K.S.A. 60-413

WORKERS COMPENSATION FUND, STATE GENERAL FUND, AND TRANSFER OF FUNDS
KANSAS BUILDING INDUSTRY WORKERS COMPENSATION FUND ET AL. V. STATE OF KANSAS ET AL.
SHAWNEE DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
COURT OF APPEALS – AFFIRMED

FACTS: Plaintiffs, who were required to pay fees to a state agency in order to practice their trade or transact business in Kansas, brought suit against the state of Kansas and Kent Olson, director of Division of Accounts and Reports in the Department of Administration. The action challenged a 2009 appropriations bill, Senate Sub. for House Bill No. 2373, which directed the transfer of moneys into the State General Fund (SGF) from the various state agency fee fund accounts into which the respective plaintiffs had paid fees. The plaintiffs argued that the legislature’s sweep of large sums of money from the fee-funded accounts into the SGF was an invalid exercise of the state’s police powers and an unconstitutional exercise of its taxing authority. The district court dismissed the lawsuit, finding that plaintiffs did not have standing to sue, because the moneys were taken from the agencies, not from the individuals that paid fees into the agencies’ accounts. Further, the district court opined that the plaintiffs’ complaints were required to be addressed under the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 et seq.

Plaintiffs appealed, and the Court of Appeals reversed the order of dismissal, finding that plaintiffs had standing because they had been uniquely damaged by the transfer of funds and that the plaintiffs were not required to bring their claims under the KJRA because the agencies had no authority under the KJRA to grant the relief sought by plaintiffs, which was a finding that the legislation directing the fee fund transfers was unconstitutional.

ISSUES: (1) Workers compensation fund, (2) SGF, and (3) transfer of funds

HELD: Court agreed with the Court of Appeals and rejected the state’s assertion that all moneys in the state treasury are public moneys over which the state has unfettered, general appropriation powers. Here, the fees were found in payments for a particular and specific purpose and, accordingly, they were to be kept as separate funds and not as part of the general fund. Court held the state’s attempt to fit within the Baker v. Carr factors with conclusory declarations that budgetary matters are political falls within Baker’s rejection of “semantic cataloguing.” Consequently, Court rejected the state’s argument that this case presents a nonjusticiable political question. Court held the plaintiffs had standing because they suffered a cognizable injury and that the injury is fairly traceable to the challenged conduct, which was the legislatively ordered transfer of fee funds to the SGF. Court held that certain plaintiffs had associational standing as well.

STATUTES: K.S.A. 44-566a; K.S.A. 75-3036; and K.S.A. 77-601

CRIMINAL

STATE V. KEEL
MCPHERSON DISTRICT COURT – REVERSED
COURT OF APPEALS – AFFIRMED
NO. 106,096 – AUGUST 28, 2015

FACTS: Keel was convicted of possession of methamphetamine and drug paraphernalia. At sentencing, his pre-KSGA 1993 convictions of attempted aggravated robbery and aggravated robbery were classified as person felonies. On appeal he claimed insufficient evidence supported the convictions, and claimed jury was improperly instructed on definition of drug paraphernalia. Court of Appeals affirmed in unpublished opinion. Review granted on both issues. Keel thereafter filed motion in Kansas Supreme Court to correct an illegal sentence, citing State v. Murdock, 299 Kan. 312 (2014), modified September 19, 2014, as requiring his 1993 convictions to be classified as nonperson felonies. Supplemental briefing was ordered. While appeal was pending, and in response to Murdock, legislature modified K.S.A. 2014 Supp. 21-6810 with explicit intention for retroactive application. Supplemental briefing on the legislative amendments was ordered.

ISSUES: (1) Sufficiency of the evidence, (2) jury instruction on drug paraphernalia, and (3) classification of prior convictions

HELD: State presented sufficient evidence that Keel possessed both the methamphetamine and drug paraphernalia found inside his home.

As decided in State v. Sisson, 302 Kan. ___ , 351 P.3d 1235 (2015), the jury instruction on paraphernalia in this case was not erroneous, and did not deprive Keel a fair trial.

Pursuant to K.S.A. 22-3504(1), Keel can challenge the classification of his prior convictions for first time on appeal, but his 1993 Kansas convictions must be classified as person offenses based on classification in effect for those crimes when Keel committed his current crimes of conviction. Revisiting the Court’s construction of KSGA as a whole now persuaded a majority that the legislature, in enacting sentencing guidelines, contemplated that a pre-KSGA conviction could be classified as a person offense if such a classification was proper. Murdock and State v. Williams, 291 Kan. 554 (2010), the case Murdock relied on for rule that a prior crime’s classification is determined by the classification in effect for the comparable Kansas crime when it occurred, are overruled. In the present case, district court properly classified Keel’s pre-KSGA convictions, and imposed a legal sentence under the sentencing guidelines.
CONCURRENCE (Beier, J.): Agreed with majority’s result and rationale, and was persuaded to change position in 
Murdock
and 
Williams
by majority’s honest acknowledgment of need to deal with statutory silence in this exceptional case.

CONCURRENCE and DISSENT (Johnson, J., joined by Biles, J.): Concur in majority’s result, based solely upon revision of holding in 
Williams
. Dissented from superfluous portion of majority’s opinion in which majority’s exercise in statutory interpretation unnecessarily complicates and adulterates the process.

DISSENT (Nuss, C.J.): Wrote to advocate a different analytical approach, based on 2015 statutory amendments that the Court invited the legislature to pass, and that were briefed by the parties as ordered.


STATE V. KERSHAW

SHAWNEE DISTRICT COURT – AFFIRMED COURT OF APPEALS – REVERSED

NO. 109,548 – SEPTEMBER 25, 2015

FACTS: Kershaw fired a weapon at four police officers who responded to 911 call reporting Kershaw was violent and armed. He was convicted of charges of aggravated assault of law enforcement officer with a deadly weapon. At trial, defense presented evidence of Kershaw’s heavy intoxication at time of the shooting. District court instructed jury that voluntary intoxication was not a defense to the charged crimes. Court of Appeals reversed in unpublished opinion. It held that aggravated assault of law enforcement officer with deadly weapon is a general intent crime, thus district court did not err in precluding Kershaw from presenting evidence of voluntary intoxication and in failing to instruct jury on the defense, but found clear error in district court instructing jury that voluntary intoxication is not a defense because it relieved State of burden of proving Kershaw acted knowingly. State’s petition for review granted.

ISSUE: Jury Instruction – Voluntary intoxication is not a defense

HELD: After 2011 amendment, assault statutes clearly designate aggravated assault as a general intent crime. Recent holding of 
State v. Hobbs
, 301 Kan. 203 (2015), is distinguished. A crime defined by a statute that expresses mental culpability requirement as “knowingly” is a general intent crime. Because voluntary intoxication is not a defense to general intent crimes, district court’s instruction that Kershaw’s voluntary intoxication was not a defense to the charged crimes was not clearly erroneous. Court of Appeals is reversed. District court is affirmed.

STATUTES: K.S.A. 2014 Supp. 21-5202(g), -5202(i), -5205(b), -5412, -5412(a); K.S.A. 2011 Supp. 21-5413(b)(1)(A); K.S.A. 21-3208(2); and K.S.A. 22-3414(3)

STATE V. MOORE

WYANDOTTE DISTRICT COURT – CONVICTIONS AFFIRMED, SENTENCE VACATED, AND REMANDED WITH DIRECTIONS

NO. 109,480 – AUGUST 28, 2015

FACTS: Moore and Warren were tried together for killing two victims in shoot-out during attempted robbery of drug house. Witness present at time (Brandon) identified Warren and testified at trial. Warren's voluntary intoxication was not a defense to the charged crimes. Court of Appeals reversed in unpublished opinion.

ISSUES: (1) Motions for mistrial based on potential juror’s statements, (2) motion to suppress lineup identification not preserved, (3) failure to disclose evidence, (4) chain of custody, (5) eyewitness identification instruction, (6) cumulative error, and (6) sentencing issues

HELD: Under facts in this case, there was no abuse of district court’s discretion in finding the potential juror’s comments did not constitute a fundamental failure in the proceedings, or in denying the motion for mistrial. District court judge did not sua sponte poll the jury, but took appropriate curative and mitigation measures. Moore failed to preserve challenge to lineup identification, and failed to satisfy any exception for considering a constitutional issue for the first time on appeal.

Two of the three elements for establishing a 
Brady
 violation were not met. There was no abuse of district court’s discretion in denying motions for mistrial and new trial that were based solely on 
Brady
. Under facts in this case, any deficiency in chain of custody goes to weight of the evidence, not its admissibility. There was no abuse of discretion for district court to admit evidence relating to the weapon.

State concedes district court erred in instructing jury to consider the degree of certainty demonstrated by Brandon when he identified Moore, as a factor of the reliability or accuracy of the identification. Brandon’s identification was crucial to the state’s case, and Brandon opined on his certainty of identification. But no clear error was found where defense counsel rigorously cross-examined Brandon and during closing argument discussed inconsistencies in Brandon’s testimony, and where Brandon’s identification of Moore was not the state’s only evidence linking Moore to the crime.

One error identified does not establish applicability of cumulative error doctrine.

Moore’s sentence was imposed in violation of his constitutional right to a jury trial. 
Alleyne v. United States
, 131 S. Ct. 2151 (2013); 
State v. Soto
, 299 Kan. 102 (2014). This error was not harmless. Moore’s hard 50 sentence is vacated and case is remanded for resentencing. Moore’s remaining sentencing claim is moot, and can be corrected on resentencing.

STATUTES: K.S.A. 2014 Supp. 22-3501; K.S.A. 2011 Supp. 22-3608(c); K.S.A. 21-4635, -4636(b), -4636(c), -4636(d); K.S.A. 22-3423(1)(c), -3717(b); and K.S.A. 60-404

STATE V. MORRISON

JOHNSON DISTRICT COURT – REVERSED COURT OF APPEALS – REVERSED

NO. 110,835 – OCTOBER 2, 2015

FACTS: State brought quo warranto action, K.S.A. 60-1205, to oust Prairie Village City Council member Morrison from office, al-

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leging misconduct in allowing homeless friend to briefly live in city hall. District court entered order of removal. Finding that the facts did not satisfy criteria for judicial ouster, Court of Appeals reversed and remanded for judgment in Morrison's favor and reinstatement. 50 Kan. App. 2d 1001 (2014). State's petition for review was granted.

ISSUE: Standard for ouster under K.S.A. 60-1205(1) and (2)

HELD: Case meets statutory prerequisite for quo warranto relief. Court recognizes that the standard for “willful” conduct has evolved from two lines of cases – one requiring a showing of bad or corrupt purpose, the other examining legal justification for the conduct. Both showings are required. To find willful misconduct justifying judicial ouster from public office, a court must find both a bad or corrupt purpose and illegal action or inaction that was not justified under the given circumstances. Court of Appeals standard, requiring persistent and habitual disregard, was too high. District court's standard, based on whether Morrison had good faith belief that actions were legal or justified under the circumstances, was too low. Both decisions are reversed. District court's order for Morrison's removal from the city council is reversed, and case is remanded for application of the clarified standard.

DISSENT (Johnson, J., joined by Biles, J.): Does not agree that district court failed to determine that Morrison's conduct was product of a bad or corrupt purpose. Would reverse Court of Appeals and affirm district court's Judgment of Ouster.

STATUTES: K.S.A. 2013 Supp. 60-262(d), -262(f); and K.S.A. 60-1201, -1202(2), -1205, -1205(1), -1205(2), -1205(4)

STATE V. MOYER
SHERMAN DISTRICT COURT – REMANDED WITH DIRECTIONS
NO. 105,183 – OCTOBER 16, 2015

FACTS: Moyer convicted of sex crimes against his minor daughter. On appeal he claims district court erred by: (1) denying Moyer's motion for independent physical exam of the victim; (2) failing to grant mistrial after jury viewed unredacted version of victim's intake interview; (3) failing to give jury unanimity instruction on four charged counts; and (4) providing an erroneous limiting instruction on prior crimes or civil wrongs evidence. He also claimed prosecutor erred during closing argument by stating "[t]here is so much physical corroborating evidence here, but there is always in these cases." He further claimed trial judge should have recused because judge's son was principal investigator in the case, even though judge struck his son as a witness. Finally, Moyer raised complaints about defense counsel, including trial court's failure to conduct meaningful hearing on Moyer's pretrial motion for new counsel, trial court's failure to sufficiently inquire into defense counsel's conflict of interest in failing to properly subpoena and call exculpatory witness for whom counsel served as guardian ad litem, and claim that he is entitled to a Van Cleave remand to pursue assistance of counsel claim on question of whether he was provided effective assistance of counsel.

ISSUES: (1) Independent physical exam of victim, (2) erroneous showing of unredacted interview, (3) unanimity instruction, (4) K.S.A. 60-455 limiting instruction, (5) prosecutorial misconduct, (6) trial judge recusal, and (7) complaints about trial counsel

HELD: Under facts of case, reasonable persons would agree that Moyer failed to show a compelling reason for independent physical exam of the victim.

District court correctly found that jury viewing the unredacted intake interview was fundamental failure in the proceeding, but that prejudicial effect of the evidence was ameliorated by properly admitted inculpatory evidence. There was no abuse of discretion in trial judge's determination that jury would heed directive to disregard the improperly submitted evidence.

Under facts of case, no room for jury confusion as to the particular sexual act being prosecuted in three of the four challenged charges. For remaining challenge to one criminal sodomy charge, failure to give unanimity instruction was harmless error.

There was no merit to claim that prosecutor impermissibly offered personal opinion on quality of state's evidence. Statements about evidence presented in the case are different from personal opinion on witness credibility. Second part of challenged comment stated a fact not in evidence, which was gross and flagrant error, but statement was not motivated by ill will, and considered against whole record there is no reasonable probability the isolated erroneous statement contributed to the guilty verdict.

Three bases for recusal, stated in State v. Sawyer, 297 Kan. 902 (2013), were reviewed and applied. First, recusal under K.S.A. 20-311d fails because Moyer failed to comply with statutory procedure for seeking recusal. Second, even if one could discern that the Code of Judicial Conduct suggested the trial judge should have recused, an error was harmless under fact of this case where judge's son did not testify and judge was never informed that judge had a relative involved in the case. Third, there was no denial of due process in failing to recuse because there was no showing of actual bias or prejudice.

Under facts of case, trial judge provided all due process to which Moyer was constitutionally entitled. Regarding conflict of interest claim, district court inquired into facts underlying the alleged conflict but did not make determinations necessary for appellate court to assess impact on attorney's performance. If unavailability of witness was consequence of attorney's failure to properly issue and serve subpoena, then there was possible Sixth Amendment violation. Case is remanded to district court to determine whether Moyer was denied right to effective assistance of counsel.

CONCURRING IN PART, DISSENTING IN PART (Rosen, J.): Would reverse and remand because trial judge had a duty to recuse under statute, the Code of Judicial Conduct, and the Due Process Clause through "safety valve" in Sawyer. Moyer asserted a tenable claim of presumed prejudice where presiding judge's son was member of law enforcement team that arrested Moyer, was identified in various police reports that gave rise to the prosecution, and was listed as endorsed material witness in state's amended complaint.

DISSENT (Stegall, J., joined by Biles, J.): Dissented from remand for further findings on ineffective assistance of counsel claims. Trial court conducted an adequate hearing and made sufficient record for finding that no conflict of interest existed, even if that ruling was less than articulate. Moyer failed to sustain burden of establishing abuse of trial court's discretion, or that he was entitled to a Van Cleave remand for further factual findings. Would affirm the convictions. Moyer can litigate ineffective assistance of counsel claim in a K.S.A. 60-1507 motion.

STATUTES: 2014 Supp. 38-2205(a), -2205(d); K.S.A. 2009 Supp. 60-455, -455(a), -455(b), -455(d); K.S.A. 20-311d, -311d(c); K.S.A. 21-3504(a)(1), -3505(a)(2), -3506(a)(1), -4643; K.S.A. 22-3601(b)(1); K.S.A. 60-455, -455(d), -1507

STATE V. PFANNENSTIEL
SUMNER DISTRICT COURT – AFFIRMED COURT OF APPEALS – AFFIRMED
NO. 107,987 – SEPTEMBER 25, 2015

FACTS: Pfannenstiel was convicted of aggravated sexual battery. Prior to sentencing he filed pro se motion to dismiss defense counsel, alleging ineffective counsel. District court conducted preliminary hearing and denied the motion. On appeal Pfannenstiel claimed district court should have instructed jury on lesser included offense of sexual battery. He also claimed district court erred in failing to appoint a new, conflict-free counsel during hearing on motion to dismiss counsel. Court of Appeals affirmed in unpublished opinion, citing State v. Kirby, 272 Kan. 1170 (2002), in rejecting Pfannenstiel's claim that he was entitled to appointment of conflict-
free counsel on motion to dismiss defense counsel. Pfannenstiel's petition for review was granted.

ISSUES: (1) Jury instruction on lesser included offense and (2) failure to appoint substitute counsel

HELD: District court did not commit clear error by failing to instruct jury on sexual battery as lesser included offense. Aggravated sexual battery requires additional showing that victim was “unconscious or physically powerless.” Court is not firmly convinced the jury, applying ordinary meaning of “unconsciousness,” would accept that the victim was conscious under facts in this case. There was no abuse of district court’s discretion in conducting inquiry into Pfannenstiel’s dissatisfaction with counsel. Court disagreed with panel’s reliance on Kirby and other cases dealing with motions for new trial. Instead, Pfannenstiel’s motion was viewed as requesting new counsel. The motion was sufficient to trigger district court’s duty to inquire into potential conflict of interest. District court held hearing, but its inquiry of counsel in this case did not create conflict of interest requiring automatic substitution of counsel. General rule in State v. Pierce, 246 Kan. 183 (1990), was distinguished. Under multi-factor test used by federal courts, as well as Kansas cases, a Kansas district court need not appoint new counsel until it finds, after its initial inquiry into potential conflict of interest, that a defendant has established justifiable dissatisfaction with current attorney. Distinction in State v. Prado, 299 Kan. 1251 (2014), between an attorney truthfully accounting facts, or going further to advocate against a client’s position, was applied, finding Pfannenstiel’s attorney did not cross the line.

CONCURRENCE and DISSENT (Biles, J., joined by Rosen, J.): Concur in the result and most of the majority’s analysis which clarifies case law and lays out the appropriate analytical framework dealing with a trial court’s duty to inquire when a criminal defendant expresses dissatisfaction with court-appointed counsel. Wrote separately to criticize the continuing mischaracterization of attorney’s statements in Prado as going beyond facts to explicitly advocate against Prado’s interest. Methods and rationale adopted in today’s case apply equally to Prado, and prolonging the Prado mischaracterization does disservice to practitioners.

STATUTES: K.S.A. 2014 Supp. 21-5109(b)(1), -5505(a), -5505(b), -5505(b)(2), -5505(c); K.S.A. 2014 Supp. 22-3414(3); and K.S.A. 22-3210(d)

STATE V. WARREN

WYANDOTTE DISTRICT COURT – CONVICTIONS

AFFIRMED, SENTENCE VACATED, AND REMANDED

WITH DIRECTIONS

NO. 107,159 – AUGUST 28, 2015

FACTS: Warren and Moore were tried together for killing two victims in shoot-out during attempted robbery of drug house. Witness present at time (Brandon) identified Warren and testified at trial. Warren was convicted of premeditated first-degree murder, intentional second-degree murder based on aiding and abetting theory, and attempted premeditated first-degree murder. Hard 50 life was sentence imposed for the first-degree premeditated murder conviction. On appeal Warren claimed: (1) district court violated right to impartial jury by denying motion for mistrial after potential juror’s comments about fear of retribution from defendants tainted the jury pool, and by denying motion for mistrial after state witness made improper, prejudicial comment; (2) district court erred in denying motion for new trial based on newly discovered evidence of letters and affidavits by prisoners reporting Brandon’s comments about Warren and the shooting; (3) district court erred in denying motion for severance from Moore's trial due to antagonistic defenses; (4) district court erroneously instructed jury on reasonable doubt that lowered state's burden of proof; and (5) cumulative error denied him a fair trial. Warren also raised three sentencing issues, including claim that the hard 50 statute in effect at time of his sentencing, K.S.A. 21-4635, was unconstitutional.

ISSUES: (1) Motions for mistrial – right to impartial jury, (2) motion for new trial – newly discovered evidence, (3) motion to sever, (4) jury instruction – reasonable doubt, and (5) cumulative error, (6) sentencing issues

HELD: Under facts in this case, there was no abuse of district court’s discretion in finding that the potential juror’s comments did not constitute a fundamental failure in the proceedings, or in denying the first motion for mistrial. District court judge did not sua sponte poll the jury, but took appropriate curative and mitigation measures. Also, there was no abuse of district court’s discretion in denying the second motion for mistrial, based on state witness testimony about Warren “and his associates.” There was no abuse of discretion in district court’s finding that the newly discovered evidence was not credible, and in finding that the proffered new evidence was insufficiently material to warrant a new trial.

Warren failed to make even a cursory showing of antagonistic defenses. There was no abuse of district court’s discretion in refusing to sever trial from that of codefendant. Warren’s reasonable doubt jury instruction claim was defeated by State v. Herbel, 296 Kan. 1101 (2013), which rejected the same argument.

Cumulative error doctrine not applicable in this appeal.

Warren’s sentence was imposed in violation of his constitutional right to a jury trial. Alleyne v. United States, 131 S. Ct. 2151 (2011); State v. Soto, 299 Kan. 102 (2014). The error was not harmless. Warren’s hard 50 sentence was vacated and case was remanded for resentencing. Warren’s remaining sentencing claims are moot.

STATUTES: K.S.A. 21-4635, -4635(d), -4636(b), -4636(c), -4636(d); and K.S.A. 22-3204, -3413(3), -3423(1)(c), -3717(b)

STATE V. TAHAH

FORD DISTRICT COURT – AFFIRMED

NO. 109,857 – OCTOBER 2, 2015

FACTS: Following reversal of his convictions, 293 Kan. 267 (2011) (Takah), Tahah was again convicted of felony murder and underlying felony of criminal discharge of firearm at occupied building. On appeal he claimed: (1) district court should have instructed jury on intentional second-degree murder as a lesser included offense to felony murder; (2) three comments by prosecutor denied Tahah a fair trial; (3) there was judicial misconduct in telling newly impaneled jury that consideration of outside information could result in mistrial at tremendous expense and inconvenience to parties, the court, and taxpayers; and (4) sentence was unconstitutionally increased based on prior convictions not proven to a jury beyond a reasonable doubt.

ISSUES: (1) Lesser included offense instructions, (2) prosecutorial misconduct, (3) preliminary instructions, and (4) constitutionality of enhanced sentence

HELD: Tahah’s claim for lesser included instruction was defeated by legislative amendment after State v. Wells, 297 Kan. 741 (2013), to make the elimination of lesser included offenses for felony murder retroactive, and by State v. Todd, 299 Kan. 263 (2014), which rejected the claim that the amendment violated Ex Post Facto Clause.

Prosecutor’s comments were examined, finding one was picturesque speech referring to facts in evidence, and one was a reasonable inference drawn from the evidence. Statement in closing argument that Tahah “cannot have it both ways” misstated the law. That error was not gross and flagrant, but it was motivated by ill will. Because direct and overwhelming evidence against Tahah substantially outweighed any prejudicial effect, the error was harmless.

Issue reviewed as instructional error rather than judicial misconduct, finding no clear error. State v. Salts, 288 Kan. 263 (2009),
which disapproved Allen-type instruction, was distinguished, finding that Salts rationale did not apply to the preliminary instruction at issue in this case. Warning against juror misconduct contained in PIK Civ. 4th 101.12 is legally and factually accurate in the criminal context as well as the civil.

Sentencing claim was defeated by controlling Kansas Supreme Court precedent.

CONCURRENCE (Rosen. J.): Wrote separately only to address any confusion or perceived inconsistency that may result from the finding of error in state's use, during retrial's closing argument, of his dissenting opinion in Tabah v. State.

CONCURRENCE (Johnson, J., joined by Beier and Biles, JJ.): Agreed with majority's determination that trial court's orally delivered preliminary jury instruction was not clearly erroneous, but could not accept majority's declaration that it was legally and factually appropriate. Rationale in Salts was equally applicable here when fuller context of district court's preliminary instruction is considered. Majority's distinction of character and purpose of preliminary instruction in this case from Allen-type instruction in Salts cannot withstand closer scrutiny. Consequence-of-mistrial portion of district court's preliminary instruction was erroneous, but not clear error because omission of erroneous parts would not have impacted result of the trial.

STATUTES: K.S.A. 2014 Supp. 21-5402(d), -5402(e); K.S.A. 2012 Supp. 21-5109; K.S.A. 21-4219(b), -5402; and K.S.A. 22-3414(3)

COURT OF APPEALS

CIVIL

AUTOMOBILE ACCIDENT, DIMINISHED VALUE, AND ATTORNEY FEES

OHLMEIER V. JONES

JOHNSON DISTRICT COURT – AFFIRMED IN PART AND REVERSED IN PART.

NO. 111,801 – OCTOBER 16, 2015

FACTS: Josh and Sarah Ohlmeier obtained a judgment against Whitney Jones for the diminished value loss to their automobile as a result of an accident in the amount of $4,185 plus a judgment for their attorney fees in the amount of $15,440 pursuant to K.S.A. 2014 Supp. 60-2006.

ISSUES: (1) Automobile accident, (2) diminished value, and (3) attorney fees

HELD: Court affirmed the judgment for diminished value loss but reversed the judgment for attorney fees pursuant to K.S.A. 2014 Supp. 60-2006 as diminished value loss does not qualify as “property damages only” under the statute to sustain the award of attorney fees.

STATUTE: K.S.A. 60-258a, -456, -2006, -2102, -2103

ESTATES AND FILING A CLAIM

IN RE ESTATE OF CLARE

JOHNSON DISTRICT COURT – AFFIRMED

NO. 112,762 – SEPTEMBER 4, 2015

FACTS: Michael A. Clare and his wife, Deborah Clare, were found in their Johnson County residence on December 22, 2013, in what the district court found to be a murder/suicide tragedy with Michael as the shooter. Michael died intestate. Deborah's daughter, Jessica K. Crosslin, petitioned to open Michael’s estate to file a claim against the estate. The district court found the petition by Crosslin to open Michael's estate was ineffective because, as a creditor of the estate, she failed to obtain an executed order for hearing within six months of Michael's death.

ISSUES: (1) Estates and (2) filing a claim

HELD: Court stated that Crosslin timely filed a petition to open the estate but failed to obtain an executed order for hearing before the nonclaim period expired. The order for hearing is a crucial step in the process of opening an estate. Court stated that our Supreme Court has required that statutes be read and applied giving common words their ordinary meaning. As previously stated, the probate process is adversarial and is designed to give reasonable notice to all interested parties as the district court orders. We must remember we are dealing with a probate code designed, drafted, and predominantly passed in 1939—long before communication by email was available. The advent of new communication tools does not change a petitioner's obligation to comply with the existing statutes of the probate code. Our obligation is to apply the probate code as drafted, and if it needs to be updated, that is a job best left to the legislature. Court held the time frames within the probate code are tight and create very short statutes of limitations for interested parties to comply with. Like all statutes of limitation, the failure to comply with the time limit and the required procedure can be harsh. Crosslin's failure to obtain an executed order before June 22, 2014, setting the petition for hearing pursuant to K.S.A. 59-2208 or K.S.A. 59-2209, reflects that the estate proceeding was not timely opened within the six-month deadline required by K.S.A. 59-2239(1). The district court correctly found the nonclaim period had expired.

STATUTES: K.S.A. 59-617, -709, -2201, -2204, -2208, -2209, -2222, -2223, -2239; and K.S.A. 60-203

GRANDPARENT VISITATION

T.N.Y. V. E.Y.

WYANDOTTE DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS

NO. 113,099 – SEPTEMBER 25, 2015

FACTS: The maternal grandparents of a minor child appeal from a district court order dismissing their motion for grandparent visitation because it was filed in a paternity action rather than in a divorce proceeding.

ISSUE: Grandparent visitation

HELD: Court found that the district court properly interpreted the plain and unambiguous language of K.S.A. 2014 Supp. 23-3301(a) as limiting the authority of a district court to grant grandparent visitation only in dissolution of marriage proceedings. However, Court concluded that the statute—as applied—violates the equal protection rights of a child born out of wedlock. Court held that discriminating on the basis of a child's legitimacy in the context of grandparent visitation serves no important legislative or governmental purpose. Therefore, the district court should rule upon the merits of the motion for grandparent visitation.

STATUTES: K.S.A. 23-2201, -2701, -3301, -3302, -3304; K.S.A. 38-129; and K.S.A. 60-1616

OIL AND GAS AND REVERSION

OXY USA INC. V. RED WING OIL LLC ET AL.

HASKELL DISTRICT COURT – REVERSED AND REMANDED WITH INSTRUCTIONS

NO. 111,973 – OCTOBER 16, 2015

FACTS: In 1945, Luther had a one-half interest in the mineral rights to 160 acres in Haskell County for a period of 20 years.
No minerals were produced on the property from 1945-2009 when Oxy USA Inc. began producing oil and/or gas. The district court concluded that King (property owner and owner of other half-interest in minerals) had a reversionary interest that was triggered in 1972 but holding that her claim was unimpaired and that she acquiesced in the continuation of the Luther mineral interest. The court granted summary judgment in favor of the Luther mineral interest holders.

ISSUES: (1) oil and gas and (2) reversion

HELD: Court held that if Luther’s mineral interest automatically reverted to King after 20 years, then Luther became a tenant-at-will with King and the statute of limitations does not apply because King owned all of the mineral rights and allowed Luther to retain their interest while no production was occurring. Court held King was not barred by the statute of limitations. Court also held that permitting a tenant-at-will when no royalty payments are at issue for the production of minerals on a property is not a position inconsistent with King’s claim of ownership that should preclude her from making a claim of ownership in a quiet title action brought by another party. Court concluded that a claim of acquiescence simply does not apply to the reversionary interest of King to the Luther mineral interests. Court stated that although the district court correctly held that the cessation of production on the property triggered reversion of the Luther mineral interest to the property owner, i.e., King, the court incorrectly interpreted the effect of reversion and improperly held that King’s claim to the property was barred by the statute of limitations and/or acquiescence. Court entered judgment for King.

STATUTE: K.S.A. 60-503, -507

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**UNIVERSITY EXPULSION AND STUDENT CODE VIOLATIONS**

**YEASIN V. UNIVERSITY OF KANSAS**

**DOUGLAS DISTRICT COURT – AFFIRMED**

**NO. 113,098 – SEPTEMBER 25, 2015**

FACTS: During the summer break of 2013, Yeasin engaged in reprehensible, demeaning, and criminal behavior with W., who is also a University of Kansas student. In addition, Yeasin posted a series of puerile and sexually harassing tweets on his account. None of the conduct occurred on campus or at a university sponsored or supervised event. The Student Code, the rules by which the university can impose discipline upon its students, deals only with conduct on campus or at university sponsored or supervised events. The university expelled Yeasin. After pointing out that the university presented no evidence that the conduct set forth as the basis for the alleged Article 22 Student Code violation occurred on campus or at a university sponsored event, the district court found that the Student Code, as written, did not apply to off-campus conduct. The district court found that the university’s decision that Yeasin violated Article 22 was not supported by substantial evidence because it failed to establish that Yeasin’s conduct occurred on campus or at a university-sponsored event. The district court ordered that the University readmit Yeasin, reimburse or credit Yeasin for his fall 2013 semester tuition and fees that he paid, and pay the transcript fees.

ISSUES: (1) University expulsion and (2) student code violations

HELD: Court upheld the district court’s decision that the university had no authority to expel Yeasin. Court stated that because Article 18 and Article 22 both concern alleged violations of student conduct the university seeks to discipline, and they contain more specific language directing that the university’s authority only extends to on-campus or at university-sponsored events than the general provision in Article 20 that gives no indication as to where the misconduct must occur, the more specific statutes control. Court held the district court did not err in interpreting the Student Code to mean it applies only to student conduct that occurs on campus or at university sponsored activities. Consequently, court did not address whether the university’s decision to expel Yeasin was supported by substantial evidence, whether Title IX permits the university to extend its jurisdiction to discipline student conduct occurring off campus, and whether Yeasin’s tweets were protected speech under the First Amendment to the U.S. Constitution.

STATUTE: K.S.A. 77-601, -623

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**WILLS AND ESTATES, PROBATING WILL, TIME BAR, AND NOTICE OF HEARING**

**IN RE ESTATE OF RICKABAUGH**

**GREENWOOD DISTRICT COURT – AFFIRMED**

**NO. 111,389 – SEPTEMBER 11, 2015**

FACTS: In 1992, Beuford Rickabaugh executed a will dividing his estate equally between his granddaughters and, thus, effectively disinheriting their father, his son, Everett Rickabaugh. When Beuford died 20 years later and the will was presented for probate in the Greenwood County District Court, Everett launched a multifaceted attack aimed at keeping the document from being enforced—meaning he would inherit the estate, likely worth millions of dollars, through intestate succession. The district court rebuffed each of the procedural and substantive challenges from Everett and directed disbursement of Beuford’s estate to Angella Glasgow and Lisa Rickabaugh, the granddaughters, in accordance with the will.

ISSUES: (1) Wills and estates, (2) probating will, (3) time bar, and (4) notice of hearing

HELD: Court held the construction of the will could not have been more evident to disinherit Everett. Several conditions that came to fruition during the life of Beuford did not change the evidence of disinheritance. Court also agreed that any later perceived attempt or intent to execute a later will did not invalidate what Everett did in his will in 1992. Court held the fact that the executor never obtained an order from the district court confirming the hearing date before the six-month time period following Beuford’s death had passed did not bar probating the 1992 will. Court stated that filing the petition would suffice to avoid the time bar despite recent case law filed by the Court of Appeals to the contrary. Court also found the late filing of the affidavit of service did not bar probate of the will either. Court rejected Everett’s claim that written notice of the hearing was required or that the district court’s order for a new hearing to admit the will to probate did not result in a time bar.

STATUTES: K.S.A. 59-506, -611, -615, -617, -2201, -2204, -2208, -2209, -2211, -2213, -2219; and K.S.A. 60-260

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**CRIMINAL**

**STATE V. BROWN**

**SEDGWICK DISTRICT COURT – AFFIRMED**

**NO. 111,771 – SEPTEMBER 4, 2015**

FACTS: Brown appealed the district court’s decision to revoke his probation after he admitted committing a new felony while on probation. He argued that his admission to the offense wasn’t voluntary and that the district court abused its discretion when it revoked his probation. The district court had told him that he had a right to an evidentiary hearing at which the state would have to prove any violations, and the defendant acknowledged that he had discussed admitting to the violation with his attorney before the hearing.

ISSUE: Probation revocation

HELD: Court stated that the judge had advised Brown of the right to an evidentiary hearing at the initial hearing on the six technical violations. The resolution of those violations was held over—at Brown’s request—to give further time to explore resolution of the new felony-theft charge. When the parties came back for the final
hearing, Brown's attorney said that Brown wanted to admit to the felony theft for the purpose of the probation-revocation hearing; the court confirmed that Brown wanted to waive the hearing and admit to that violation. Brown complains that his personal admission came only after the district court had already said that it found him in violation of the probation. But the court's statement came after Brown's attorney told the court that Brown "would admit" the theft charge for the purpose of the probation-violation hearing. In addition, Brown told the court later in the hearing that he was "taking full responsibility of everything I've done here." In the context of a probation-revocation hearing, Brown has not shown that his admission was involuntarily made in violation of his due-process rights. Because the district court's finding that Brown had violated his probation by committing a new felony theft remains intact, the district court was not required to enter an intermediate sanction and thus had discretion to decide whether to reinstate the probation or send Brown to serve his prison sentence. The court's conclusion that Brown was "not amenable to further probation" is factually supported. Brown was convicted of crimes for which the presumed sentence is prison, and he faced a very severe sentence if he failed on his probation. Yet he failed to take basic, required steps, including reporting to his probation officer, enrolling in a drug-treatment program, and enrolling in a sex-offender-treatment program. In addition, he committed a new felony while on probation. A reasonable person could agree with the district court that sending Brown to serve his prison sentence. The court's conclusion that Brown thus had discretion to decide whether to reinstate the probation or send Brown to serve his prison sentence. The court's conclusion that Brown was "not amenable to further probation" is factually supported. Brown was convicted of crimes for which the presumed sentence is prison, and he faced a very severe sentence if he failed on his probation. Yet he failed to take basic, required steps, including reporting to his probation officer, enrolling in a drug-treatment program, and enrolling in a sex-offender-treatment program. In addition, he committed a new felony while on probation. A reasonable person could agree with the district court that sending Brown to serve his prison sentence was the proper course.

STATUTES: K.S.A. 21-5706; and K.S.A. 22-3716

IN RE C.D.A.-C.

BUTLER DISTRICT COURT – APPEAL DISMISSED

NO. 112,908 – OCTOBER 9, 2015

FACTS: Juvenile pled guilty to charges of aggravated indecent liberties with a child. District court granted 36-month probation and required successful completion of sex offender treatment program. After 20 months, state filed motion to revoke probation, citing juvenile's unsuccessful discharge from sex offender treatment program. District court revoked juvenile's probation, and imposed sentence in juvenile correctional facility which was a presumptive sentence under K.S.A. 2014 Supp. 38-2369(a). Juvenile appealed. State argued the order revoking probation was not an appealable order.

ISSUES: (1) Appellate jurisdiction and (2) probation

HELD: Jurisdiction to review the revocation of a juvenile's probation is issue of first impression. Under the revised Juvenile Justice Code, K.S.A. 2014 Supp. 38-2380, a juvenile offender may only appeal from an order of adjudication or sentencing, or both. The Juvenile Code does not authorize appeals from district court orders revoking probation, and under K.S.A. 2014 Supp. 48-2380(b)(2)(A), a juvenile may not appeal from a presumptive sentence. The appeal was dismissed.

In case jurisdictional analysis is wrong, district court had proper grounds to revoke juvenile's probation and commit him to a juvenile correctional facility.


STATE V. DONALDSON

SEDGWICK DISTRICT COURT – AFFIRMED

NO. 110,270 – SEPTEMBER 11, 2015

FACTS: A decade after he was convicted of felony murder and the sale of cocaine, Donaldson filed a motion to correct an illegal sentence. He claimed that the district court's failure to sua sponte order a competency hearing and stay his prosecution, pursuant to K.S.A. 22-3302, rendered his convictions and sentences void for lack of jurisdiction. The district court summarily denied his motion, and Donaldson filed a direct appeal to the Supreme Court pursuant to K.S.A. 22-3601(b)(3) as the court that had jurisdiction to hear the original appeal.

ISSUE: Illegal sentence

HELD: Court stated that in a recent unpublished decision, State v. Ford, No. 109,806, 2015 WL 4598831 (Kan. 2015), the court held that a K.S.A. 22-3504 motion to correct an illegal sentence is not an appropriate vehicle for challenging a conviction based upon an alleged violation of the competency to stand trial statute, K.S.A. 22-3302. Court affirmed the district court’s summary denial of Donaldson’s motion to correct an illegal sentence as being the correct result.

STATUTES: K.S.A. 22-3302, -3504, -3601; and K.S.A. 60-1507

STATE V. MILLER

SEDGWICK DISTRICT COURT – AFFIRMED IN PART

AND VACATED IN PART

NO. 111,573 – AUGUST 28, 2015

FACTS: Miller pled guilty to felony charges of burglary and theft of property, namely a machete and baby powder. District court’s order for $4,700 in restitution included repair of damage caused by Miller’s removal of copper wiring and pipes, including electrical and plumbing repairs, that were a “direct result of Mr. Miller’s actions.” Miller appealed the restitution order.

ISSUE: Restitution

HELD: Kansas statutes do not provide for restitution orders beyond those caused by the crime of conviction without the defendant’s agreement. Here, district court erred by ordering restitution for damages caused by removal of copper wiring and plumbing. Those losses were not the direct result of Miller’s crimes of conviction for burglary and theft of a machete and baby powder. District court’s restitution order was vacated.


STATE V. PARRY

CLAY DISTRICT COURT – AFFIRMED

NO. 113,130 – SEPTEMBER 18, 2015

FACTS: State charged Parry with marijuana offenses. Parry filed motion to suppress evidence obtained in warrantless search of his apartment. State argued there was voluntary consent for the search. District court granted the motion. State filed interlocutory appeal. Court of Appeals affirmed in unpublished opinion. Four days later state dismissed the case against Parry without prejudice, and refiled new case on same charges. Parry filed motion to dismiss. This time state argued exigent circumstances and inevitable discovery. District court again granted Parry’s motion. State filed interlocutory appeal. Court of Appeals requested supplemental briefing on law of the case doctrine.

ISSUE: Law of the case doctrine

HELD: Under facts of this case, the law of the case doctrine applies, and precludes state from again litigating the constitutionality of the search of Parry’s apartment in the renewed prosecution. District court’s ruling is affirmed without reaching merits of state’s position with respect to exigent circumstances and inevitable discovery.

DISSENT (Gardner, J.): Did not agree the law of the case doctrine applies here. Parry’s first case was dismissed without prejudice to charges being refiled, and district court had discretion and duty to consider suppression issue anew. Affirmative defense of res judicata or collateral estoppel may apply, but that was not argued by parties and sua sponte consideration on appeal was not appropriate.

STATE V. SWAZEY
JACKSON DISTRICT COURT – SENTENCE VACATED
AND REMANDED WITH DIRECTIONS
NO. 112,351 – OCTOBER 2, 2015

FACTS: Swazey pled no contest to one count of possession of methamphetamine and one count of fleeing or attempting to elude a police officer. The district court accepted his pleas and found him guilty of both offenses. Prior to sentencing, Swazey filed a motion seeking a downward dispositional or durational departure. In it, he requested that he be sentenced either to probation and drug treatment or, alternatively, to a term of 24 months’ imprisonment. Swazey’s criminal history placed him in drug grid block 5-C, a border box. During the sentencing hearing, Swazey’s attorney requested that Swazey receive “Senate Bill 123 treatment,” referring to drug treatment. The district court denied the request and sentenced him to a controlling durational departure sentence of 24 months in prison.

ISSUE: Sentencing

HELD: Court found that under K.S.A. 21-6824(b)-(c), if an offender is assigned a high-risk status by a drug abuse assessment and either a moderate- or high-risk status by a criminal risk-need assessment, then the sentencing court is required to commit the offender to treatment in a drug abuse treatment program until the court determines the offender is suitable for discharge by the court, but in no case longer than 18 months. Court found the statute was at odds with the border box optional nonprison sentence language in K.S.A. 21-6805(d). Court held the record was devoid of any evidence establishing that Swazey was assigned a moderate- or high-risk status by the LSI-R. The district court did not make any explicit findings on that point either. If Swazey’s LSI-R score placed him in the moderate- or high-risk category, then he was entitled to mandatory drug treatment and probation rather than the prison sentence he received. Given that the district court did not consider the mandatory provisions of K.S.A. 21-6824 at time of sentencing, Swazey’s sentence was illegally imposed. Court vacated the sentence and remanded for additional findings and resentencing.

STATUTES: K.S.A. 21-6804, -6805, -6824; and K.S.A. 22-3504

STATE V. WILLIS
WYANDOTTE DISTRICT COURT – AFFIRMED IN PART,
REVERSED IN PART, AND
REMANDED WITH DIRECTIONS
NO. 110,954 – OCTOBER 2, 2015

FACTS: Willis was convicted of two counts of aggravated indecent liberties with a child, one count of aggravated criminal sodomy, and one count of attempted rape of his ex-wife’s daughter.

ISSUES: (1) Discovery, (2) motion in limine, (3) prior crimes evidence, (4) prosecutorial misconduct, (5) cumulative error, and (6) sentencing departure

HELD: (1) Court held the district court did not restrict Willis from viewing the documents with counsel; it simply denied his request for personal copies to keep in his cell. Court stated that based on the entire record, there was not a reasonable probability that the error in denying Willis personal copies of discovery affected the trial’s outcome. The error was harmless. (2) Court agreed with the state that any evidence concerning subsequent rapes of the victim would have been inadmissible at Willis’ trial. However, Willis explained in arguing for his discovery request, he was not attempting to introduce details of the alleged rapes. He was more interested in the requested discovery documents to the extent that they might have a bearing on the victim’s motive to fabricate her allegations against Willis. Court held the district court abused its discretion in denying Willis’ discovery requests without first reviewing the documents in question. Court remanded for the district court to conduct an in camera review of the requested discovery and determine whether the documents probably would have changed the outcome and if so, then grant a new trial. (3) As for prior crimes evidence, court held that Willis failed to contemporaneously object at the first admission of the evidence that he had previously sexually abused the victim that he now wished to challenge; he has failed to explain persuasively why this court should make an exception to the general rule that a party may not raise a constitutional claim for the first time on appeal; and he has failed to challenge the two bases the district court articulated on the record for admitting the evidence. (4) Court stated that the limiting instruction regarding the K.S.A. 60-455 evidence could have been improved by modifying the language to read: “Evidence has been admitted ‘alleging’ that the defendant committed crimes other than the present crimes charged.” When K.S.A. 60-455 evidence consists of a prior conviction, the “tending to prove” language is appropriate. But when the defendant is disputing that the uncharged conduct ever occurred, and the K.S.A. 60-455 evidence does not consist of a prior conviction, the better practice would be to change the language of the limiting instruction from “tending to prove” to “alleging.” However, court concluded the jury instructions as a whole properly and fairly stated the applicable law and could not have misled the jury. (5) Court found all of the challenged comments by the prosecutor during closing argument were based on facts in evidence and did not constitute misconduct. (6) Court did not find more than one error to accumulate. (7) As far as sentencing, Court held the district court carefully considered the proposed mitigating factors and found that they did not justify a departure from the statutorily prescribed sentence. The district court’s decision to deny the departure sentence was not arbitrary, fanciful, or unreasonable, and the decision was not based on an error of law or fact.

STATUTES: K.S.A. 21-6627, -6818; K.S.A. 22-3212, -3213; and K.S.A. 60-261, -455, -2105
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