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The Journal of the Kansas Bar Association

2018-19
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The Journal of the Kansas Bar Association (ISSN 0022-8486) is published monthly with combined issues for July/August and November/December for a total of 10 issues a year. Periodical Postage Rates paid at Topeka, Kan., and at additional mailing offices. The Journal of the Kansas Bar Association is published by the Kansas Bar Association, 1200 SW Harrison St., Topeka, KS 66612-1806; Phone: (785) 234-5696; Fax: (785) 234-3813. Member subscription is $25 a year, which is included in annual dues. Nonmember subscription rate is $45 a year.

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Baseball manager Leo "The Lip" Durocher once declared, "Nice guys finish last." If this Hall of Famer is correct, then all 167 of Kansas' district court judges must be "nice guys"—because nationally they have now finished dead last in judicial pay.¹

This stark fact, while disappointing, was nevertheless foreseeable. According to the National Center for State Courts, compared to their counterparts, our district court judges have endured a steady decline in the national rankings—from 37th in 2007 to 51st in 2018. Even when the salary drop is adjusted for regional differences in cost of living, their national ranking still slumped from 19th to 43rd during those 11 years.

This deterioration should be troubling to the more than 15,000 lawyers in Kansas as you consider the future of a judiciary historically entrusted with making life-changing decisions for your clients, families, and communities. The constant financial fall-off requires us to ask: "What value do we really place on the Rule of Law and judicial excellence in Kansas?" And at that question’s core, "What value do we place on justice itself?"

U.S. Supreme Court Justice Anthony Kennedy made related points in 2007 when he criticized the neglectful approach Congress had taken toward judicial salaries. After telling a Senate subcommittee that "Judicial independence presumes judicial excellence," he cautioned that because of this financial neglect, "judicial excellence is in danger of erosion."² The Justice warned, "Without a functioning, highly qualified, efficient judiciary, no nation can hope to guarantee its prosperity and secure the liberties of its people."

Kansas district court judges' salaries have not only dropped to dead last in the national rankings. But also, their fall has been worsened by the continual loss of earning power. Lawyers know that under the Kansas Constitution, the people protect their judiciary's independence (and thus excellence) by requiring that the salaries of judges generally not be diminished during their terms in office.³ While their salaries have not been expressly diminished by the legislature, Kansas judges have not received salary adjustments that kept pace with inflation. For example, a district judge's 2007 salary ($117,109) would be comparable to a salary of $142,021 in 2018 dollars.⁴ But with judges actually being paid $125,499 in 2018, they have lost $16,522 in value.

So while district judge pay is at its highest-ever face value today, in effect it has become the lowest value during the past 30 years.⁵ This unfortunate reality, as Justice Kennedy would warn, further threatens to erode judicial excellence in Kansas.

We know that many Kansas lawyers like to tell juries to "send a message" with their verdicts. This rock bottom national ranking certainly sends a message to the Kansas judges who labor each day to make sound decisions and protect the Rule of Law. It also sends a similar negative message to many lawyers who might aspire to the bench, but are hesitant to
embrace a loss in earning power, stagnant salary growth, and membership in an institution that regularly faces such challenges.

While district judge annual pay of $125,499 is not insignificant, one must consider lawyer compensation levels described in the KBA’s 2017 Economics of Law Practice Survey. It discloses that experienced law partners—whom we might hope to attract to the bench—can make well over $200,000 per year. Detractors may suggest the inevitability of pay disparity between public service and private practice. But a number of public sector general counsels, district attorneys, city attorneys, and county attorneys earn substantially more than the judges—who make final decisions on those same attorneys’ cases.

We realize pay is not the only factor considered when a lawyer decides whether to apply for a judicial vacancy, but common sense tells us it is an important one. Indeed, the number of applicants to replace judges retiring—or simply leaving for greener financial pastures—has been decreasing. A shrunken pool of well-qualified applicants can result in diminished professional and personal diversity, as well as experience, on the Kansas bench. These factors all impact judicial performance. Equally as important, they influence both client and public perception of our state’s system of justice.6

The legislature will soon consider the judicial branch’s Fiscal Year 2020-21 proposed budget. Included within that budget is a request that would raise Kansas district judge salaries to the average adjusted level of our four neighboring states. Because Kansas has fallen so far behind Colorado, Missouri, Nebraska and Oklahoma, this average would actually raise our district judge salaries about 21 percent, from $125,499 to $152,205. Twenty-one appellate jurists and 79 district magistrate judges would see the same proportional increase in their salaries under the budget proposal. And employee salaries would be raised to market level, consistent with a recent salary study conducted by the National Center for State Courts.

The Kansas judicial branch’s budget typically comprises less than one penny of every dollar of all funds in the state budget. Our pending budget proposal would still dedicate to the judicial branch less than a full penny of each dollar the state spends annually, if other spending levels remain unchanged. In my view, Kansans receive an excellent return, i.e., justice, on their small investment in this co-equal branch of government.7

Despite our rock bottom national ranking, I do not believe that Kansans (and particularly Kansas lawyers) truly place a lower value on justice than the people of the other 49 states and the District of Columbia. That is why we need—and ask for—your expertise in openly advocating for increased judicial pay so Kansas can be restored to a more respectable level nationwide. Please contact your legislator and urge full funding of the Kansas judicial branch Fiscal Year 2020-21 budget, including our supplemental request for salary increases. Or, as some of you did last spring, deliver this message in person when legislators are in Topeka.

Lawyers are especially well-positioned to explain not only how decisions made by judges affect Kansans but also the level of professional expertise required to correctly render those decisions. Lawyers also particularly understand the unique challenges of their communities and can illustrate how an appropriately-funded judiciary benefits all constituents. At the heart of Kansas lawyer expertise on these subjects lies a basic appreciation for the magisterial words of Thomas Jefferson: “The most sacred of the duties of a government [is] to do equal and impartial justice to all its citizens.” (Emphasis added.)

I thank you for your continued service to our noble profession.

About the Author

Chief Justice Lawton Nuss was appointed to the Supreme Court by Gov. Bill Graves in 2002. He presides over the Supreme Court as it exercises its administrative authority over all state courts. He is a fourth-generation Kansan born in Salina. He attended the University of Kansas on a Naval Reserve Officers Training Corps scholarship and was commissioned a second lieutenant in the United States Marine Corps after graduating. He served with the Fleet Marine Force Pacific before graduating from the University of Kansas School of Law. He had a 20-year law practice in Salina before his appointment to the Supreme Court.

2. https://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/judicial_pay/kennedystatement.authcheckdam.pdf
5. Based on judicial salaries as of August 1 of each year for the years of 1988-2018. Inflation information obtained from the Bureau of Labor Statistics Consumer Price Index Inflation Calculator.
6. Kan. Const. Bill of Rights, § 18: “All persons, for injuries suffered in person, reputation or property shall have remedy by due course of law, and justice administered without delay.”

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Gratitude and Hope
by Sarah E. Warner

It’s customary at the end of a KBA President’s term for a person to write a final column reflecting on the successes and challenges of the past year, thanking everyone who has contributed to moving the KBA toward its goals. My time as president ends June 30, and—for better or worse—this is far from my last column. Nevertheless now—the dawn of 2019 and the midway point of my term—is an excellent time to pause and recognize someone who went above and beyond to devote his time and efforts to the betterment of our organization in 2018.

As you likely know, I was elected president in a time of transition with the passing of Bruce Kent. Those challenges were heightened by our former executive director’s move to a different organization two days after that election.

In light of shake-ups in leadership at both the president and executive director levels, the KBA Board of Governors determined that it would be best to seek to bring in an interim executive director while we conducted a nationwide search for the person who would direct the organization in the long term. We made a wishlist of qualities we would like to have in an interim director: A lawyer who understood the profession and wouldn’t need a lot of time to get up to speed. A professional who would be willing to come into the office every day to be present for the KBA staff. Someone who had a history with the organization. Someone who could administer and plan a budget for an organization our size. Someone who valued service and could inspire others to serve. And—perhaps most notably—someone who had the time to run the organization. It was a long list, and even I, who tend at times toward grating optimism, wondered where we were going to find someone with the skills and the willingness to take the helm.

A few days later, I was on the phone with Hon. Evelyn Z. Wilson from Shawnee County, talking about her colleague Hon. Larry Hendricks. Judge Hendricks had just retired from the bench in March of this year, looking forward to spending time travelling with his wife and seeing his children and grandchildren. In many ways, Larry was exactly the type of person we were seeking. Before serving as a judge, he had been in private practice in Topeka where he was managing partner of his law firm and served as city attorney for Alma, Auburn, Lecompton, and Perry—in other words, he intimately understood the challenges facing our members. He also served eight years in the U.S. Air Force and understood how to supervise and run an organization with many moving parts. (I should
add that my only experience with Judge Hendricks before my conversation with Judge Wilson was him ruling against me in a preliminary injunction action.)

"He would be wonderful," Judge Wilson said.

"I keep hearing that from people," I responded. "But do you think he would be interested?"

I could almost hear Judge Wilson’s dubious shrug over the phone: "It never hurts to ask."

And so it was I found myself calling Judge Hendricks at home the last week of June and preparing to make the pitch to come out of retirement for "a few months" to serve as interim director. I cringe when I think of awkwardness of my original voicemail. (To paraphrase: "Judge Hendricks, this is Sarah Warner, the new KBA President. I know you just retired and are looking forward to free time, but I want to talk with you about coming in and running the KBA every day for a while instead.") To my astonishment, Larry called me back. A day later, KBA Vice President Charles Branson and I were meeting with him at the KBA, talking about the needs of the organization and our timeline for conducting a search for the new director. To my even greater astonishment and delight, Larry agreed—taking on the interim director mantle the Monday after Independence Day.

I cannot stress enough what a service this has been to our organization, our staff and our members. The KBA is an organization with myriad hats. The executive director must balance everything from continuing legal education offerings to law practice management tools to networking, advocacy and public outreach. Larry dove in to each of these areas, and we are in a much better place now because of his leadership.

In the past six months, Larry has worked with staff, building trust and rapport in a very short timeframe. When I was talking with various departmental heads at the KBA recently, all noted how Larry was able to use his "quick wit and sense of humor" to lighten the mood, even in weighty conversations. One staff member noted how he made Monday morning staff meetings "quite fun." Larry has been willing to dive in to understand the KBA's technological needs and has dealt with everything from investigating whether the KBA can offer health insurance to its members to replacing a boiler. As Amanda Kohlman, who now directs the KBA’s CLE offerings and bookstore, observed, Larry "was respectful and intelligent, which made trusting his decisions and leadership easy. He helped create structure during a time of confusion and uncertainty." Anne Woods, the director of public outreach, noted that "It has been a true joy to have Judge Hendricks with us at the KBA."

I know that the KBA Board of Governors and KBF Board of Trustees also appreciated Larry’s leadership style. Board members have commented consistently on his "financial acumen," his "no-drama attitude" and willingness to "step in and take control of the situation." Indeed, Larry has had to navigate the KBA budget and put together a workable budget for 2019—no small task for someone who jumped into a budget midyear. But Larry’s focus has not merely been internal. He has visited local bar associations around the state and met with local judges, talking about the importance of the KBA in a changing profession. He has made a point of building relationships with the law schools and law students, attending trivia nights and looking for ways for the KBA to engage students before they enter practice. After all, as Larry explained time and again, the law students are "the future of this profession and this organization."

The KBA Board of Governors has now hired a new executive director—Shelby Lopez, who previously served as the executive director of the Kansas Board of Technical Professions and the Kansas Volunteer Commission—and Larry can finally enjoy his retirement. Shelby took the reins on December 17th. We are excited to welcome her and look forward to the opportunity for our members to get to know Shelby and our KBA staff during the coming months and years. Personally, I have immense hope for what our future holds. 2019 will be a fabulous year.

But before we dive into this new year, I want to encourage you to contact Judge Hendricks and thank him for his Herculean efforts over the past six months. As we step forward into 2019, let’s lift a glass to a life of service to the profession, to a quick joke and a calm voice amid sometimes rough waters, and to answering the call—or sometimes returning the random, rambling voicemail—when we are needed the most.

Judge Hendricks—Larry—from the bottom of my heart, thank you.

About the Author

Sarah E. Warner is an attorney at Thompson Warner, P.A., in Lawrence. Before becoming president of the KBA, Warner served as president of various professional associations, including the Kansas Association of Defense Counsel, Douglas County Bar Association, and Douglas County Law Library Board of Trustees, as well as the KBA Appellate Practice and Young Lawyer Sections. She also serves as a member of the Kansas Board for Discipline of Attorneys. Warner and her husband Brandon (an administrative patent judge with the U.S. Patent and Trademark Office) call Lenexa home with their dog Kolbe, who has resolved to make 2019 another year of squirrel chasing and belly rubs.

sarah.warner@333legal.com
Introducing....KBF Trustees

by Amy Fellows Cline

To kick off the new year, let me introduce to you the members of the Kansas Bar Foundation Board of Trustees. These attorneys generously donate their time, talent and treasure to help the Kansas Bar Foundation achieve its mission “to serve Kansans and the legal profession through funding charitable and educational projects that foster the welfare, honor and integrity of the legal system by improving its accessibility, equality and uniformity, and by enhancing public opinion of the role of lawyers in our society.”

Since 1957, attorneys have generously donated their time, talent and treasure to help the Kansas Bar Foundation achieve its mission. Each year, the KBF has an annual dinner (to which all of you are invited) in conjunction with the Kansas Bar Association Annual Meeting, to recognize Fellows of the KBF and to honor a Kansas attorney with the Robert K. Weary Award. Next year’s dinner will be June 20 at the Evel Knievel Museum in Topeka.

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Amy Fellows Cline is a partner of the Wichita law firm of Triplett Woolf Garretson, LLC. She handles a wide variety of commercial litigation matters, including employment, oil and gas, construction and consumer protection disputes. Ms. Cline has significant experience appearing before courts across Kansas, as well as the Kansas Corporation Comm., Kansas Human Rights Comm., Kansas Department of Labor and U.S. Equal Employment Opportunity Comm.
One of the KBA Young Lawyer Section’s biggest projects each year is the Kansas High School Mock Trial competition. By organizing and hosting the only competition in Kansas that can send the winning team to the National High School Mock Trial Association’s Championship, the KBA YLS serves Kansas high school students and possible future Kansas lawyers by encouraging an understanding and appreciation of the American judicial system and providing valuable academic opportunities.

Several hundred high school students participate in the Kansas High School Mock Trial competition each year. Preparation for the 2019 competition began in late-December when the case materials were posted to the KBA website. Materials provided to students vary according to the year’s case but often include witness statements, charging documents, incident reports, and photographs. This year, the case the high school students will try is a civil matter involving a student running for student council at a public high school. The student was prepared to give a speech on religion as the foundation for his platform, but the school told him that it is against separation of church and state for him to give his speech as planned.

The students participating in the competition will prepare to represent both sides of the case and will be assigned as plaintiff’s or defense counsel prior to each round. Students prepare opening statements, lines of direct and cross-examinations, and closing arguments. In addition, students are expected to object and respond to opposing counsel’s arguments. The students are evaluated on both their presentation style and the substance of their questions and objections.

The success of the Kansas High School Mock Trial competition is due in large part to the hard work of Bill Walberg and Casey Walker, KBA YLS Mock Trial Co-Chairs. Walberg and Walker chose this year’s case from a national database and adapted it for use in the Kansas competition, developed the case materials, and will coordinate with the participating high schools, and organize the regional and state tournaments. But they need assistance to make the competition as valuable for the high school students as possible.

The students are judged by volunteers, and although being a litigator (or even an attorney) is not required to judge, the students appreciate receiving feedback from practitioners and judges who are experienced in courtroom practice. For this reason, the KBA YLS invites all KBA members to help judge a round or two of this year’s tournament. Regional tournaments will be held in Olathe and Wichita on February 23 and the state tournament will be held in Topeka on March 23. Devoting an hour or two of your weekend to judge the tournament is well worth it to witness the enthusiasm, dedication, and hard work the high school students put into the trial.

“I would put some of the high school students in the mock trial competition up against other attorneys in the state,” Walberg said. “They are pretty amazing to watch. They look like real lawyers and their presentation is polished.”

If you are not interested in volunteering to judge, please consider donating to the competition. Funds are used to support the state and regional competitions and also provide travel costs and competition fees so the state championship team can travel to the national tournament. This year’s tournament is in Athens, Georgia, and the KBA YLS hopes to support the winning team’s attendance at the national competition. Any donation is appreciated. If you are interested in volunteering or donating, please contact Anne Woods awoods@ksbar.org, or contact KansasMockTrial@gmail.com.

About the Author

Sarah Morse serves as the Kansas Bar Association’s Young Lawyer Section President. She is Corporate Counsel at FHL Bank Topeka. Sarah received her bachelor’s degree in American History and Literature from Emory University and her law degree from Emory University School of Law in Atlanta, Georgia. Shortly after joining private practice in Topeka, Sarah became involved with the KBA YLS, and she looks forward to working with the engaged and enthusiastic YLS board members this year. In her free time, Sarah enjoys spending time with her family and pursuing more hobbies than is probably advisable.

Sarah.Morse@fhlbtopeka.com
2019 Legislative Outlook

by Joseph N. Molina III

For the first time in nearly a decade, the Kansas Legislature will open its legislative session with a Democrat as governor. Governor Laura Kelly was sworn into office earlier this month. She, along with her Lt. Governor Lynn Rogers, will lead Kansas for the next four years. Gov. Kelly will focus on expanding Medicaid and finishing up the school finance formula; both were main issues in her campaign for governor.

Gov. Kelly will need to work with a Republican-controlled House. The 2018 election saw no change in the composition of the Kansas House, with Republicans continuing to hold an 85-40 advantage. However, conservative Republicans were able to increase their caucus by winning key primary races. Moderate Republicans saw their numbers decrease due to those primary election losses and losses in the general election against Democrats in the Johnson County area.


On the Senate side, change will come by way of ascension and resignation. Three sitting Senators ascend to higher office (Laura Kelly, Lynn Rogers and Vicki Schmidt) while Sen. Steve Fitzgerald resigned after losing in the primary for the 2nd Congressional District. Sen. Fitzgerald was replaced by Kevin Braun, a veteran of the United States Army and the Kansas Army National Guard. Gov. Laura Kelly’s seat will be assumed by Rep. Vic Miller (D-Topeka). Lt. Gov. Rogers was replaced by Mary Ware. Sen. Vicki Schmidt will be succeeded by Eric Rucker who has been an assistant the Kansas Secretary of State’s Office. Also of note is Sen. Barbara Bollier’s decision to leave the Republican party after serving as an “R” for 10 years. She is now the newest member of the Democrat caucus in the Senate. This alters the Senate make-up to 31-9 Republican advantage.

With conservatives maintaining leadership positions in both chambers, it may be hard going for the new governor’s agenda. Leadership could block tax policy or expanding Medicaid. On the flip side, leadership will have to contend with
a governor who isn’t as willing to sign off on certain social policy issues. Whether a bipartisan group emerges that can overcome this built-in hurdle will be the dynamic to watch this coming session.

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<td>Rep. Sharice Davids (D-KS City)</td>
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<tr>
<td>U.S. House District 4</td>
<td>Rep. Ron Estes (R-Wichita)</td>
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<tr>
<td>Secretary of State</td>
<td>Scott Schwab (R-Olathe)</td>
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<tr>
<td>Attorney General</td>
<td>Derek Schmidt (R-Independence)</td>
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<tr>
<td>Treasurer</td>
<td>Jake LaTurner (R-Topeka)</td>
</tr>
<tr>
<td>Insurance Commissioner</td>
<td>Vicki Schmidt (R-Topeka)</td>
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While Gov. Kelly readies her team for the upcoming session, they have an advantage the past few governors did not—a stable revenue projection. Over the last ten years, state revenues have consistently fallen below expectations. Reasons for the shortfalls vary from economic recession to poor oil/gas returns to depressed farm exports. Whatever the reasons, these issues are not affecting the state at the start of the Kelly era.

In November, the Kansas Consensus Revenue Estimating Group forecast an increase of more than $300 million for the remainder of FY 2019. This revision should see an ending balance of $900 million or 12 percent. Those numbers tail off a bit in FY 2020/FY 2021, for which estimators see a $75 million drop-off from FY 2019 levels.

Those projections could make it easier to pass the last phase of the school finance formula dealing with inflation and open the door to lowering the sales tax on food. However, with more money in the bank, there is an opportunity for additional spending, most of which will be opposed by leadership who would rather see tax cuts from the federal windfall.

The Kansas Bar Association will be engaged on several technical issues with a direct impact on the practice of law. The KBA will once again support the Kansas Supreme Court’s budget proposals. (Be sure to see the Chief Justice’s article on pages 6-7 of this issue of The Journal.) Those proposals include a request for raises for judges at each level and for judicial staff. The KBA will also support the Court’s efforts to implement E-Courts statewide and its request for additional staff to assist with high volume districts. The KBA will support revisions to the Limited Liability Company Act. Those revisions, drafted by a KBA subcommittee, will help Kansas maintain a positive business environment.

See the proposals, along with other information pertaining to the Kansas Legislature, on the KBA Legislative Homepage, www.ksbar.org.

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**Lawyers and Law-Trained Legislators 2019 Kansas Legislature**

**KANSAS SENATE**

**Senator David Haley**

*Senate District No. 4*

*D-Kansas City*

Sen. David Haley is the managing partner of Village East, a redevelopment company in Kansas City, Kansas. He served in the Kansas House of Representatives from 1994-2000 and was elected to the Kansas Senate in 2000. He was reelected in 2004, 2008, 2012 and 2016. Senator Haley is the Ranking Minority Member of the Senate Committee on Judiciary and the Senate Committee on Public Health and Welfare. He is also a member of other joint committees. Senator Haley received his J.D. from Howard University.


**Senator Vic Miller**

*Senate District No. 18*

*D-Topeka*

Sen. Vic Miller has been appointed to fulfill the term of now Governor-Elect Laura Kelly. Miller previously served for four terms as a representative before his appointment. Miller also served as Shawnee County Commissioner (15 yrs.), and Topeka City Councilman (8 yrs.), once acting as Topeka Deputy Mayor. Miller also served as Topeka Municipal Judge and Kansas Property Valuation Director. Miller has spent his legal career as a sole practitioner. Miller graduated from Emporia State and Washburn University School of Law.


**Sen. Eric Rucker**

*Senate District No. 20*

*R-Topeka*

Sen. Eric Rucker is a life-long Kansan originally from Herming. Rucker has a Bachelor of Arts in History from Kansas Wesleyan University, a Master’s Degree in Educational Counseling from Emporia State University and earned his law degree from Washburn School of Law. Rucker is a former Shawnee County Commissioner, a former Dickinson County Attorney, former Assistant Jefferson County Attorney as well as serving as Chief Deputy District Attorney for Johnson County. Rucker also served as Chief of Staff in the Kansas Attorney General’s office and as Deputy Assistant Secretary of State. In addition, Rucker served as Executive Director of the Kansas Republican Party and as Former JAG officer in the Kansas Army National Guard.
KANSAS HOUSE OF REPRESENTATIVES

Representative John Barker
House District No. 70
R-Abilene

Rep. Barker is a farmer, retired District Court Judge, and U.S. Army veteran. Rep. Barker served 25 years as a judge for the Eighth Judicial District covering Dickinson, Geary, Marion, and Morris counties. Rep. Barker has been recognized for his work with Kansas youth, championing initiatives to prevent drug and alcohol abuse, working with local school districts to reduce truancy rates, and working with juvenile offender programs. Rep. Barker and his wife of 30 years, live in Dickinson County where they raised their two children.


Representative Jesse Burris
House District No. 82
R- Mulvane

Rep. Burris is serving his second two-year term for the 82nd District. Burris has worked for various state agencies throughout his career, including the Kansas Secretary of State’s Office and KDHE. He received his Political Science & Business Administration degree, and his law degree from Washburn School of Law. Burris is also a former US Air Force veteran.

http://kslegislature.org/li/b2019_20/members/rep_burris_jesse_1/

Representative John Carmichael
House District No. 92
D-Wichita

Rep. John Carmichael represents the 92nd District in Wichita. He earned his Political Science degree from the University of Kansas in 1979, his Administration of Justice degree from Wichita State University in 1980 and his law degree from KU School of Law in 1982. Rep. Carmichael is Of Counsel with the law firm of Conlee, Schmidt and Emerson, LLP in Wichita. Rep. Carmichael has been a member of the Wichita Bar Association and the Kansas Bar Association for more than 30 years. Rep. Carmichael will serve as ranking minority member on the House Judiciary, as a member on Elections and Energy/Environment and local gov. committees this session.


Representative Blaine Finch
House District No. 59
R-Ottawa

Rep. Finch will serve as Speaker Pro Tem in the Kansas House for the next two years. He is also majority owner and President of Green, Finch & Covington, Chtd. His practice covers a broad spectrum of legal issues including municipal law, real estate, contracts, corporate law and estate planning. He also teaches at Ottawa University as an adjunct faculty member in the fields of History, Political Science and Pre-Law. Finch is a former city commissioner and Mayor of the City of Ottawa. Rep-Elect Finch graduated Summa Cum Laude from Ottawa University with degrees in History, Political Science and Psychology. Finch is a member of the Kansas Bar Association and a member and past president of the Franklin County Bar Association. He attended Washburn University School of Law.

http://kslegislature.org/li/b2019_20/members/rep_finch_blaine_1/

Representative Dennis “Boog” Hightberger
House District No. 46
D-Lawrence

Rep. Highberger graduated from the University of Kansas Law School in 1992. His areas of private practice have included wills, estates, contracts, family law, federal communications law, and general civil practice. Highberger served on the Lawrence City Commission from 2003 to 2009 and was Mayor in 2005/2006. He has been an active member of the Lawrence community and currently serves on the Douglas County Food Policy Council, the City of Lawrence’s Public Incentives Review Committee (PIRC) and Sustainability Advisory Board (SAB), and the boards of directors of Independence, Inc., the Community Mercantile Education Foundation (CMEF), and the East Lawrence Neighborhood Association (ELNA).

http://kslegislature.org/li/b2019_20/members/rep_highberger_dennis_1/

Representative Tim Hodge
House District No. 72
R- North Newton

Rep.-Elect Hodge is member of the Adrian & Pankratz law firm in Newton Kan. Hodge has developed his practice in diverse areas such as tax law, real estate, business law, secured
transactions, and Medicaid Planning. He has served as an adjunct professor of business law at Tabor College. During law school, he clerked for the Kansas Board of Tax Appeals and the Kansas National Education Association. Before law school, Mr. Hodge served as a teacher and a coach at Peabody High School. He and his wife reside in North Newton with their three children. His wife is a teacher in the Newton School District. Hodge graduated Magna cum laude from Tabor College in 1999 and received his JD from Washburn Law School in 2003. Hodge also attended the Oxford Honours Program in 1998. He is a KBA member since 2004.

Representative Susan Humphries
House District No. 99
R-Wichita

Rep.-Elect Humphries joined the Kansas Bar in 2014, after graduating from the University of Denver Sturm College of Law. During law school Humphries had clinical experience in Mediation and at the Rocky Mountain Children’s Law Center. Humphries practices at Shultz Law Office, P.A., in Wichita, with a focus on adoption and general law. Humphries is the coordinator for Wichita Christian Legal Aid, which offers free legal aid at three non-profits. Humphries married husband Cary after graduating from Texas Christian University, and they proceeded to live in (and enjoy!) five states and two foreign countries. They moved to Kansas for the first time in 1981, and have considered it their married home ever since. They have four adult children (two are married), and one grandson. Humphries will serve as Representative for the 99th district, which includes Andover and east Wichita.

Representative Leonard Mastroni
House District No. 117
R-LaCrosse

Rep.-Elect Leonard Mastroni is currently a Rush County Commissioner, serving in that capacity since 2011. Prior to his service as a county commissioner he was a District Magistrate Judge where he served on the KDMJA Legislative committee for 12 years. Mastroni also served a chairman of the KDMJA Legislative committee and its educational committee. Mastroni attended Fort Hays University where he received his BA in political science. Mastroni also attended University of Nevada at Reno where he graduated from the national judicial college.

Representative Fred Patton
House District No. 50
R-Topeka

Rep. Fred Patton graduated from the University of Kansas Law School before joining the legal research staff at the Shawnee County District Court. Currently, Patton owns and operates Patton Law Offices, LLC in North Topeka with a varied practice area including banking, business/corporate, construction, estate planning, general civil, probate, and real estate. Patton is very active in the community having leadership roles in more than 15 local organizations.

Representative Bradley Ralph
House District No. 119
R-Dodge City

Rep.-Elect Ralph is currently the City Attorney for Dodge City, Kan. Prior to this position he was in private practice with the firm of Williams, Malone & Ralph for 25 years. His private practice focused on representation of insurance companies, healthcare providers, schools, and municipalities. Ralph has been active in his community in leadership positions with his church and the Community Foundation of Southwest Kansas. He has also served the legal profession on several committees, including the Professional Ethics Committee. He is a graduate of St. Mary of the Plains College and Washburn University School of Law. Ralph and his wife Shannon have three adult children.

Representative-Elect Mark Samsel
House District No. 5
R-Wellsville

Rep.-Elect Samsel is a Wellsville native. He attended Missouri Valley College, graduating in 2007 with a degree in political science and business administrations. He then attended KU Law School, graduating in 2010. Samsel now works in Overland Park for the law firm of Lathrop Gage LLP. In 2017, Mark was promoted to partner. He participated in both the Leadership Overland Park and KC Tomorrow leadership programs.

In his spare time, you will find Mark officiating high school basketball and soccer throughout the State of Kansas. His favorite venues include working the City Showdown in Allen Fieldhouse last year, KC Schlagle and Iola (and their bands!), tournaments in Burlington, McPherson, and Topeka, KSH-SAA State Championship games in Salina and Wichita, and
multiple others throughout Kansas. Mark also enjoys volunteering with the Kansas City Sports Commission as a member of their Emerging Leaders Group.

Representative Jim Ward
House District No. 86
D-Wichita

Rep. Ward is the owner of the Law offices of James Ward of Wichita. He was appointed to the Kansas Senate to fill a vacancy in 1992. He was later elected to the Kansas House in 2002 and reelected every two years through 2016. Representative Ward served as the Assistant House Minority Leader and is a member of the House Committees on Calendar and Printing, Health and Human Services, Interstate Cooperation, Judiciary and Legislative Budget, as well as several joint committees. He received his J.D. from Washburn University School of Law.

Representative-Elect Kellie Warren
House District 28
R-Leawood

Rep.-Elect Kellie K. Warren is a graduate of The University of Kansas School of Law. She is a problem-solver with over 20 years litigation experience, and joined Property Law Firm, LLC after working at one of Kansas City’s largest law firms. She enjoys working closely with clients and says that clients can expect to receive big-firm expertise at a small-firm price. Kellie has experience in all stages of litigation, from factual investigation, motion practice, mediation, and has led jury trials and bench trials.

Warren graduated from Cornell University where she earned her Bachelor’s of Arts in Government and History. At the University of Kansas School of Law she was a published author on the staff of The Kansas Journal of Law and Public Policy, and worked at the Douglas County Legal Aid Clinic as an attorney. Warren is a member of the Johnson County Bar Association and the Kansas City Metropolitan Bar Association.

Representative John Wheeler
House District No. 123
R-Garden City

Rep. Wheeler is the former Finney County Attorney, first elected in 1993. He was elected to the House in 2016 to his first term. He is a graduate of Fort Hays State College (1969) with a degree in political science and pre-law. He graduated from Washburn School of Law in 1976. Prior to being elected as Finney County Attorney, Rep. Wheeler was in private practice with Calihan, Green, Calihan and Loyd, Associate, 1976-1979, then Soldner & Wheeler, Partner, 1979-1987, and finally with John P. Wheeler, Attorney at Law, Solo Practitioner, 1988-1992. Rep. Wheeler is a proud member of Harry H. Renick American Legion Post #9, Past Commander; Garden City Salvation Army Advisory Board; Garden City Noon Lions Club; and the Finney County Historical Society.

2019 Kansas Legislature:
KS Senate: 29 Rs/10 Ds/1 Independent
KS House of Representatives: 84 Rs/41 Ds

Additional Information
The official state website for the Kansas Legislature is:
www.kslegislature.org

From that site, you can find information on the House and Senate members and contact information, calendars, bill introductions, committee activity, minutes of committees, committee memberships and virtually anything related to the Kansas Legislature.

About the Author
Joseph N. Molina III currently serves as the legislative services director for the Kansas Bar Association. He previously served as chief legal counsel for the Topeka Metropolitan Transit Authority and assistant Kansas attorney general. Molina earned his J.D. from Washburn University School of Law.

jmolina@ksbar.org

jmolina@ksbar.org
Spotlight the BEST & BRIGHTEST attorneys you know with a 2019 KBA Awards Nomination

- Phil Lewis Medal of Distinction
- Distinguished Service
- Professionalism
- Pillars of the Community
- Christel Marquardt Trailblazer Award
- Distinguished Government Service
- Courageous Attorney
- Outstanding Young Lawyer
- Diversity
- Outstanding Service
- Pro Bono

Learn more about the awards online at www.ksbar.org/awards
The KBA Awards Committee is seeking nominations for award recipients for the 2019 KBA Awards. These awards will be presented in June at the KBA Annual Meeting in Topeka. Below is an explanation of each award and a nomination form for completion. 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 1.

**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.

- A 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;
- This award is only given in those years when it is determined that there is a worthy recipient.

**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.

**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.

**Pillars of the Community Award**

This award is available to a Kansas lawyer and KBA member with a minimum of 10 years active non-specialized, general legal practice in a predominately low-density population area of Kansas. Recipients will have had substantial practice in small or solo law firms or local government service. Requirements are flexible but consideration will be given to the following factors, including how such factors apply to the lawyer’s community:

- The variety/diversity of law practiced
- Impact/high profile law work
- General contributions to the law and legal profession
- Specific contributions to the legal profession
- Mentoring and support for legal education
- Contributions to the State/community
- Notable civic activities
- Periods of elected or appointed public/government service
- Military service
- Examples of volunteerism and charitable activity
- Reputation in the organized bar, state and community

This award may be but need not be given every year. More than one recipient can receive the award in a one year.
***NEW*** Christel Marquardt Trailblazer Award ***NEW***

This award is named in honor of Hon. Christel Marquardt, the first woman to serve as President of the Kansas Bar Association, by recognizing exceptional KBA members who break new ground, shatter glass ceilings, or pave new paths for others to follow. The award is bestowed upon a member who has made innovative contributions to improve the legal profession or our communities, exhibiting courage, leadership, professional excellence, and service to the profession in a manner that makes a substantial and positive impact on all those who follow in his or her footsteps. The award will be given to a KBA member who demonstrates qualities Judge Marquardt has exemplified, such as:

- Service to the Bar or to the legal profession generally;
- Courage in challenging societal, institutional, or historical barriers;
- Innovation and carving a path for future lawyers through mentorship, hard work, and compassion;
- Leadership by word and example.

The Trailblazer Award will be given in years where there is a worthy recipient.

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

The KBA created a new award in 2000 to recognize 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.

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.

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.
Outstanding Service Award(s)

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 non-lawyers for especially meritorious deeds or service that significantly advance the administration of justice or the goals of the legal profession and/or the KBA.

- No more than six Outstanding Service Awards may be given in any one year.
- Recipients may be lawyers, law firms, judges, non-lawyers, groups of individuals, or organizations.

Outstanding Service Awards may 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(s)

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.

- No more than three Pro Bono Awards may be given in any one year.

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.
KBA Awards Nomination Form

Nominee’s Name ________________________________________________

Please provide a detailed explanation below of why you have nominated this individual for a KBA Award. Attach additional information as needed. Award descriptions can be found at ksbar.org/awards.

- Phil Lewis Medal of Distinction
- Distinguished Service Award
- Professionalism Award
- Pillars of the Community Award
- "NEW* Christel Marquardt Trailblazer Award"
- Distinguished Government Service Award
- Courageous Attorney Award
- Outstanding Young Lawyer
- Diversity Award
- Outstanding Service Award
- Pro Bono Award/Certificates

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_________________________________________________________________

Nominator’s Name ________________________________________________
Address __________________________________________________________________________________________________________
Phone ______________________ Email ________________________________

Return Nomination Form by Friday, March 1, 2019, to:

KBA Awards Committee
Attn: Deana Mead
1200 SW Harrison St.
Topeka, KS 66612

NOTE: a fillable PDF version can be downloaded at https://www.ksbar.org/awards
The Center for Work-Life Policy published a series of intriguing reports starting in 2005 called Off-Ramps and On-Ramps. The reports examine professionals who temporarily leave careers (off-ramping) and barriers faced when trying to return (on-ramping). The lawyer-specific data indicates that 31-42 percent of women temporarily leave practice primarily to care for children, parents, or family members. As many as 15 percent still in the workforce would like to off-ramp temporarily but indicate they cannot afford to or worry an on-ramp back will not be available. By contrast, some 15 percent of men off-ramp but usually due to frustrations in the profession or to change careers altogether.

Private Sector Efforts

While men and women graduate law school and are hired on as new associates at similar rates, women start disappearing at the mid- and senior-levels in firms and industry. The OnRamp Fellowship aims to address the “leaky pipeline” of capable women lawyers by improving the on-ramps back into practice. OnRamp places returning lawyers with top law firms, legal departments, and financial services firms for six month and one-year paid positions. In addition to opening an employment door, lawyers have access to free continuing education, business training, and one-on-one coaching. (Information available at onrampfellowship.com.)

Another attempt to improve the on-ramp comes from the insurance world via ALPS. Leah Gooley, ALPS Underwriting Manager, indicates that over 30 years of claims data revealed that women lawyers have a lower propensity for malpractice claims—almost a full 20 percent better risk than male counterparts. Retaining women or easing their on-ramp back into practice would improve the ALPS bottom line and that data-driven information prompted ALPS to survey how to better serve women in law. ALPS is interested both in retention and in improving the on-ramp back into the practice. (The survey is available at available at www.surveymonkey.com/r/FHP3R8C.)

Public Sector Barriers

Despite private sector interest in helping lawyers find an on-ramp back into practice, the actual mechanics of doing so under the rules of the Kansas Supreme Court are obscured. Multiple Kansas lawyers interviewed indicate that planning an orderly exit and return was difficult given the open-ended nature of Supreme Court Rule 208(g)(2). This often results in a less formal off-ramp through administrative suspension under (g)(3). A number of barriers to on-ramping were identified:

Undefined Requirements

The Kansas Continuing Legal Education Commission has discretion in setting terms for return for lawyers inactive for less than two years. If a lawyer remains inactive for the national off-ramping average of three years, then the Supreme Court
may impose its own conditions for return. The Court’s discretion is open-ended and undefined, leaving one lawyer to note, “It was very frustrating not knowing what I needed to do.”

While not written anywhere, the requirements were addressed tangentially in an unrelated disciplinary hearing by Justice Carol Beier: “When somebody, for example, wants to come back from inactive status, we have kind of a rule of thumb that if it’s been 10 years, they need to take a bar review course or if it’s shorter than that, then they certainly have to be up on CLEs.” (Remark by Justice Carol Beier during oral arguments, In the Matter of: Rosie M. Quinn, No. 119,148, Kan. Sup. Ct. Archived Oral Arguments, Oct. 25, 2018, available at https://www.youtube.com/embed/5bRE6ZeWzcE?autoplay=1&rel=0, at time marker 6:54 (link provided on http://www.kscourts.org/kansas-courts/supreme-court/archive/archived-arguments-October-2018.asp).) There is, however, no data supporting bar preparation courses or making up years of CLE protect the public or effectively prepare a lawyer to on-ramp back into practice.

Reinstatement Application

Returning from inactive status requires completion of an Application for Reinstatement or Return to Active Status form. Unfortunately, the form is available nowhere on the Supreme Court’s website. Lawyers wanting to know what to expect must request it from the Clerk of the Supreme Court.

Despite Rule 208(g)(2) being clear that an inactive lawyer is still a lawyer, the inquiries on the application read like an initial application for fitness to practice. A lawyer must provide information about divorce and probate cases in which she has participated and detail certain financial situations including revoked credit cards, bankruptcies, and past due student loans. Those inquiries are not part of annual registration for active lawyers so their relevance to protecting the public and profession are unclear. While active lawyers’ personal finances are private, inactive lawyers must waive privacy in financial matters and consent to open-ended financial investigations by the Office of the Disciplinary Administrator.

Interestingly, anecdotal stories from some lawyers interviewed indicated the application may not always be required. Some who had returned to active status had never heard of the application nor did they provide the sensitive, personal information it requires.

Alternative Models

The overwhelming majority (93 percent) of lawyers who take the off-ramp from practice plan to return. The on-ramp back into practice is easier to find in some states than others. In several of our neighboring states, for example, requirements are spelled out in rule or statute, forms for status change are available online, and CLE requirements to return are capped at one to two compliance periods required as make-up. States with clear and manageable requirements to reactivate appear to view off-ramping as a normal part of modern practice, and procedures simplify the return of legal talent to the profession.

On-ramping in Kansas is more complicated. Whether a lawyer can on-ramp is discretionary and not tied to documented requirements. In application, the requirements to return can be daunting. As a reactivated Kansas lawyer recalled, “It didn’t feel like they wanted me to return to the law,” and she wondered, “Is it even going to be feasible for me to come back?”

About the Author

Larry N. Zimmerman is a partner at Zimmerman & Zimmerman P.A. in Topeka and former 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. lslpm@larryzimmerman.com
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19th Annual CLE
SLAM-DUNK
Tuesday, February 5
& Wednesday, February 6, 2019
Hilton Garden Inn
410 S. 3rd Street
Manhattan, Kansas 66502
For more information or to register visit:
https://www.ksbar.org/event/slamdunk2019
Sanguine Doves in the Hands of the State or How the Power of Eminent Domain has Few Practical Restraints

By Chris Burger
"I believe the Kansas basketball coach had the power to hold his athletics director in his hand like a dove. And he had a choice to either crush me with his power of influence or let me fly with my vision for a better, total program. He chose to crush me." - Al Bohl, April 9, 2003…from his driveway…before his garage sale…of all his KU apparel.1

The Power to Take has Few Restraints

Your property can be taken through the exercise of the power of eminent domain, which is a power that has few restraints upon it. That does not mean the power can be exercised indiscriminately—a trial court must review and affirm the authority of the condemning authority, and the Kansas Eminent Domain Procedure Act ("EDPA") requires all affected parties to be notified of the rights and interests to be taken and the hearings to be held through actual notice (such as service of process) or publication. But these procedural safeguards alone do little to limit the nature or extent of what can be taken. Instead, the practical limit on the nature and extent of a taking comes through “the purse,” namely the amount that the condemning authority must pay under the Fifth Amendment’s requirement that the condemning authority pay “just compensation” for the taking2 and the EDPA requirement for payment of damages caused by the taking,3 as defined under the EDPA.4

The determination of a taking’s compensable value is complicated and sometimes contentious. Kansas law, as stated by the Kansas Supreme Court, gives condemning authorities the power to define and exclude what is being taken, who might be an affected party, and what can be considered in the calculation of the award for such taking. In response, good practitioners for affected parties try to look through the condemner’s description of the taking in light of the use and characteristics of the property and its environs in order to help ensure just compensation.

Restraints: Real or Imagined

The power of eminent domain is an inherent power of the sovereign, but the state of Kansas has legislatively shared it with various private and public entities and political subdivisions (e.g. cities, counties, school districts, public wholesale water supply districts, public utilities, cemetery corporations, and railroads).5 The power therefore is more widely possessed than is commonly known, and rests with some unelected bodies that may be largely insulated from political pressures seeking to limit their exercise of the power.

The procedures of the EDPA must be followed since it is "the only avenue through which the government can exercise its eminent domain power,"9 but (with the exception of some limited post-Kelo limitations on municipalities)10 the EDPA does not substantively limit the power to take. Instead, the EDPA helps to ensure that affected persons are given notice of the actions to be taken by the condemning authority and have the opportunity to participate in the process of valuing the property taken.11 For example, the EDPA requires the condemning authority to identify in writing what rights are being taken and to give notice to all affected owners, possessors, and lienholders12 of all hearings at which the
petition is considered, the appraiser panel is appointed, or the panel receives evidence about the value of the taking.

The procedure applicable to eminent domain proceedings depends upon the stage of the proceedings, with different powers attached to each. They can occur in two stages: a) the initial administrative proceeding in which Chapter 60 does not govern, and b) an appeal of an initial award to the district court. The initial administrative proceeding “is a special statutory proceeding and is not a civil action covered by the code of civil procedure. The proceeding is administrative rather than judicial.” In appeals to the district court, the only issue to be decided (by a jury, if so elected) is the amount of just compensation and damages due to the affected party, but not the scope or legitimacy of the taking. The appeal in district court is governed by Chapter 60, including its discovery rules.

The Amount to be Paid, and Not Paid

“Just compensation” must be paid for property taken. The EDPA legislatively establishes “just compensation” and damages as the “fair market value” of the property taken (if a total taking) or (if a partial taking), the difference in the fair market value of the property before the taking and the value of the property remaining after the taking. “Fair market value” is defined [by the EDPA] as: “the amount in terms of money that a well-informed buyer is justified in paying and a well-informed seller is justified in accepting for property in an open and competitive market, assuming that the parties are acting without undue compulsion.” "The fair market value shall be determined by use of the comparable sales, cost or capitalization of income appraisal methods or any combination of such methods. “Value,” as interpreted by Strong, does not require the application of these appraisal methods but rather allows for any competent evidence bearing on market value.

Unpegging “value” from approved appraisal methodologies gives greater, but not unfettered, liberty in asserting compensation claims. Daubert should remain applicable, as does the panel’s or trial court’s ability to control its own proceedings, including the application of the rules of evidence. The EDPA is silent as to the applicability of any rules of evidence at the appraisal hearing, and the informal nature of such hearings strongly suggests none would apply, subject only to the panel’s general power to control its proceedings. The rules of evidence apply on appeal to the trial court.

"Generally speaking, ‘[t]he district court has broad discretion in determining what evidence will be allowed in an eminent domain proceeding.’” The appellate courts "will not second-guess the specific evidentiary decisions of the trial court absent an abuse of discretion. Considerable discretion is vested in the trial court in admitting or rejecting evidence of value, and the latitude accorded to the parties in bringing out collateral and cumulative facts to support value estimates is left largely to the discretion of the trial court.” Cases are won and lost within this discretion, which could be viewed as an equitable tool to better promote justice or a source of greater unpredictability and uncertainty. For example, in Strong, witnesses were given great leeway in their opinions about value and compensation.

Essentially, when the entirety of a property is being taken, the compensation is for its full value, and the valuation of partial takings requires consideration of a "nonexclusive list of factors [in K.S.A. § 26-513 that] shall be considered if such factors are shown to exist.” This list is not exhaustive but gives guidance on what can and should be valued. The factors give insight to an attentive condemning authority as to how to describe the taking and potentially to exclude some factors from the taking description.

There may also be factors that are not identified in the EDPA, yet would affect the particular property’s value. For example, valuation is determined according to the property’s highest and best use rather than how it is used at the time of the taking. Another example is where the described property should be joined for valuation purposes to other property or otherwise considered as part of a larger parcel than what has been described. These are matters that may not be known to a condemning authority that is not familiar with local conditions but are known by affected parties who have personal and local knowledge.

There are events that may affect value but cannot be used in determining just compensation. The amount of compensation is limited to the reduction in value of the real estate as a whole rather than a sum of various separate items of damage. Just compensation therefore must not be calculated by adding the values of individual items taken, such as a fence. This rule, referred to as the Unit Rule, rejects the Summation Method:

The “summation method” denotes a process of appraisal whereby each of several items that contribute to the value of real estate are valued separately and the total represents the market value thereof. Use of this method of appraisal has generally been rejected since it fails to relate the separate value of the improvements to the total market value of the property. ... In contrast, the 'unit rule,' which is the generally accepted method of valuation, denotes a process of appraisal whereby the total value of real estate is first determined without placing a value on each of the separate contributing items. Consideration of the value of buildings and improvements is limited to the extent they enhance the value of the land taken. The same rule applies to machinery or other articles of personal property which have become affixed to the real estate.”
In *Pener v. King*, the property owner presented evidence of the cost to replace a fence lost to condemnation. Although apparently agreeing as to the cost of the fence, the condemning authority presented expert testimony that the loss of the fence diminished the parcel's post-taking value by approximately one-fifth of the fence's cost. The award was based on the change to the value of the real estate as a whole, not on the cost to replace the fence. The Kansas Supreme Court affirmed. "When the district court adopted [the condemning authority’s] view, it acted consistent with K.S.A. 26-513(d)’s admonition that replacement cost be considered to the extent it affected value rather than as a separate item of damages."30

Another category of financial loss potentially incurred by an affected party but excluded from the compensation award is the revenue generated from a business located on real estate that is taken. Such revenue is not to be considered in the determination of value.

If the owner of property uses it himself for commercial purposes, the amount of his profits from the business conducted upon the property depends so much upon the capital employed and the fortune, skill and good management with which the business is conducted, that it furnishes no test of the value of the property. It is, accordingly, well settled that evidence of the profits of a business conducted upon land taken for the public use is not admissible in proceedings for the determination of the compensation which the owner of the land shall receive.31

For example, the revenue and profits of a shop located on taken real estate are not recoverable as compensation to the landlord or tenant. But the amount of any rent paid to the owner likely is to be considered in determining the value of condemned property.

Also excluded from consideration in the compensation award are any anticipated value increases that would result from the project for which the property is being taken. Under this "Project Influence Rule," the "enhancement or depressing of value due to anticipated improvements by the project for which condemnation is sought is excluded in determining fair market value."32 The rule found in the EDPA requires value to be measured "at the time of the taking."33

**Compensation is for what is described as being taken**

The description of the taking in the petition determines the scope of the taking, and hence the just compensation and damages paid. This rule applies whether the description is too narrow (not fully describing the actual effect of the taking) or too broad (describing a greater taking than will actually occur).34

"The landowners and the condemner may, and must, rely on the language of the commissioners' report [relying on the petition's description of the taking] as to the extent of the easement and the extent of the use. If the landowners are not compensated in full for the full use, as set out in the report [relying on the petition], the condemner can take the full use in the future without further compensation to the landowners."35

Compensation is not to be limited by oral or (non-petition) written promises of limited use or other promises that acquired written rights will not be used.36 However, even if not expressly stated, good faith and fair dealing are implied into the exercise of the rights, along with obligations for mutual accommodation of economically beneficial uses.37

**The description of the taking is under the sole control of the condemning authority**

The description of the taking is found in the language used in the petition that is unilaterally drafted by the condemning authority. It cannot be challenged in the EDPA proceedings.38 (The Appraisers’ Report's description is to mirror the Petition.39) It is this language that determines the property rights being taken by the condemning authority.40 The condemning authority has the burden, and power, of writing the description to show the limitations of its taking by making clear a) what is taken and b) what is not taken.41 Incorporated exhibits are considered part of the description.42

**Doves in the Hands of Scrupulously Fair Coaches**

In *Water Dist. No. 1*, a water district filed a condemnation petition. The petition stated that the taking was "subject to existing easements." It thereby defined the taking so as to expressly exclude any impact upon existing easements that were on the land. Accordingly, the petition failed to name the easement holders.

An easement holder learned of the condemnation action and asserted that its rights would certainly be affected, both physically and legally. However, because the petition and the Appraisers' Report expressly stated that there would be no impact on easements, the Kansas Supreme Court majority affirmed the trial court’s and appraisal panel’s acceptance of its accuracy.43 The majority opinion upheld not only the denial of compensation to the easement holders but their exclusion from participating in the condemnation proceedings.44 Specifically, K.S.A. § 26-513 says the (non-exhaustive) factors "shall" be considered but only if they are shown to exist. Accordingly, it appears permissible for a petition to allege that particular factors do not exist. The majority concluded that, if the representation proved to be incorrect, an affected easement holder would have to pursue its rights in a separate inverse condemnation proceeding.

One justice of the Kansas Supreme Court was concerned by the potential abuse of the condemnation power by "drafting gamesmanship."
"However, the reality our decision today manifests without articulating—a state of affairs deserving explicit acknowledgment—is that the EDPA grants condemning authorities carte blanche to consciously limit the scope of the required notice [of the condemnation proceedings] through drafting gamesmanship."45

"Left unchecked by flood walls erected either by the people’s representatives or by the people’s constitution, the power of the state will flow like an encroaching ocean into and through every available chink and crevice. The statutory requirement of prior notice is one such flood wall against the “abuse of a private citizen” in eminent domain proceedings. But in its absence, as today’s case aptly demonstrates, condemning authorities are more likely to take advantage of this crack in the law—the better to effect expansive exercise of power—than they are to be "scrupulously fair" and "cognizant of the responsibility that comes with a power so great."46

"In response to this failure of statutory language, my colleagues muster the hope that government actors will "be scrupulously fair in the exercise of eminent domain, always cognizant of the responsibility that comes with a power so great." Slip op. at 14. I am not so sanguine. Instead, I am mindful that in the past, considering the potential for abusive practices in eminent domain proceedings, we have noted that it is difficult to "conceive of a policy of government afflicted with greater potentials for abuse of a private citizen."47

Though the concurrence was skeptical that condemning authorities would always exercise their power in good faith, the majority followed both its precedent and the language of the EDPA, which allow such “gamesmanship.” An aggrieved condemnee would have to separately proceed with its own inverse condemnation lawsuit to seek redress. Water Dist. No. 1 has affirmed the eminent domain Petition’s description of the taking as the basis for compensation and blessed it as a tool for limiting the compensable property rights taken.48

Petition Drafting and Interpretation

A condemning authority’s attorney would be wise to follow the directions of the Kansas Supreme Court and carefully draft a petition for condemnation so as to satisfy the client’s needs while minimizing the impact of the taking, thus preserving as much mutually beneficial use of the land as possible while protecting the purse. A property owner’s counsel would equally be wise to know the landscape of not only the petition but also the literal landscape of the property being taken and whether it has been more affected than the petition indicates.

Through careful consideration and planning, along with a non-ham-handed taking of the necessary rights, condemning authorities can embrace the Kansas Supreme Court’s instruction "to be scrupulously fair in the exercise of eminent domain, always cognizant of the responsibility that comes with a power so great."49 ■

About the Author

Chris Burger is a partner with the law firm of Stevens & Brand LLP out of Lawrence and Topeka, specializing in real estate and design and construction issues. As a Kansas country Lawyer, Mr. Burger handles the complex and simple and has been on the forefront of Kansas construction and real property law, sharing his experience and knowledge as the University of Kansas School of Law’s Adjunct Professor on the subject of Construction Law and Litigation. He is a trial attorney who brings those skills and experiences to prosecuting and defending claims, and counseling his clients to help keep them out of courtrooms, hearing rooms and losses. His practice is broadened through his involvement in the community, sharing projects such as these, and his family.

2. “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” USCS U.S. Const. amend. V (emphasis added). See also Kan. Const. art. XII, § 4 (“No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation.”)
4. An excellent summary and overview of the eminent domain process is found in Mary Feighny’s stimulating May 2013, Journal of the Kansas Bar Association article, “Coping with ED (Eminent Domain).” The Article you are presently reading will explore whether a property owner can remain master of its domain under recently affirmed Kansas Supreme Court opinions.
5. Please see Mary Feighny’s May 2013, Journal of the Kansas Bar Association Article, “Coping with ED (Eminent Domain)” for a compilation of applicable cites and the overview of the EDPA.
7. See K.S.A. § 26-501a(a).
10. See K.S.A. § 26-501a, authorizing takings for subsequent transfers to private entities for certain right-of-way acquisitions, utilities, and municipalities, with meaningful limits on the municipalities unless there
is acquiescence, title issues, or life-safety issues. Further exceptions require legislative action.

11. E.g., K.S.A. § 26-502 (contents of Petition), 503 (notice of proceeding), 504 (suggesting valuation panelists), 505 (panel instructions and notice of award), 506 (notice of and participation in valuation hearing), 507 & 510 (notice of payment of award and duty to remove personal property), 508 (right to appeal valuation only). K.S.A. § 26-513 outlines a non-exclusive list of factors used in valuing a taking, including a requirement for damages. This is discussed in more depth later.

12. The meanings ascribed to these terms can affect the decision whether and how to exercise the power of eminent domain. For example, in Creegan v. State, 305 Kan. 1156, 391 P.3d 36 (2017), the Kansas Supreme Court held that all of the parties to a restrictive covenant are "owners" under the EDPA and must be named in eminent domain proceedings or otherwise have claims for inverse condemnation. Accordingly, as argued by parties in the appeal, because condemnation or voluntary acquisitions of property covered by a restrictive covenant would require the inclusion of every person within the restrictive covenant community, even if they have no physical taking upon them, the costs will dramatically increase.

13. K.S.A. § 26-502 (contents of Petition), 503 (notice of proceeding), 504 (suggesting valuation panelists), 505 (panel instructions and notice of award), 506 (notice of and participation in valuation hearing), 507 & 510 (notice of payment of award and duty to remove personal property), 508 (right to appeal valuation only).

14. In re City of Great Bend, 254 Kan. 699, 701, 869 P.2d 87 (1994); see also Sutton v. Freizer, 183 Kan. 33, 37, 325 P.2d 338 (1958) ("An eminent domain proceeding is a special statutory proceeding and is not a civil action covered by the code of civil procedure. The proceeding is administrative rather than judicial, and its nature is the same whether conducted by or before a district court, or any judge thereof, the probate court, or its judge, a board of county commissioners or any other official board or tribunal authorized by the legislature to act in that capacity. … The report of the amount found due is an award and is not a judgment. Prior to an appeal from the award the proceeding is in the nature of an inquest.")

But the prohibition against Chapter 60 in initial proceedings may not be as absolute as suggested. Although the Kansas Supreme Court has made definitive statements about the inapplicability of Chapter 60, it also has recognized that "In Kansas, provisions of the EDPA control the proceedings to the extent the provisions address an issue." Water Dist. No. 1, 304 Kan. at 606. The EDPA is silent on many things otherwise found in Chapter 60. For example, in Water Dist. No. 1, the intervention of a person was allowed after an award. "Despite their nonparty status, we agree with the district court that they share with the main action a common question of law or fact." K.S.A. § 60-224(b)(1)(B). WaterOne notes that the Bonhams characterized their motion specifically as a motion to void under City of Wichita rather than a motion to intervene. But implicit in the motion to void was an intervention question—whether the Bonhams had an ownership interest sufficient to give them a place in this action. And typically intervention is subject to liberal construction in favor of intervention. [Citation omitted]. In this procedurally unique case, we do not find that the district court wholly lacked jurisdiction to narrowly consider the Bonhams’ claims." Water Dist. No. 1, 304 Kan. 603.

15. USCS U.S. Const. amend. V.


18. K.S.A. § 26-513(e). "Well informed" was included as part of the definition of "fair market value" in the amendments of 1999. The use of "well informed" is different than the more common use of "willing" and was used to mirror K.S.A. § 79-503a, which is the statute applicable for taxation of real estate. The legislative comments note that the "committee is of the opinion that it is appropriate to define fair market value in the same manner in situations in which the government is taking a citizen's property as it is defined in situations in which the government is taxing a citizen's property."
must be considered in determining the value of the land taken. [Citation omitted] The “unit rule” denoted a process of appraisal whereby the total value of real estate is first determined without placing a value on each of the separate contributing items. Consideration of the value of buildings and improvements is limited to the extent they enhance the value of the land taken. [Citation omitted] In contrast, the “summation method” of appraisal denotes a process of appraisal whereby each of several items that contribute to the value of real estate are valued separately and the total represents the market value thereof. Use of this method of appraisal has generally been rejected since it fails to relate the separate value of the improvements to the total market value of the property. [Citation omitted]."


34. There would appear to be room for disagreement about what must be paid for, but for the clear statements in Water Dist. No. 1, 304 Kan. at 607. When a condemning authority uses more than it took, those rights must be paid for, possibly through inverse condemnation proceedings. Under the guiding precept of ensuring compensation for the property owner, the landowners are entitled to full compensation for the actual rights acquired by the condemnor, not the rights actually used. [Citations omitted] Hudson v. Shawnee, 246 Kan. 395, 400, 790 P.2d 933 (1990). This can be true if collective and encompassing terms are permitted to gather together a wide range of rights. Id. at 402, 790 P.2d 933 (“The petition stated the easement was for “surveying, excavating, filling, grading and all other purposes incidental to the construction of a street or sidewalk on the permanent right of way adjacent thereto.” Sutton does not stand for the proposition that every common-law right of property owners must be specifically listed in a condemnation petition in order to be taken.”). Additionally, if there is a post-taking use beyond the described rights, that use must be paid for as well, typically through inverse condemnation initiated by the owner. “Nothing is taken by implication or intention. The landowners may rely implicitly on the [appraisers’] report filed. This [appraisers’] report becomes the evidence and the only evidence of the commissioners doing.” In re Great Bend, 254 Kan. at 703, 869 P.2d 587; Sutton, 183 Kan. at 45, 325 P.2d 338.


36. Id. at 159, 392 P.2d 914 (“The measure of damages should have been based on the rights acquired by the condemnor and not upon testimony as to the intended use. The landowners were entitled to compensation based on the full use which the condemnor had the right to exercise over the easement condemned as described in the commissioners’ report.”); see also In re Great Bend, 254 Kan. at 701, 869 P.2d 587 (“The first question involves careful consideration of the nature of the interest taken by the City to secure a ponding easement on the 61.8 acres of the Essmiller property. The parties are in agreement with the law applicable to this case but are deeply divided on the question of whether the City was allowed to introduce evidence of a limited use of the ponding easement, thereby contradicting the description of the easement taken according to the Petition and appraisers’ report. Kansas law is clear that regardless of the future intention of the condemnor, the rights actually acquired, and not the intended use of those rights, is the measure of the landowner’s compensation.”).

37. See Restatement Third, Property (Servitudes) secs. 4.10 Cmts. a, b & g, 4.9 cmts. a & b, 4.1 Rptr. Notes; City of Ark. City v. Bruton, 284 Kan. 815, 166 P.3d 992 (2007); Hudson, 246 Kan. at 402, 790 P.2d 933 (“The landowner retains the right to use condemned property for any purpose not inconsistent with the public right. [Citations omitted]”; Water Dist. No. 1, 304 Kan. 603 (“Nevertheless, we are constrained in an eminent domain proceeding by the language the condemning authority uses, its condemnation plans, and the limits of the EDPA.”).

38. The language of a taking cannot be challenged in an EDPA proceeding. A separate proceeding would be required. “This court has characterized these proceedings as an ‘inquest’—an investigation into exactly how much the government owes. Indeed, the proceedings are narrow and not a ‘forum for litigation of the right to exercise the power of eminent domain nor the extent thereof.’” Id. at 607. “In short, EDPA proceedings intended for and concerned with the condemnation of land are actions which require the condemnor to make a finding of the right to acquire and the extent of its right for the taking. Litigation of collateral issues is relegated to other civil actions.” Id. at 608. Any challenge appears to bear a heavy burden. In fact, WaterOne’s discretionary decision to take an interest in Tract 16A and leave the Bonhams with their easement is only subject to judicial review upon a showing of fraud, bad faith, or abuse of discretion. [Citations omitted] Water Dist. No. 1, 304 Kan. 603, 614.

39. The “language of the petition” and “the language of the report” are often used interchangeably within the decades of decisions concerning the exercise of the power of eminent domain. Little discussion of any distinction exists in Kansas cases, possibly due to the practical reality that counsel for the condemning authority almost always prepare a draft report that mirrors the language in the petition. However, some attention must be given to the fact that an appraisal panel would have the independence to physically draft its own report but would not be empowered to alter what is sought in the Petition, absent further agreement or revision—a fertile subject in and of itself. In re Great Bend, 254 Kan. at 702-03, 869 P.2d 587 (discussing two separate documents - “Of crucial importance is the description of the nature of the interest taken in the appraisers’ report. In most cases, the interest set forth in the petition becomes the interest identified in the appraisers’ report. If the two are different, then both descriptions must be read together to determine the nature of the interest to be taken. Any ambiguity must be resolved in favor of the landowner and ultimately determined by the description contained in the appraisers’ report. [Citations omitted]”) compared with In re Condemn. of Land, 193 Kan. at 157, 392 P.2d 914 (stating in a pre-EDPA environment that “[t]he commissioners’ report, and only their report, is evidence of the land appropriated, the extent of the easement and its use.”) and with City of Wichita, 262 Kan. at 544 (“Under the provisions of K.S.A. 26-502, the condemnor’s only obligation in naming parties is to name in the petition the owners and all lienholders of record and any party in possession.”) [Citation omitted]. The property rights taken by a condemning are to be determined by the language in the petition and in the appraisers’ report. A condemning bears the burden of drafting its petition to show the limitations in its taking. [Citation omitted]."


42. See Hudson, 246 Kan. at 402, 790 P.2d 933.

43. Deference would be less likely if the representatives included such things as, “nothing herein shall affect the after value of the property,” or “this taking shall not affect the value of the property.”

44. Water Dist. No. 1, 304 Kan. 603.

45. Id. at 619 (Stegall, J. concurring).

46. Id. at 620 (Stegall, J. concurring).

47. Id. at 619-20 (Stegall, J. concurring).

48. Id. at 603.

49. Id. at 613-614.
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Respectfully Submitted
Writing with Respect for Courts, Counsel and Others

by Tonya Kowalski

I remember my first opposing counsel “nasty-gram.” I was a green attorney who had just helped to file a very carefully prepared complaint in a routine commercial case. The letter arrived a few days later, reeking and dripping with anger and sarcasm, and threatening a quick and painful end to both my client’s business and my career. Vacillating between anger and terror (what if they’re right?), a lot of draft responses and unbilled hours lay on the cutting room floor before I could muster a civil response. Little did I know that this would eventually become a routine experience: nasty letters, angry telephone messages, scathing personal attacks in briefs and so on.

I am grateful for the mentors and professors who cautioned me and my peers always to preserve our reputations, to take the high road, not to succumb to the Dark Side. But I also counted the casualties: the many drawn-out cases that should have been so much easier and less expensive, the clients who became embittered at the system, and sometimes even the joy of serving the profession.

For green attorneys still experiencing this rite of passage, please know that the offenders out there are not fooling anyone, except for possibly your anxious, first-time client, who will need your care and reassurance. Those offenders are damaging their own reputations beyond repair.1 But even worse, every uncivil act causes another little crack in the rule of law.

The Rules of Professional Conduct instruct that lawyers “should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.”2 They also prohibit “undignified or discourteous conduct degrading to a tribunal.”3 So how does a lawyer learn to communicate confidently and even forcefully, but also with respect?
When communicating with or about opposing counsel:

1. Do perform some word-of-mouth research on your colleague’s reputation before engaging with him or her for the first time.
2. Do learn to stay centered and focused on the client’s needs rather than your own feelings.
3. Do recognize the role each lawyer plays in forming the parties’, witnesses, and jurors’ perceptions of the legal system and rule of law.
4. Don’t make a practice of referring to opposing counsel’s conduct in briefs or even in the courtroom. No judge wants to feel like a kindergarten teacher, but sadly, they often do.
5. Don’t file a knee-jerk motion for sanctions for every single slight; leverage the court’s power only when doing so is truly in the client’s best interests.

When communicating with or about the Court:

1. Do show respect by following all court rules, including local rules and general rules of decorum.
2. Do usually refer to natural persons involved in the case with respectful titles, such as Ms., Mr., Dr., etc.
3. Do capitalize the proper names of legal institutions and the “C” in “this Court,” for example: the Supreme Court, the District Court, the Tenth Circuit, the Legislature, Congress, etc.
4. Do learn the current and preferred terms for referring to various aspects of diversity, such as race; ethnicity; disability; gender identity and expression, and sexual orientation (several helpful links are provided below.) But at the same time, don’t draw attention to a person’s diversity when the only real purpose is to marginalize him or her by suggesting “otherness.” Keep in mind that sometimes, our own biases can lead us to mention race or other aspects of otherness even when they are not important to the case.
5. Do address the court based upon the default presumption that the court itself is unbiased, but also point out miscarriages of justice caused by systemic bias.
6. Do exercise care when telling the stories of clients who come from backgrounds and worldviews different from the lawyer or the dominant society. This task will call upon the lawyer’s best cross-cultural communication skills, especially the art of truly listening.
7. While it is sometimes necessary to attack the opposing party’s character, don’t cross the line into dehumanization or unnecessary personal attacks.
8. Here again, do recognize the role each lawyer plays in forming the client’s and public’s views of the legal system and rule of law.

Further Resources

- Diversity Style Guide (Center for Integration and Improvement of Journalism): https://www.diversitystyleguide.com/
- Disability Language Style Guide: http://ncdj.org/styleguide/
- For Asian American, Latino/a, religious, and other communities, please see the Diversity Style Guide, above (numerous journalists’ associations contributed to its creation). ■

About the Author

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1. For previous Substance & Style columns on professionalism and civility, please see Chelsi Hayden, Knowing Your Audience in an Ever-Changing Social Media World, J. Kan. B. Ass’n, January 2016; Pamela Keller, Tell the Story of the Professional Lawyer, J. Kan. B. Ass’n, September 2012; and Joseph P. Mastro Simone, Mind Your Manners, J. Kan. B. Ass’n, October 2014.
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"Blessed are the Peacemakers:"

The Case for Civility in the Practice of Law

by J. Nick Badgerow
We expect all attorneys to advocate zealously on behalf of their clients. We also expect attorneys to conduct themselves in a courteous, civil, and professional manner.3

INTRODUCTION.

Just as many citizens complain of the decline in civility in the general population, many lawyers and outside observers decry the obvious erosion of civility in the practice of law. It is not the purpose of this article to detail or attribute all the causes for this erosion, though one only need consider the parallel devolution of personal communication in social media to surmise some relationship. However, just to explore the edges of the issue, consider the following:

- There are many more lawyers per capita in the United States than in prior decades. Indeed, since 1950, the proportion of lawyers has outpaced the growth of the general population by more than double.4 This increase in the number and percentage of lawyers has, in turn:
  - increased the pressure for clients and cases, leading to stress and short tempers;5
  - decreased the likelihood that one may in the future encounter a lawyer to whom one has been less than civil. The old “what goes around, comes around” rule is fading away.
- The increasing view of “the law as a business” has in turn worn down the view that “the law is a profession.” Then-Justice Sandra Day O’Connor, speaking on the topic of Professionalism, said this more than twenty years ago:

  It has been said that a nation and its laws are an expression of the highest ideals of its people. Unfortunately, the conduct of our nation’s lawyers has sometimes been an expression of the lowest. Clients increasingly view lawyers as mere vendors of services, and law firms perceive themselves as businesses in a competitive marketplace. As the number of lawyers in this country approaches one million [1.43 million in 2018],6 the legal profession has narrowed its focus to the bottom line, to winning cases at all costs, and to making larger amounts of money. Almost every complaint about the decline of ethics and civility “sounds the dirge of the profession turning into a trade.” Practice at the turn of the century, we are told, “promises to be nasty, brutish and, for some, short.”7

- There are far more non-lawyers performing services and tasks today which were in prior years performed only by lawyers.8 Indeed, one no less well-placed than Charles Dickens has observed the following regarding the relationship of lawyer and client:

  The one great principle of the English law is, to make business for itself. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think it. Let them but once clearly perceive that its grand
principle is to make business for itself at their expense, and surely they will cease to grumble.9

- The ubiquitous use of e-mail as the primary means of communication, and other social media, have made people less restrained in our communications.10

Civility in our profession is waning, especially in the litigation arena. Lawyers routinely sling insults at each other, and even at judges. Yelling occurs in depositions and courtrooms. Requests for extensions are improperly withheld to gain tactical advantage. Email, while a convenient communication tool, has led many of us to write things that could have been said with more tact.11

- Frankly, even in the face of egregious conduct by lawyers, judges appear to be reluctant to utilize the discretion given to them to sanction bad behavior by the lawyers appearing before them.12 This in turn may embolden lawyers to stretch the limit, to escalate friction and uncivil conduct.

Regardless of the cause, the decline in civility in the practice of law is a recognized phenomenon, and must be taken as a given.13

Taking the decline in civility among lawyers as a given then, it is the purpose of this article not to complain, but to discover that the phenomenon is not new, and to explore how civility, and not incivility, is (a) professional, (b) ethical, and ultimately (c) more successful. It is hoped that these inducements may help to encourage our fellow lawyers to adopt a more civil approach in dealing with other lawyers.

INCIVILITY IS NOT NEW.

Lawyers are advocates. We are trained to argue strongly for our clients. It has always been so. But this advocacy has also led lawyers to act uncivilly towards one another.14 This was observed as early as ancient Rome:

If no one paid a fee for lawsuits, . . . there would be fewer of them. Now, however, hatred, strife, malice, and slander are fostered. Just as bodily sickness gives fees to doctors, so also a diseased legal system enriches lawyers.15

The very falls of the Greek and Roman Empires have been attributed to the decline of civility among its citizens.

The principal cause of the [decline of ancient Greek and Roman civilizations] was a degeneracy of manners, which reduced those once brave and free people into the most abject slavery.16

A recently published book, "A Field of Blood," explores the debates among United States Congressmen (most of whom were lawyers) in the days leading up to the American Civil War. The author, Joanne B. Freeman, describes legislative sessions which included threats of death, flipped desks, canings, and unbarred fisticuffs. Congressmen were reported to have drawn pistols and waved Bowie knives at each other. One of the representatives even killed another in a duel. Many of them were bullied and beaten in an attempt to force them into conformity, particularly on the issue of slavery.17

Recognizing that lawyers endemically do not get along, and perhaps have never gotten along, does it serve the interests of lawyers (and their clients) to persist in such behavior?

LAWYERS MUST BE ZEALOUS.

An often-cited excuse for incivility is a lawyer’s duty to be zealous. Among the first of the Rules of Professional Responsibility applicable to lawyers is the requirement that a lawyer zealously represent his/her client. Rule 1.3 of these Rules mandates that: “A lawyer shall act with reasonable diligence and promptness in representing a client.”18 The official Comment to this Rule explains:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.19

Thus, lawyers are required to represent their clients zealously, and many more are the lawyers who have been disciplined for a lack of suitable zeal,20 than for exercising excessive zeal.21

ZEAL VS. CIVILITY.

Zealous representation must always be tempered, however, with good manners and civility. The Kansas Supreme Court has cogently observed:

It is within the real meaning and intent of our Code of Professional Responsibility that lawyers should always be cognizant of the necessity for good manners, courtesy and discourse, both to client and other practitioners, as being part of our professional ethics. The zeal employed by an attorney in guarding the interests of his clients [and in communicating with adverse parties] must always be tempered so as not to inject his personal feelings or display a demeanor that subjects parties to a proceeding or opposing counsel to certain indignities.22
It is the task of striking an appropriate balance between zeal and civility, then, which calls for the exercise of due professional judgment on the part of the lawyer. As one court put it:

We close this discussion with a reminder to counsel—all counsel, regardless of practice, regardless of age—that zealous advocacy does not equate with “attack dog” or “scorched earth”; nor does it mean lack of civility. **Zeal and vigor in the representation of clients are commendable. So are civility, courtesy, and cooperation. They are not mutually exclusive.**

The Minnesota Supreme Court has similarly stated:

Respondent asserts he has a right, indeed an obligation, to represent his clients vigorously, aggressively, and zealously. To be vigorous, however, does not mean to be disruptively argumentative; to be aggressive is not a license to ignore the rules of evidence and decorum; and **to be zealous is not to be uncivil.**

Perhaps by gaining a better understanding that civility is both professional and ethical, one can come to the conclusion that civility in the long run also leads to more success in the practice of law. At the least, zeal should be balanced with manners.

**CIVILITY IS PROFESSIONAL.**

**The Law is a Profession.** A profession – more than mere “employment” – carries with it a sense of “calling,” involving higher education, standards for admission, standards of conduct, and self-regulation. A “profession” is defined by its characteristics, which are:

the requirements of extensive formal training and learning, admission to practice by a qualifying licensure, a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace, a system for discipline of its members for violation of the code of ethics, a duty to subordinate financial reward to social responsibility, and, notably, an obligation on its members, even in non-professional matters, to conduct themselves as members of a learned, disciplined, and honorable occupation.

“The practice of law is a profession and its uniqueness distinguishes it from all other endeavors.” The Law is thus not just a business; indeed, its best practices are arguably contrary to those found in “business.”

[T]he rules of professional ethics that attorneys are duty-bound to observe most scrupulously are diametrically opposed to the code by which businessmen must live if they are to survive. The Rules of Professional Conduct ensure that [t]he practice of law is not simply an occupation; it is a profession, whose members seek to avoid even the appearance of impropriety and, thus, strive[…] to live by a higher standard of conduct than a layperson.

**Creed/Pillars of Professionalism.** In an effort to stem the clear tide of increasing incivility among lawyers, many courts and bar associations have adopted the Creed of Professionalism (sometimes called the Pillars of Professionalism) in some form. The Pillars were developed by the American Bar Association late in the Twentieth Century, and were adopted by the Kansas Supreme Court after a Commission study authorized by the Court in 2012. The Pillars were also adopted by the United States District Court for the District of Kansas the same year.

The Preamble to the Pillars sets the tone for its aspirations:

**Professionalism focuses on actions and attitudes.** A professional lawyer behaves with civility, respect, fairness, learning and integrity toward clients, as an officer of the legal system, and as a public citizen with special responsibilities for the quality of justice.

The Pillars do not represent minimum standards, such as are provided in the Rules of Professional Conduct.

Instead, the Pillars represent higher aspirational goals to which “professionals” should hold themselves – at the risk of public and professional disapprobation, and not necessarily the loss of one’s license.

The Pillars have been cited a number of times in considering the propriety of counsel’s conduct. Magistrate Judge Gwynne Birzer has held: “Although the Pillars are not law, the Court expects counsel to reflect these tenets in all aspects of litigation.” After reviewing a number of the Pillars, Magistrate Judge Teresa James observed:

The Court is disappointed that such extremely capable and highly accomplished counsel continue to allow unprofessional personal conflicts and attacks to overshadow the substantive legal and factual issues in this case. The Court implores counsel to focus on these issues and start conducting themselves in accordance with the Pillars of Professionalism.
Several of the Pillars are relevant to a consideration of civility in the practice of law.

**Duties to Clients.** For example, under duties to clients, Rule 3 asks lawyers to:

> Encourage clients to act with civility by, for example, granting reasonable accommodations to opponents. Maintaining a courteous relationship with opponents often helps achieve a more favorable outcome. Counsel clients against frivolous positions or delaying tactics, which are unprofessional even if they may not result in sanctions.

Even when the lawyers are getting along with each other, they should counsel their clients to get along with opposing parties as well. This may mean addressing, and dealing with, the stresses which come from a busy law practice.

> The practice of law is a profession which can be attended by significant stress, and a lawyer’s inability to manage such stress can harm the interests of a client. Substance abuse is often a factor in attorney discipline cases.

Thus, not only should lawyers agree to extensions of time where they are reasonable, but they should encourage clients to make such concessions and explain the reason. Further, no one benefits from frivolous claims or delaying tactics, which are also prohibited by the Kansas Rules of Professional Conduct.

**Duties to Courts.** Similarly, with respect to courts, Rule 1 of the Pillars directs that lawyers should:

> Treat judges and court personnel with courtesy, respect, and consideration.

Because of the unique relationship between lawyers and the courts, which admit them to practice and before which they must practice, it is important for lawyers as professionals to treat those courts with respect.

> To be sure, at the foundation of the rule of law is respect for the law, the courts and judges who administer it. And the attorneys who practice law and appear in the courts are officers of the court.

As officers of the court, lawyers owe to the court an obligation of respect.

> A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.

**Duties to Opposing Parties and Counsel.** And perhaps most importantly, “[w]ith respect to opposing parties and counsel,” there are five important Pillars:

1. Be courteous, respectful, and considerate. If the opposing counsel or party behaves unprofessionally, do not reciprocate.

   [A]ttorneys are required to act with common courtesy and civility at all times in their dealings with those concerned with the legal process. Vilification, intimidation, abuse and threats have no place in the legal arsenal. An attorney who exhibits the lack of civility, good manners and common courtesy . . . tarnishes the entire image of what the bar stands for.

   In the Kansas case from which this statement was taken, the respondent had sent a letter characterized as “vicious, offensive, and extremely unprofessional,” employing “a number of vile and unprintable epithets referring to opposing counsel.” The lawyer was suspended indefinitely.

2. Respond to communications and inquiries as promptly as possible, both as a matter of courtesy and to resolve disputes expeditiously.

   As discussed above, the prompt resolution of clients’ matters is a valuable goal of the professional practitioner. It is also consistent with the proper administration of justice. Thus, failure to respond to communications and inquiries is inimical to that proper administration of justice. In a Kansas disciplinary case, the respondent lawyer caused . . . substantial delay in two federal cases by repeatedly failing to respond to motions, by repeatedly failing to comply with court orders, [and] by repeatedly failing to properly communicate with opposing counsel.

   As a result of this, and other, conduct, the lawyer was disbarred.

3. Grant scheduling and other procedural courtesies that are reasonably requested whenever possible without prejudicing your client’s interests.

   Making agreements for extensions of time or other concessions that would likely be granted anyway and/or where no real harm can result to the client’s matter, is common courtesy – and an element of the Golden Rule. One certainly cannot foresee and foretell when an agreement for an extension may be required from the opposing counsel.

   When engaged in even the most contentious litigation, attorneys should be ever mindful that the practice of law is a profession and that attorneys are expected to extend professional courtesy to opposing counsel when health problems or other unforeseen events prevent attendance at scheduled proceedings. Moreover, parties are expected to contact the opposing party and attempt to resolve discovery disputes amicably.

44 The Journal of the Kansas Bar Association
prior to seeking sanctions from the court. See Rule 2-431. Once Glassman knew Post was in the hospital, he made no attempt to reschedule the deposition or otherwise informally resolve the matter. Such conduct does not reflect well on the practice of law, and most assuredly should not be rewarded by the grant of a default judgment.49

Short and non-repetitive extensions of time to accommodate counsel should be routine, again within the context of protecting the client’s substantive rights.

4. Strive to prevent animosity between opposing parties from infecting the relationship between counsel.

Clients often feel strongly in their animosity to opposing parties, particularly in litigation. But, as the spokesperson for his client, the lawyer need not take on the mask of that animosity. Indeed, the professional lawyer remains courteous and civil even when confronted with animosity.

A good attorney is detached from the emotions of the parties. They serve as an objective voice of reason; an independent source of wise counsel. A good attorney understands the conflict, but is never part of the hostilities. A good attorney is above the fray. He or she is careful to never inflame the passions of their client. A good attorney is a peacemaker who resolves disputes, not encourages them.50

This also does not mean the lawyer should act in a passive-aggressive manner, for example acting aloof from the dispute, while counseling or encouraging the client’s boorish behavior.

It is no defense that the individual participant’s conduct, when isolated from that of the group as a whole, would not violate the court’s order. The foregoing applies with equal weight to those who direct, control, plan and supervise activity in defiance of the court order. The true instigators may not be absolved by maintaining the appearance of remaining above the fray. One who conspires to induce contemptuous conduct by others which does in fact occur, may be equally guilty with those who actually engage in that conduct.51

Lawyers should remain professional, and prevent client animosity from infecting attorney relations. As Shakespeare recognized regarding lawyers:

And do as adversaries do in law, 
Strive mightily, but eat and drink as friends.52

5. Be willing and available to cooperate with opposing parties and counsel in order to attempt to settle disputes without the necessity of judicial involvement whenever possible.

“Dilatory practices bring the administration of justice into disrepute.”53 As professionals, lawyers should work to resolve their clients’ matters promptly, and try to work out disputes without having to file motions.54

Thus, applying the Pillars of Professionalism, it is easy to conclude that a true professional acts with civility and courtesy at all times, even in the face of incivility and discourtesy from opposing counsel or parties. Thus, Civility is Professional.

CIVILITY IS ETHICAL.

Several of the Rules of Professional Conduct are applicable to uncivil behavior, and such behavior may well result in discipline, up to and including disbarment – perhaps a motivator to reconsider such behavior.

Rule 1.3 (Zeal). The discussion above has already explored the lawyer’s duty of zealous representation and its limits, to be balanced with the obligation to be civil.

Rule 1.2(a) (Abide Client Decisions). This Rule states that “a lawyer shall abide by a client’s decisions concerning the objectives of representation.”55 This duty may lead the lawyer to feel compelled to adopt the client’s antipathy towards the opposing party – and thereby, the opposing party’s counsel – and to employ methods of communication which are less than civil, and to be disagreeable about simple matters, such as extensions of time, etc.

However, Rule 1.2 only requires the lawyer to abide the client’s decisions concerning the objectives of the representation, and not the means, methods, and tactics employed to achieve those objectives.56 If the client objects to the lawyer’s civility towards opposing counsel, the “lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation,”57 including the lawyer’s duties as herein examined.

Rule 3.3 (Candor Towards Tribunal). Rule 3.3(a)(1) and (3) prohibit a lawyer from knowingly making “a false statement of fact or law to a tribunal” or offering “evidence the lawyer knows to be false.”58 Sometimes, lawyers get carried away with their vitriol to the extent of continuing it in the courtroom, and then making false statements to justify or prolong that vitriol.59

Rule 1.7(a)(2) (Conflict Between Client’s and Lawyer’s Interests). This Rule directs that “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest [including a situation where] there is a substantial risk that the representation will be materially limited . . . by a personal interest of the lawyer.”60

Thus, where a client demands that a lawyer act aggressively,
Uncivil or unethically towards a client, to the extent that such behavior would conflict with the lawyer’s ethical obligations, the lawyer should not take on the representation in the first instance, or withdraw from it if the client insists on such behavior.61

Rule 3.5(d) (Conduct Disruptive to Tribunal). This Rule prohibits a lawyer from engaging “in conduct intended to disrupt a tribunal.”62 Again, acting uncivilly in a court will not have positive results. For example, in the Kansas case of In re Romious,63 the respondent lawyer, on various occasions:
- “loudly and rudely interrupted the [court] proceeding.”64
- “made loud and rude statements.”65
- “asserted that the proceeding was a ‘joke’ and a ‘travesty.’ The Respondent accused the judge of ‘apparent reckless, bias, prejudice, and potentially racist activity and conduct.’ The Respondent told the judge that the ‘proceeding was a joke’ and that the judge was ‘going to sit [his] ass up there.’ The Respondent accused the court of ‘corrupting and stinking up the case’ and ‘corrupting the system.’”66
- “repeatedly spoke over the judge and opposing counsel in a loud, rude, and angry manner [and] refused to stop talking when so ordered by the judge.”67
- “asked the court whether he is a ‘pedophile.’ . . . stated to the court that ‘you’re going to sit up there with the audacity and the smugness of your holiness,’ repeatedly spoke over the judge and opposing counsel in a loud, rude, and angry manner. . . [and] refused to stop talking over the judge and opposing counsel when ordered to do so by the court.”68

Understandably, this conduct was held to violate, inter alia, Rule 3.5(d).69

Rule 4.4(a) (Embarrass, Delay or Burden a Third Person). This Rule prohibits a lawyer, in representing a client, from using “means that have no substantial purpose other than to embarrass, delay, or burden a third person.”70 “Yelling and screaming” at others can have no substantial or appropriate purpose, and it violates Rule 4.4(a).71

Going back to the Romious case, respondent was held to have violated Rule 4.4(a) by rude and disruptive behavior and the use of profane language.72 What lawyer has not observed (or participated in) conduct which could be interpreted as “rude,” “disruptive” or “profane”?

Rule 8.4(d) (Conduct Prejudicial to the Administration of Justice). Rule 8.4(d) prohibits a lawyer’s “conduct that is prejudicial to the administration of justice.”73 Uncivil words and conduct fit within this prohibition.74

[R]ule 8.4(d) casts a wide net over an assortment of attorney misconduct and encompasses behavior that is rude, disruptive or in other ways impedes the proper functioning of the legal system.75

And Rule 8.4(d) is not limited to litigation-related conduct. “Rule 8.4(d) also reaches conduct that is uncivil, undignified, or unprofessional, regardless of whether it is directly connected to a legal proceeding.”76 Understandably, “inflammatory, disparaging, and uncivil remarks directed at the Court and opposing parties” have represented a violation of Rule 8.4(d),77 and yet who has not observed (or been guilty) of such remarks?

Rule 8.4(g) (Conduct Which Adversely Reflects on Lawyer’s Fitness). This Rule makes it professional misconduct for a lawyer to “engage in any other conduct that adversely reflects on the lawyer’s fitness to practice law.”78 Rude, threatening and disparaging remarks violate Rule 8.4(g).79

Thus, these various Rules make it unethical to engage in uncivil conduct. And lawyers are frequently and regularly disciplined for such conduct. Some examples follow:

- Assault on opposing counsel—disbarred;80
- Abusive, disruptive, and contumacious behavior towards court and court personnel—disbarred;81
- Rude, overly aggressive, unprofessional—disbarred;82
- Rude and offensive, repeatedly failed to return her phone calls (and other misconduct)—disbarred.83
- Rude, obstreperous and evasive in his deposition (and other misconduct)—disbarred;84
- A pattern of rude, undignified, and unprofessional conduct from a judge that included abusive verbal outbursts, unjustified expulsions from the courtroom, and berating or humiliating persons in the presence of others—two-year suspension;85
- Rude, antagonistic, and extremely unprofessional behavior—two-year suspension;86
- Rude and abrasive conduct towards judge and attorneys—three-month suspension;87
- Blatant incivility—90-day suspension;88
- A course of professional and private conduct that was inappropriate, rude, vulgar, insulting, occasionally dangerous, and sometimes criminal—indefinite suspension;89
- Abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening and turbulent conduct—bar application denied;90
- Rude, loud and disrespectful conduct towards the court—reprimand;91

CIVILITY IS SUCCESSFUL.

Thus, if a lawyer can be disciplined and even disbarred for uncivil conduct, does it not follow that a lawyer avoids disci-
pline and keeps his/her license intact by not engaging in uncivil conduct, and perhaps even does better for his/her clients?

The common objection to civility is that it will somehow disserve the client. I see it differently. In my view, incivility diserves the client because it wastes time and energy -- time that is billed to the client at hundreds of dollars an hour, and energy that is better spent working on the case than working over the opponent. I suspect that, if opposing lawyers were to calculate for their clients how much they could save by foregoing what has been called "Rambo-style" litigation (in money and frustration), many clients, although not all, would pass on the pyrotechnics and happily pocket the difference. It is not always the case that the least contentious lawyer loses. It is enough for the ideas and positions of the parties to clash; the lawyers don’t have to.92

Again, while lawyers have a duty to represent their clients zealously, that zeal should not extend into uncivil and disagreeable words or conduct.

Whether some attorneys believe it to be necessary to spew this venom for the benefit of their unhappy clients, or to take the spotlight off their own inadequacies as legal practitioners, such childish behavior is uncivil and beneath the members of a professional bar association and it is a dangerous method of appellate advocacy. By couching [an] argument in the form of a written temper tantrum, an attorney can detract from the merits of the argument and do his or her client irreparable harm by failing to maintain the required level of professionalism.93

And uncivil conduct in the end harms, rather than helps, the lawyer’s client.

While we are fully aware of a lawyer’s responsibility to aggressively represent his or her clients’ interest, respondent’s conduct here far exceeds the limits of professional representation, despite the numerous warnings of lower tribunals and heavy sanctions imposed. . . . [R]espondent marched relentlessly onward . . . to the great detriment of [her] clients and in total disregard of the waste of judicial resources.94

Thus, if being uncivil ultimately harms, rather than aids, a client’s cause, it follows that civil and appropriate conduct ultimately benefits, rather than harms, the client’s cause.

[A]ttorneys are required to act with common courtesy and civility at all times in their dealings with those concerned with the legal process.95 Vilification, intimidation, abuse and threats have no place in the legal arsenal. An attorney who exhibits the lack of civility, good manners and common courtesy . . . tarnishes the entire image of what the bar stands for.95

SOME SUGGESTIONS.

Assuming that one agrees with the observation that civility among lawyers has reached an all-time low and assuming further that one cares and wishes to do something to stem the tide, what can be done? The following are some suggestions:

- **Inn of Court.** Join in and participate in an Inn of Court program, and encourage others to do so.

  The American Inns of Court inspire the legal community to advance the rule of law by achieving the highest level of professionalism through example, education, and mentoring.96

  One of the Goals of the American Inn of Court program is “[t]o be widely recognized as a leader in promoting professionalism, which includes ethics, civility, and excellence.”99

  In Kansas, there are Inns of Court in Wichita,98 Topeka,99 Lawrence,100 Johnson/Wyandotte Counties,101 and in Johnson County focused on Family Law.102 The benefits of participation in an Inn of Court program include developing a relationship with other lawyers in the community, collegiality, innovation, respect, education, connections and mentorship, through regular programs, presentations and social events.103

- **Mentor.** Take the opportunity to mentor other lawyers, especially recent admittees to the Bar, on the expectations and benefits of civility among lawyers – and the costs and drawbacks of incivility, as outlined above. If you are a new lawyer, seek out a mentor with experience and a good reputation, and develop a mentoring relationship.

- **Don’t React.** When a fellow lawyer acts in an uncivil manner, do not respond or react similarly. Instead, respond with cool reflection and in an even-tempered manner.

- **Keyboard Catharsis.** Sometimes, especially when typing a quick and sharp e-mail response, the message goes straight from the heart to the typing hand, without stopping off at the brain for consideration. That is cathartic, but ultimately destructive. Exercise “Keyboard Catharsis,” that is, go ahead and type it, read and re-read it, enjoy the poetry of it, then delete it. One seldom regrets the message he did not send; one frequently regrets the message he did send.104

- **Don’t Tolerate Incivility.** If another lawyer acts in a rude, disruptive, uncooperative manner, take some action. If the conduct violates one or more of the Kansas Rules of
Professional Conduct, then one has a duty under Rule 8.3 to report the other lawyer to the appropriate disciplin ary authorities. If the conduct violates Federal Rule of Civil Procedure 11 or some other applicable court rule, then file a motion with the court.

- Seek Help. If the lawyer’s conduct indicates or implies a possible substance reliance or emotional issue, then refer the lawyer to the Kansas Lawyer Assistance Program (“KALAP”), which was established pursuant to Kansas Supreme Court Rule 206, to provide immediate and continuing assistance to any lawyer needing help with issues, including physical or mental disabilities that result from disease, addiction, disorder, trauma, or age and who may be experiencing difficulties performing the lawyer’s professional duties.

CONCLUSION.

Civility, above all, should be exemplified and encouraged by all thinking professionals. Justice Robert Benham of the Georgia Supreme Court took the opportunity to comment on the role and importance of civility in litigation in a criminal case where a defendant claimed his trial counsel had been “ineffective because he showed respect for and friendship with opposing counsel.” Naturally, the court rejected this contention, and Chief Justice Benham—in concurring—took some effort to explain.

While serving as advocates for their clients, lawyers are not required to abandon notions of civility. Quite the contrary, civility, which incorporates respect, courtesy, politeness, graciousness, and basic good manners, is an essential part of effective advocacy. Professionalism’s main building block is civility and it sets the truly accomplished lawyer apart from the ordinary lawyer.

Civility is more than good manners. It is an essential ingredient in an effective adversarial legal system such as ours. The absence of civility would produce a system of justice that would be out of control and impossible to manage; normal disputes would be unnecessarily laced with anger and discord; citizens would become disrespectful of the rights of others; corporations would become irresponsible in conducting their business; governments would become unresponsive to the needs of those they serve; and alternative dispute resolution would be virtually impossible.

It is easy to become enamored of a client’s cause, to take up the sword with the same vigor and emotion which the client feels and conveys. This is natural for any good advocate. It is easier still to be drawn into the fray, to respond to incivility with rudeness, to meet blow for blow, to appear strong rather than weak, and to respond to each unkind remark with a remark still unkind, thus elevating the dispute out of control. However, Civil behavior towards the tribunal and opposing counsel does not compromise an attorney’s efforts to diligently and zealously represent his or her clients. Indeed, it is a mark of professionalism, not weakness, for a lawyer zealously and firmly to protect and pursue a client’s legitimate interests by a professional, courteous, and civil attitude toward all persons involved in the litigation process ... [I]ncivility disserves the client because it wastes time and energy — time that is billed to the client at hundreds of dollars an hour, and energy that is better spent working on the case than working over the opponent ... [C]ivil law is not an oxymoron ... Zealous advocacy never requires disruptive, disrespectful, degrading or disparaging rhetoric ... Lawyers are not free, like loose cannons, to fire at will upon any target of opportunity which appears on the legal landscape. The practice of law is not and cannot be a free fire zone.

As a penmanship exercise, George Washington is reported to have hand-copied, at the age of 16 years, certain “Rules of Civility & Decent Behavior in Company and Conversation,” derived from rules developed by the French Jesuits in 1595. General Washington is said to have kept these Rules of Civility by his side, and he attempted to live by these Rules throughout his life. While some of these Rules are anachronisms from a bygone age (such as those referring to table manners), the last of them is worth repeating here:

Labor to keep alive in your breast that little spark of celestial fire called conscience.

May we all live by such a Rule, with manners and civility.

About the Author

J. Nick Badgerow is a trial-lawyer partner with Spencer Fane LLP in Overland Park, Kansas. For thirty years, he has served as Chairman of the Johnson County Bar Ethics and Grievance Committee. He is Chairman of the KBA Ethics Advisory Opinion Committee; member of the Kansas Judicial Council; Chairman of the Council’s Civil Code Advisory Committee; Chairman of the Kansas Ethics 2000 Commission and Ethics 2020 Commission; and he was a member of the Supreme Court-KBA Joint Commission on Professionalism. He is the Editor and a co-author of the KBA’s Ethics Handbook, Third Edition (2015). For sixteen years, Nick was a member of the Kansas State Board of Discipline for Attorneys.
1. “Blessed are the peacemakers; for they shall be called the children of

2. J. Nick Badgerow is a partner with Spencer Fane LLP in Overland
Park, Kansas. His practice focuses on construction and professional re-
sponsibility litigation, as well as consultation with and representation of
lawyers and judges in professional responsibility matters. Nick was a mem-
ber of the Kansas State Board of Discipline for 16 years; a member of the
Kansas Judicial Council for 23 years; chairman of the Johnson County Bar
Ethics & Grievance Committee for 30 years; and has served as chair
man of the KBA Ethics Advisory Committee for 13 years. Nick was
chairman of the Kansas Ethics 2000 Commission and the Kansas Ethics
20/20 Commission, and a member of the Kansas Supreme Court Profes-
sionalism Commission. He is a co-author and the editor of the KBA Ethics


4. How Many Attorneys Are in the USA?, https://www.dennisspot-
slaw.com/united-states-attorneys-map/ (last visited November 26, 2018).

5. “Research related to lawyer stress, depression, health care utiliza-
tion and suicide all suggest that law is a particularly stressful profession, and
lawyer stress often arises as a result of the nature of the work, especially in
combination with common lawyer traits.” Traci Cipriani, “Who Cares
www.law.com/ctlawtribune/2018/08/08/who-cares-about-attorneys-rec-
ognizing-stress-and-committing-to-change/?slreturn=20181002102313
(August 8, 2018).

November 26, 2018).

asbl/kmvz/basic (footnotes omitted).

8. “Non attorneys are moving into various service sectors that have
traditionally been the exclusive purview of lawyers; legal services are being
commoditized at an ever increasing rate; and computers are about to take
the place of legal support staff and even attorneys to some degree.” Mark
solopratechnicleuniversity.com/2016/02/09/the-great-business-vs-profession-
debate/ (February 9, 2016).

Books 1971 (1853).

americanbar.org/groups/litigation/committees/products-liability/prac-

psychology/20cssa.html (attributing lack of “cyber restraint” to the "online
disinhibition effect") (emphasis added).

12. See e.g., Harpy v. Ferocious & Impetuous, LLC, Civil 2013-111

13. See e.g., Lonnie D. Johnson, “Civil = Zealous?” http://www.lawjc-
b.com/civil-%E2%89%A0zealous/ (February 26, 2014); Donald E. Camp-
bell, “Raise Your Right Hand and Swear to Be Civil: Defining Civility as
an Obligation of Professional Responsibility,” http://blogs.gonzaga.edu/
gulawreview/files/2011/12/Campbell_final_pdf (November 2, 2011);
Street to Main Street, From the Boardroom to the Courtroom – Law-
com/2018/06/30/civility-advocacy-and-the-rule-of-law-from-wall-street-
to-main-street-from-the-boardroom-to-the-courtroom-lawyer-civility-is-
crucial-the-un-civil-world/ (June 30, 2018).

14. See Hon. Warren E. Burger, Chief Justice, U.S. Supreme Court,
“The Necessity for Civility,” Remarks at the Opening Session of the
American Law Institute (May 18, 1971), in 52 F.R.D. 211, 213-14
(1971) (discussing the writings of a nineteenth-century barrister).

Brundage, Vultures, Whores, And Hypocrites: Images of Lawyers in
Medieval Literature, 1 Roman Legal Tradition 56, 62 (2002).

16. Montagu Edward W. (1778), Reflections on the rise and fall of the
ancient republics, adapted version London, UK., reported at https://
youngfoundation.org/wp-content/uploads/2012/10/Civility-Loss-and-

17. Joanne B. Freeman, Field of Blood: Violence in Congress on the Road to
the Civil War, New York, Farrar, Straus and Giroux (September 19, 2018),
reported online at https://us.macmillan.com/books/9780374154776. See
also, Williamjames Hull Hoffer, “Civility in Modern America Isn’t as Bad
as Before the Civil War,” https://historynewsnetwork.org/article/125680
(April 18, 2010).

18. Rule 1.3, Kansas Rules of Professional Conduct (hereinafter
“KRPC”), appearing at Rule 226, Rules of the Kansas Supreme Court,
Discipline+of+Attorneys&r2=52.


20. See e.g., In re Vanderbei, 279 Kan. 491, 110 P.3d 419 (2005).


with approval, Columbus Bar Assn. v. Richel, 69 Ohio St. 2d 290, 292,
432 N.E.2d 165 (1982); Master of Herman, 254 Kan. 908, 869 P.2d 721
(1994)).

23. In re Marriage of Davenport, ___ Cal.Rptr.3d ___, 194 Cal. App. 4th
1507, 1537 (2011) (emphasis added) (citing McGuire, Reflections of a
F.R.D. 283; Yablon, Stupid Lawyer Tricks: An Essay on Discovery Abuse
(1996) 96 Colum. L. Rev. 1618, 1619 (describing the litigation climate
as one ‘where over-aggressiveness is equated with zealous advocacy, and
attorneys are expected to win at all costs’); Garth, From Civil Litigation
to Private Justice: Legal Practice at War With the Profession and Its Values
(1993) 59 Brook. L. Rev. 931)).


(Ohio Comm. 1999) (“a high calling”); Disciplinary Counsel v. Bein, 822
N.E.2d 358, 105 Ohio St. 3d 62 (Ohio 2004) (same).

26. In re Unification of the New Hampshire Bar, 109 N.H. 260, 264,
248 A.2d 709, 711 (1968).


28. Lincoln Rochester Trust Co. v. Freeman, 34 N.Y.2d 1, 355 N.Y.S.2d

quotations omitted).

org/kansas-courts/supreme-court/orders/2012/2012SC82.pdf); U.S.
District Court, District of Kansas (http://ksd.uscourts.gov/wp-content/
uploads/2018/01/2-15-13-Pillars-of-Professionalism.pdf); Kansas Bar
Association (https://www.ksbar.org/general/custom.asp?page=pillars); John-
son County Bar Association (https://www.jocobar.org/page/1); Wichita
Bar Association (https://www.wichitabar.org/page/Pillars). For a list of the
federal, state and local bar associations which have adopted the Creed of
Professionalism, see https://www.americanbar.org/groups/professional_re-
sponsibility/resources/professionalism/professionalism_codes/.

ksbar.org/general/custom.asp?page=pillars.


Observations from the Field,” 69 J. Kan. B. Ass’n 24 (Feb, 2000).


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the case for civility

38. Rule 3.1, KRPC.
39. Rule 3.2, KRPC (“A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.”).
42. KRPC, Preamble, ¶ [5].
45. Id. at 622.
46. Id. at 632.
48. Id. at 23.
52. William Shakespeare, The Taming of the Shrew, Act 1, Scene 2, 276-277.
53. Rule 3.2, KRPC, Official Comment [1].
54. This is consistent with the “Golden Rule” required in most courts as a prerequisite to filing motions to compel discovery. See e.g., K.S.A. § 60-237(a) and Federal Rule of Civil Procedure 37(a)(1).
55. Rule 1.2(a), KRPC.
57. Rule 1.4(b), KRPC.
58. Rule 3.3(a), KRPC.
60. Rule 1.7(a)(2), KRPC.
62. Rule 3.5(d), KRPC.
63. Id. Note 20, 291 Kan. 300.
64. 291 Kan. at 303.
65. Id.
66. Id. at 303-04.
67. Id.
68. Id.
69. Id. at 308.
70. Rule 4.4(a), KRPC.
73. Rule 8.4(d), KRPC.
76. In re Downing, 930 So. 2d 897, 904 (La. 2006).
78. Rule 8.4(g), KRPC.
83. In re Robinson, 46 So. 3d 662 (La. 2010).
94. In re Pinotti, 585 N.W.2d 55, 63 (Minn. 1998).
97. Id.
103. http://home.innsofcourt.org/AIC/About_Us/Member_Experience/AIC/AIC_About_Us/Member_Experience_Pages/Member_Experience_October_2017_Update.aspx?hkey=585c4db8-a8f3-4102-9c4d-7f68843e5c5f.

106. See e.g. K.S.A. §§ 60-211 and 60-237.
107. Kansas Supreme Court Rule 206(a).
109. Id. at 485 (Benham, C.J., concurring).

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Law students are unique in that they attend law school from varying walks of life, with dissimilar backgrounds and life experiences. It is a privilege to meet and learn from our fellow classmates and peers. Our peers challenge us, question us, and ultimately make us better lawyers. Kasie VanDonge, Class of 2020, brings hard work and excellent time-management to every facet of her life. Kasie is a valuable student to Washburn Law as well as a co-owner of The White Linen, a fine dining restaurant. I sat down with Kasie during a break from studying to learn how she deals with the challenges of law school and life.

EE: Let’s start off with what you and your husband did before you came to law school last year?

KV: My husband Adam and I owned a sandwich shop in Holton where he was the chef. One weekend a month, we also did “Drum Room dinners” which are seven course meals. Adam would prepare and I would serve. I also worked full time for the Jackson County Clerk’s Office where I did a variety of things such as resolutions, contracts, elections, budgeting, taxes, HR and PR. I had the opportunity to learn a lot and I really loved that job. But I knew I wanted to go to law school.

EE: When you started law school did you know that you and your husband were going to open a new restaurant at the same time?
KV: Actually, we received a phone call from someone who had heard about our monthly dinners and suggested that we invest in a restaurant in downtown Topeka. The day we met with the owner of the building about the restaurant was the same day I got the call from Washburn congratulating me on being accepted. It was quite a day.

EE: So you both experienced a career change and your dream careers came true.

KV: Yes, it was surreal.

EE: Why did you choose Washburn Law School—because it was so close or . . . ?

KV: No! I loved Washburn. I knew the law school was a close-knit community that would be a good environment for learning. I saw the renovations being made on campus. I was so proud of Washburn and I just hoped they would let me in.

EE: Going back to the restaurant -- give me a bit of background about downtown Topeka and how this project evolved.

KV: We looked at several buildings and choose the Columbian Building, the most historic one. We invested time and money into the room that used to be an old bank to bring Adam's dream to life. We knew we wanted to do fine-dining because Adam is a connoisseur of exotic food and drink. We wanted to raise the “bar” for good food. We saw a desire for a movement to revitalize downtown and we wanted to be at the forefront to show people that you can invest in downtown and people will come.

EE: Tell me a little about how you handled being a first-year law student at the same time you were helping your husband in his new business. How did you support each other in probably the hardest years in your careers?

KV: Oh yes, the first year of a restaurant is the hardest. Me being the planner that I am, I did a lot of the things like the liquor license, the food licenses, the specs, things like that before starting school. We opened the night before my property final. It's hard to explain—how proud you feel but also how anxious and terrified you are that it will fall apart. We really leaned on each other. Adam is the chef and I was in the front of the house every Friday and Saturday. I don't go there every weekend anymore but last year I was there to be a face for the restaurant.

EE: So it sounds like things have evolved from last year.

KV: Yes, this year is different. I'm on law journal, I'm a study group leader and serve on four different boards. So I'm not around the restaurant as much, but I still do the website and other things behind the scenes. Recently I helped with Adam's Mental Health fundraiser. I'm proud of the staff because they served 70 people a night, and we were able to donate $9,000 to Valeo.

EE: That's a perfect segue to the next question. Washburn's Dean Pratt emphasizes work-life balance. Given your responsibilities like you've described with school, the restaurant, children, how do you balance everything?

KV: I'm a big believer in the daily planner, because if you don't know what's ahead, you don't know how to prioritize. So, when I get to spend quality time with my kids I don't stress so much because I know I have time allotted to do what I need to do. It is a juggling act. But growing up the way I did, I am used to juggling things.

EE: Let's talk about your expectations going into law school, versus the reality. Now it's 2L year, now we understand what goes on and we have a bit better perspective.

KV: Well, before I started law school, I had no idea what to expect. So, I read a book called “1L of a Ride.” I enjoyed it because it answered some questions about law school. I thought of law school as walking up to a mountain—I thought that I had to climb the mountain barehanded.

For the first several weeks of 1L year, it still felt like a mountain. It's all foreign to you and you're rewiring your brain. The first part of the year is always the hardest. Then 2L year is where they work you the hardest. That's certainly true for people like you and me who take on extra activities and responsibilities. Because you want to get the most out of your law school experience. With Journal and five classes it is still a mountain, but it feels and looks more like a hill because you know what to expect.

EE: Right—we know what to expect but we just have more to do. It's not so foreign, it's just piled on. To what do you attribute your success in law school so far?

KV: Honestly, I think it's just from growing up on the farm and having to do things I didn't want to do. I had to learn all about the ins and outs of a truck before I could drive. I learned how to change the oil, a tire, a headlight. Things I didn't want to do but now I'm glad I know how to do. I can't say enough about my parents for making me work because I do see people struggling trying to get themselves acclimated and motivated in school, which is a harsh environment.

EE: That's right; in law school everyone is smart. It's the intelligent person with motivation who gets things done. Tell us some advice and pitfalls to avoid.

KV: Get some sleep. I can't stress that enough. And get some exercise. If you keep with working out, that makes it possible to focus and really be there mentally in class.

EE: Right. And just eating pizza is probably not the best. I
think pitfalls are simply not taking care of nutrition and exercise. If you’re not feeding your brain and your body the way that you should be, then you’re just adding to your stress.

Turning to another topic, what is your most rewarding activity in Law School so far—volunteer activities, Law Journal, maybe the 40-page note?

**KV:** So far, the volunteer work that’s been rewarding is the tax preparation assistance for lower income people in Topeka. It’s a way to help people and learn to interact with them. The people we help really appreciate it. Plus, it helps with learning critical skills you need as an attorney.

**EE:** So, moving on, what issues do you see as relevant right now to us as young lawyers?

**KV:** I think it’s easy for people to be susceptible to social media bias. The internet concerns me—the inconsistencies on any side of any political debate. That is going to be a big challenge for us—to know what’s true and what’s not. Like looking up a brownie recipe. Can you trust it? Seriously, as lawyers, we are held to the highest standard.

**EE:** Let’s end on a positive note. Is there someone in the legal profession who has influenced you as you went into law school or keeps you going? A perfect lawyer you want to emulate.

**KV:** Ruth Bader Ginsburg. She not only believes in protecting constitutional rights, but also in moving society forward toward social justice. I think she recognizes the serious issues and wants to do the right thing. She started law school when it was not common for a woman to pursue law. She obviously reached the pinnacle of the profession. She is one of my biggest heroes.

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**About the Authors**

**Elyssa Ellis** is a 2020 J.D. Candidate at Washburn University School of Law. She is a Washburn Law Journal Staff Writer, a Research and Teaching Assistant, as well as a Study Group Leader. When she isn't researching or writing, Elyssa spends quality time with family and friends.

**Kasie VanDonge** is a 2020 J.D. Candidate at Washburn University School of Law. She is President of Women’s Legal Forum and involved in Pro Bono Society, Tax and Estate Planning (Volunteer Income Tax Assistance Program), Business Law Society and is a Washburn Law Journal Staff Writer. She is also co-owner of The White Linen with her husband, Chef Adam VanDonge. She loves her husband and children, her dogs, and a good Malbec.

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Visit [https://klsprobono.org/](https://klsprobono.org/) for more information on pro bono services available in Kansas.
New Position

Mike Leyba has accepted a position as a staff attorney with Ryley, Carlock and Applewhite in Lakewood, CO assisting with discovery and document review in a multi-claimant securities and investor fraud action before FINRA in Puerto Rico.

New Location

The Cottonwood Law Group, LC, has opened in Abilene, with its office in the former Astra building. Joe Aker, formerly of Abilene, returned to the community to undertake this endeavor.

Notables

Justin Barrett, a Colby lawyer, has been named by the Kansas Supreme Court to serve on a task force to improve the pre-trial detention process. Barrett is one of three attorneys designated to represent defense attorneys on the panel. The committee is charged with making recommendations to the Supreme Court on the fairest and most efficient way to modernize the pretrial process that will be best for defendants and adequate for the system.

Clark, Mize & Linville, Chartered has been named a Tier 1 law firm (the highest ranking possible) for the Salina/Wichita metropolitan regions in the 2019 Edition of the U.S. News—Best Lawyers’ “Best Law Firms.”

Christopher M. Joseph (Topeka/Lawrence), Ross A Hollander (Wichita), M. Kristine Lawless (Topeka), Dionne M. Scherff (Overland Park/Kansas City) and Roger L. Falk (Wichita) were honored by Missouri & Kansas Super Lawyers 2018. All five are with Joseph, Hollander & Craft LLC. Additionally, Casey Y. Meek and Carrie E. Parker, both of the JH&G Lawrence office, were selected by Super Lawyers as Rising Stars. Fewer than five percent of all attorneys in Missouri and Kansas are selected as Super Lawyers in their respective states.

Joslyn M. Kusiak of Kelly & Kusiak Law Office LLC has been appointed by the Kansas Supreme Court to serve on the Kansas Continuing Legal Education Commission. This panel oversees continuing legal education requirements for lawyers licensed to practice in Kansas. Kusiak is active in a number of professional organizations, including serving on the Kansas Bar Foundation Board of Trustees and as the Young Lawyer Delegate to the American Bar Association for the Kansas Bar Association Board of Governors.

Court of Appeals Judge Patrick McAnany is to retire in January 2019 after 24 years on the bench. He was appointed a district court judge in the 10th Judicial District in 1995, then named to the Court of Appeals in 2004. He spent three decades as a trial lawyer before ascending to the bench. McAnany received his law degree and a master’s of law degree from the University of Missouri at Kansas City. In addition to many other awards and accolades, McAnany was awarded the Phil Lewis Medal of Distinction from the Kansas Bar Association.

John D. Milliken was one of the most prominent attorneys in the state during the late 1800s. He began his prac-
practice in McPherson in 1880 as one of only nine lawyers in the entire state at the time. A railroad developer in Kansas and Colorado, Milliken has the distinction of having a town near Greeley, CO, named after him. His former home in McPherson was featured in an Historic Home Tour in McPherson in November. Milliken was a member of the Kansas Bar Association!

Dan Monnat, President of the Monnat & Spurrier, Chartered law firm was honored by the 2018 Missouri & Kansas Super Lawyers, along with two other members of the firm. Monnat earned a ranking on Super Lawyers’ elite “Top 100” lawyers in Kansas and Missouri—the 13th time he has received this distinction since 2005. Firm Shareholder Sal Integliata was honored by Super Lawyers for the fifth consecutive year, while Associate Matt Gorney earned first-time recognition as one of Super Lawyers’ “Rising Stars”.

Mike Pepoon, a former assistant Sedgwick County counselor and lobbyist has been rehired by the Sedgwick County Commission to run its legal department. Pepoon takes the reins in at an unsettled time in which the county is being investigated and is conducting investigations surrounding personnel practices. Pepoon worked for the county for more than 30 years and has served as interim county counselor before.


Obituary

Rudolph F. "Rudy" Kuchan (3/5/1925 - 10/24/2018)

Rudolph F. "Rudy" Kuchan Rudolph F. "Rudy" Kuchan, 93, of Mission Hills, Kansas was born March 5, 1925 in Centerville, Iowa and passed away at home on October 24, 2018. As a kid, he enjoyed tinkering and working on electronics, ever curious of the mechanics behind the machine. After high school, Rudy joined the US Army during the end of World War II, serving overseas with the 236th Salvage Collecting Company, earning the Rank of Lieutenant. After an honorable discharge, Rudy married Mildred Elfstrom of Centerville, Iowa and to this union two children were born. He attended Drake University and graduated in 1950 with his Bachelor’s Degree in Commercial Science and then obtained his law degree specializing in Commercial Law in 1954. In 1995, he retired from Berman, DeLeve, Kuchan and Chapman Law Firm. During his life, he achieved his pilot’s license and truly enjoyed flying and traveling to the family’s lake home at the Lake of the Ozarks. In time, his tinkering turned him into quite the handyman and a ‘jack of all trades’, which entailed putting a roof on and replacing plumbing in their home. He is survived by his wife of 71 years, Mildred; daughter, Karen; son, Gary and two sisters, Joan and Eleanor. A memorial Mass was held Friday, November 9th at St. Ann Catholic Church, 7231 Mission Road, Prairie Village, Kansas. Inurnment was to take place at a later date in Oakland Cemetery in Centerville, Iowa. The family would like to express their sincerest thanks for all the wonderful help and care given during his time of illness. Memorial contributions may be made in memory of Rudy to the donor’s choice. Online condolences may be left at www.mcgilleyhoge.com
ATTORNEY DISCIPLINE

ORDER OF TEMPORARY SUSPENSION
IN RE DAVID P. CRANDALL
NO. 117,910—NOVEMBER 30, 2018

FACTS: A hearing panel of the Kansas Board of Discipline of Attorneys found that Crandall violated KRPC 1.1 (competence), 1.3 (diligence), 1.4(b) (communication), 1.5(a) (fees), 1.7(a) (concurrent conflict of interest), and 8.4(d) (conduct prejudicial to the administration of justice). An inquiry into Crandall’s conduct began when a client wrote the disciplinary administrator questioning the reasonableness of Crandall’s fees. Around the same time, a district court judge reported Crandall after most of the fees that he requested in a probate matter were rejected. An inquiry into Crandall’s fees showed that he was either inexperienced or was doing work in an attempt to justify fees which were substantially higher than those charged by other attorneys in the area.

FACTUAL FINDINGS: Crandall challenged many of the findings made by the hearing panel. The Kansas rules of attorney discipline give the court disciplinary jurisdiction over Kansas-licensed attorneys even if the behavior occurs outside of Kansas. Crandall’s failure to follow Supreme Court Rule 6.02 and the Rules of Evidence, which apply in attorney discipline proceedings, means his constitutional and evidentiary issues were not preserved for appeal. There was clear and convincing evidence that Crandall’s fees were excessive given the amount of time and labor expended. In representing another client, Crandall’s personal interest in having his fee paid conflicted with his duty to advise his client. And he charged an unreasonable fee when the value of the estate decreased significantly while the probate case was pending.

HEARING PANEL: The hearing panel noted Crandall’s multiple rule violations, which it attributed to a selfish motive. The panel also noted Crandall’s “angry and condescending” tone that was used through disciplinary proceedings. A majority of the hearing panel recommended a 6-month suspension. A minority would recommend a 1-year suspension.

HELD: A majority of the court agreed with the hearing panel and imposed discipline of a 6-month suspension. A minority of the court would have imposed a lesser sanction.

ORDER OF INDEFINITE SUSPENSION
IN RE BRANDON W. DEINES
NO. 119,111—NOVEMBER 30, 2018

FACTS: The disciplinary administrator filed a formal complaint against Deines in 2017. He did not file an answer and was temporarily suspended in September 2017. A hearing panel determined that Denies violated KRPC 1.1 (competence), 1.3 (diligence), 1.4(a) (communication), 1.15(b) (safekeeping property), 1.16(d) (termination of representation), 3.2 (expediting litigation), 8.4(d) (engaging in conduct prejudicial to the administration of justice), 8.1 (b) (failure to respond to a disciplinary authority), and Rules 207(b) (failure to cooperate in a disciplinary investigation) and 211(b) (failure to file an answer in a disciplinary proceeding). A complaint was filed after multiple instances where Deines failed to act on behalf of his clients, resulting in dismissed cases and harm to his clients.

HEARING PANEL: The temporary suspension was sought because Denies’ inaction caused significant harm to his clients. In addition, Deines’ failure to participate in the disciplinary process made it difficult to investigate. The panel acknowledged that Deines’ behavior was a result of his depression. The disciplinary administrator asked for an indefinite suspension. Because Deines’ behavior was caused by his depression, the hearing panel recommended a 2-year suspension.

HELD: Deines failed to respond to the hearing panel’s report and failed to attend the formal hearing on the complaint. The court considered this absence an additional aggravating factor. For that reason, the court imposed an indefinite suspension rather than the 2-year suspension recommended by the hearing panel.

6-MONTH SUSPENSION
IN THE MATTER OF LARA M. OWENS
NO. 118,693—DECEMBER 14, 2018
FACTS: A hearing panel of the Kansas Board for Discipline of Attorneys found that Owens violated KRPC 1.1 (competence), 1.3 (diligence), 1.4(a) (communication), 1.15(b) (safekeeping property), 1.16(d) (termination of representation), 8.1(b) (failure to respond to a demand from a disciplinary authority), 8.4(d) (engaging in conduct prejudicial to the administration of justice), and Rule 207(b) (failure to cooperate in a disciplinary investigation). The complaint arose after clients alleged that Owens failed to inform them of the relevant statute of limitations, failed to timely file lawsuits, and failed to communicate about case status. Owens failed to respond to an initial letter from the investigator and also ignored the follow-up e-mail.

HEARING PANEL: Owens and the disciplinary administrator stipulated to some facts, including Owens’ failure to provide her clients with timely updates on the status of their actions and her failure to cooperate in the disciplinary process. Owens was on diversion when some of the alleged misconduct occurred. She was also being treated for anxiety issues. The disciplinary administrator initially agreed to a two-year probation term with an underlying two-year suspension. But Owens failed to perform all of the required steps to put a plan in place, and both the disciplinary administrator and the hearing panel instead recommended a six-month suspension of Owens’ license.

HELD: Clear and convincing evidence supports the hearing panel’s findings regarding Owens’ rule violations. Owens failed to comply with Rule 211(g), which establishes the tasks an attorney must undertake in order to be placed on probation. For that reason, probation is not an appropriate sanction. Based on the nature and duration of Owens’ misconduct, a majority of the court imposed a six-month suspension of Owens’ license. A minority of the court would have imposed a shorter suspension. Owens must undergo a Rule 219 hearing before her license can be reinstated.

ORDER OF INDEFINITE SUSPENSION IN THE MATTER OF ROSIE M. QUINN
NO. 119,148—NOVEMBER 21, 2018

FACTS: Quinn was found to be in violation of KRPC 8.4(b) (committing a criminal act that reflects adversely on the lawyer’s honesty or fitness). She was convicted of multiple federal felonies after failing to pay income taxes. Quinn’s law license was temporarily suspended after she self-reported the convictions. While that disciplinary proceeding was pending, Quinn asked to have her status changed to disability inactive status. That request was granted, with the understanding that Quinn was required to obtain an independent mental health evaluation. Quinn failed to obtain that evaluation and as a result, her license was transferred back to a temporary suspension.

HEARING PANEL: The hearing panel noted Quinn’s history of discipline and the nature of her convictions. The panel also cited Quinn’s mental health issues and reputation in her community as mitigating factors. The disciplinary administrator’s office recommended that Quinn be indefinitely suspended with the suspension made retroactive to three years prior to the date of the final hearing report. The hearing panel noted that Quinn presented compelling evidence of rehabilitation and relied heavily on the mitigating evidence in recommending that Quinn’s license be suspended for three years, with that suspension made retroactive to October 5, 2011. The hearing panel believed that Quinn should be eligible for reinstatement without further proceedings.

HELD: The court adopted the hearing panel’s findings and conclusions. The only question for the court to consider is whether Quinn should be required to undergo a reinstatement hearing before being allowed to return to practice. A majority of the court held that Quinn should be indefinitely suspended with an effective date of October 2011. Before being reinstated, Quinn must complete various tasks including a bar exam review course and continuing legal education hours. A minority of the court would have disbarred Quinn.

ADMINISTRATIVE LAW—TENURE
HARSAY V. UNIVERSITY OF KANSAS
DOUGLAS DISTRICT COURT—AFFIRMED
COURT OF APPEALS—REVERSED
NO. 114,292—NOVEMBER 21, 2018

FACTS: The University of Kansas hired Harsay to a tenure-track position in 2004. She began the tenure review process in 2009. Peer reviewers were hesitant to give unqualified recommendations for tenure; there were concerns about insufficient scholarship activities leading to an inability to secure funding. Nevertheless, the department-level committee recommended that Harsay receive tenure. The College Committee disagreed and voted to reject Harsay’s application. That decision was ratified by the University Committee. Harsay appealed to the university but the chancellor upheld the decision to deny tenure. Harsay filed a timely petition for judicial review, but it was dismissed for failure to prosecute. Using the savings statute, Harsay refiled the action. The district court denied on the merits Harsay’s challenge to the university’s decision. The court of appeals reversed, noting inaccuracies in the College Committee’s report and expressing concerns about the adequacy of the university’s factual findings. The university’s petition for review was granted.

ISSUES: (1) Savings statute; (2) substantial evidence

HELD: Provisions of the Code of Civil Procedure can apply to actions taken under the KJRA. And the plain language of K.S.A. 60-518 allows it to apply to any action. Although
the reports of various tenure committees were short on details and contained errors, there is adequate support in the record as a whole for the ultimate decision to deny tenure to Harsay.

CONCURRENCE: (Goering, D.J. assigned) There is substantial evidence in the record as a whole to support the university’s decision on Harsay’s tenure application. But the panel erred by finding that K.S.A. 60-518 can apply to cases brought under the KJRA.

STATUTES: K.S.A. 2017 Supp. 77-613, -621(c)(4), -621(c)(7), -621(c)(8), -621(d); K.S.A. 60-518

CRIMINAL

CONSTITUTIONAL LAW—CRIMINAL LAW—FOURTH AMENDMENT—STATUTES
STATE V. EVANS
DICKINSON DISTRICT COURT—AFFIRMED AND REMANDED
NO. 119,458—NOVEMBER 21, 2018
FACTS: An officer conducted a warrantless search of Evans’ purse and wallet after an ambulance took Evans from auto accident scene. Evans was arrested and charged with drug offenses after officer found methamphetamine and drug paraphernalia in zippered pocket of the wallet. Evans filed motion to suppress, alleging the search violated the Fourth Amendment. State argued the warrantless search was valid under the plain-view exception and the officer’s administrative caretaking function of locating Evan’s driver’s license to complete an accident report. District court disagreed and granted the motion to suppress. State filed interlocutory appeal.

ISSUES: (1) Warrantless search—community caretaking function, (2) warrantless search—duty to complete accident report

HELD: District court’s judgment was affirmed. The caretaking role of law enforcement does not itself constitute an exception to the warrant requirement. Both Cady v. Dombrowski, 413 U.S. 433 (1973), and South Dakota v. Opperman, 428 U.S. 364 (1976), support caretaking/ inventory searches conducted under standard police procedures. Here, no evidence established the standard procedures of the police or county sheriff’s office. Accordingly, Dombrowski, Opperman and related cases do not support State’s contention that the search of Evan’s purse and wallet fits a well-delineated exception to the warrant requirement.

State v. Canaan, 265 Kan. 835 (1998), which relied on plain view and inventory search exceptions to the warrant requirement, did not create a new exception allowing a search simply because officers have a duty to complete the accident report. State failed to meet burden of establishing the inventory exception, and under facts in this case the drug evidence was not in plain view. Nor did the circumstances present an exigency or an emergency that required immediate verification of Evans’ identity or give rise to the emergency doctrine exception. Kansas statutes allow drivers a reasonable time to produce their own driver’s license, and legislature did not impose a duty on officers that would justify invading privacy guaranteed by Fourth Amendment.

STATUTES: K.S.A. 2017 Supp. 8-1604, -1611, -1611(a), -1611(a)(2), -1612, -1612(a), -1612(b), 22-3603; K.S.A. 8-244, 20-3018(c)

CRIMINAL LAW—CRIMINAL PROCEDURE—EVIDENCE—JURY INSTRUCTIONS—PROSECUTORS—STATUTES
STATE V. HAYGOOD
WYANDOTTE DISTRICT COURT—AFFIRMED NO. 115,591—NOVEMBER 21, 2018
FACTS: A jury convicted Haygood of premeditated first-degree murder and criminal possession of a firearm. On appeal he claimed error in the admission of his long-term girlfriend’s testimony about prior domestic violence, and the denial of his request for jury instructions on the affirmative defense of self-defense and the lesser-included offense of involuntary manslaughter. Haygood also claimed the prosecutor, in closing argument, misstated the facts or law, argued facts not in evidence, commented on witness credibility, and attempted to shift the burden of guilty to the defendant.

ISSUES: (1) Admission of K.S.A. 60-455 evidence, (2) prosecutorial error in closing argument, (3) instructions on self-defense and involuntary manslaughter

HELD: Three-part test in State v. Gunby, 282 Kan. 39 (2006), is stated and applied, finding the trial court did not err in admitting the prior domestic violence evidence to show motive.

Prosecutor’s comments and arguments contained facts that were either placed in evidence or that were reasonably inferred from trial evidence. Although some statements were inarticularly phrased, prosecutor did not misstate the law. No burden-shifting was implied from State’s closing argument, and no merit to claim that prosecutor impermissibly accused Haygood of lying.

In light of K.S.A. 2017 Supp. 21-5108(c), as amended in 2010, Haygood was entitled to an instruction on self-defense affirmative defense because his testimony was competent evidence that could allow a reasonable juror to conclude he was entitled to defend with deadly force. District court erred by denying Haygood’s request for an instruction on self-defense, but the error was harmless in this case. Likewise, even if an involuntary manslaughter lesser included offense instruction is assumed to be factually appropriate, the failure to give a lesser included offense instruction was harmless error.

CONCURRENCE (Rosen, J.) joined by Nuss, C.J. and
Stegall, J.): Concurs with the result but departs from majority's reasoning regarding the self-defense instruction. Disagrees that a defendant's solitary declaration that he or she committed a crime in self-defense will always satisfy the competent evidence standard described in K.S.A. 2017 Supp. 21-5108(c). Also disagrees with majority's suggestion that the 2010 statutory provision meaningfully impacts this analysis. Under facts in this case, no rational fact-finder could reasonably conclude that Haygood acted in self-defense. Would find no error in trial court's denial of a self-defense instruction.

STATUTES: K.S.A. 2017 SUPP. 21-5108(C), -5222, -5405(A)(4); K.S.A. 21-5108

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—SENTENCES—STATUTES

STATE V. HAYES

JOHNSON DISTRICT COURT—AFFIRMED

NO. 117,341—NOVEMBER 30, 2018


ISSUE: Retroactive application of 2013 amendments to K.S.A. 21-6620

HELD: Because the 2013 amendments to the sentencing provisions of K.S.A. 21-6620 are procedural in nature and do not change the legal consequences of acts completed before its effective date, the retroactive application of those sentencing procedures do not violate the Ex Post Facto Clause of the United States Constitution. Hayes' invitation to reverse rulings in State v. Bernhardt, 304 Kan. 460 (2016), State v. Robinson, 306 Kan. 431 (2017), and State v. Lloyd, 308 Kan. 735 (2018), is declined.


CONSTITUTIONAL LAW—CRIMINAL LAW—CRIMINAL PROCEDURE—EVIDENCE—FOURTH AMENDMENT—SEARCH AND SEIZURE—STATUTES

STATE V. HUBBARD

DOUGLAS DISTRICT COURT—AFFIRMED; COURT OF APPEALS—AFFIRMED

NO. 113,888—DECEMBER 7, 2018

FACTS: Hubbard answered officer's knock on apartment door. Based on smell of marijuana, officers ordered everyone to leave the apartment, and then conducted security sweep to ensure no one remained inside. Search warrant obtained and executed, finding drug evidence. Hubbard convicted of possession of marijuana and drug paraphernalia. He appealed claiming drug evidence should have been suppressed because: (1) the initial warrantless entry into his apartment for a security sweep was illegally premised on officer's report of smelling raw marijuana while standing at the front door; and (2) officer's suppression-hearing testimony about smelling raw marijuana odor was inadmissible expert testimony. Court of appeals affirmed in unpublished opinion, finding smell of marijuana provided probable cause to believe that crime had been committed, that apartment held evidence of that crime, and that sweep of the apartment was justified by need to preserve evidence. Review granted.

ISSUES: (1) Motion to suppress, (2) opinion testimony

HELD: On facts found by district court, the smell of marijuana provided probable cause, and threat of evidence destruction was an exigent circumstance. To the extent drug evidence and the search warrant were fruits of a warrantless search, the sweep was not illegal and the challenged evidence is not subject to exclusion. United States Supreme Court cases addressing relationship between odors and probable cause are reviewed.

District court did not err by admitting officer's testimony about smelling raw marijuana as lay opinion. State v. Sasser, 305 Kan 1231 (2017), is reviewed, similarly finding in this case that officers' opinions that they smelled raw marijuana, based on their perception and specialized training, qualified as lay opinion admissible under K.S.A. 2017 Supp. 60-456(a).

DISSENT (Beier, J., joined by Rosen and Johnson, JJ.): Dissents from majority's result and rationale. Would hold the district judge applied the wrong legal standard in admitting and considering the officers' suppression-hearing testimony, treating their expert opinions on the source of the odor they perceived as facts. Subsection (b) of K.S.A. 2017 Supp. 60-456, is controlling, rather than subsection (a). Would also hold district judge's conclusion, that sweep was justified by existence of probable cause and exigent circumstances, erroneously relied in part upon absence of State evidence. Would reverse the convictions, vacate the sentence, and remand to district court for new evaluation of the motion to suppress.

STATUTES: K.S.A. 2017 SUPP. 60-456, -456(A), -456(B); K.S.A. 2015 SUPP. 60-456; K.S.A. 20-3018(B), 22-3216(2), 60-419, -2101(B)

CRIMINAL LAW—EVIDENCE—JURY INSTRUCTIONS—MOTIONS—STATUTES

STATE V. INGHAM

RENO DISTRICT COURT—AFFIRMED; COURT OF APPEALS—AFFIRMED

NO. 111,444—NOVEMBER 30, 2018

FACTS: Ingham convicted of possession or use of a com-
mmercial explosive. On appeal he claimed: (1) district court erred by denying motion in limine to prevent state from using “pipe bomb” and “improvised explosive device” to describe the beer-can bomb; (2) a sheriff deputy improperly testified his opinion that Ingham combined lawfully obtained items to make an illegal improvised explosive device; (3) a jury instruction wrongfully reworded the statutory definition of “commercial explosive” by equating it to an “improvised explosive device”; (4) trial court should have sua sponte instructed jury on the definition of a consumer firework; and (5) cumulative error denied him a fair trial.

ISSUES: (1) Motion in limine, (2) “commercial explosive” testimony, (3) instruction on elements of criminal use of explosives, (4) consumer firework definition instruction, (5) cumulative error

HELD: Ingham failed to show that the use of words at issue was improper or that it unfairly prejudiced his defense. No abuse of district court's discretion in allowing prosecution to use words and phrases that correctly and accurately described Ingham’s explosive device.

Assuming without deciding that deputy's statement was close enough to testimony that Ingham was guilty of the charged crimes, and assuming this error was of constitutional dimension, the error was harmless under facts in this case.

The challenged instruction moved beyond informing jury what the state was required to prove and informed jury that state had proved an improvised explosive device was a commercial explosive. This was error, but under facts in case, the error was harmless.

No error found in district court's omission of an unrequested instruction that defined a consumer firework. Nothing in the record would have led jury to believe that Ingham's beer-can explosive was a consumer firework, either in terms of construction or intended usage.

The errors and assumed errors did not affect the two possible jury choices in this case, and even taken in their cumulative effect, did not prejudicially affect the jury's verdict.

CONCURRENCE (Nuss, C.J.): Affirms Ingham's conviction, but departs from majority's rationale regarding the motion in limine. Would hold the district court abused its discretion by allowing repeated references to the “I.E.D.” that Ingham had constructed. Under facts in case, however, cumulative effect of errors is still harmless.

CONCURRENCE (Biles, J., joined by Stegall, J.): Agrees the conviction must be affirmed but would hold: district court did not abuse its discretion in denying the motion in limine; no error in the elements instruction on criminal use of explosives; and the one assumed error of opinion testimony regarding the beer can bomb provides no basis for cumulative error.

CONCURRENCE (Stegall, J.): Agrees with court's judgment, but registers doubts about statute under which Ingham was convicted. Would welcome briefing on whether K.S.A. 2017 Supp. 21-5814(a)(1) is too vague, indefinite, or overbroad to survive constitutional scrutiny.

DISSENT (Johnson, J., joined by Luckert and Beier, JJ.): Would reverse and remand for a fair trial. Takes exception to majority's cavalier disregard of the inflammatory connotation associated with the term I.E.D. Would find district court abused its discretion in denying motion in limine, and the error was compounded by deputy's opinion testimony which improperly stated a legal conclusion on unlawfulness. Scales of justice were further tipped by instruction which erroneously equated “improvised explosive device” with “commercial explosive.” Criticizes majority for engaging in impermissible judicial factfinding or mere supposition in determining a consumer firework definition instruction was not factually appropriate in this case. Agrees the omission of that instruction was not clearly erroneous, but submits the factual record did not preclude it.


CRIMINAL PROCEDURE—RESTITUTION—SENTENCES
STATE V. MARTIN
LEAVENWORTH DISTRICT COURT—JUDGMENT
VACATED AND CASE REMANDED;
COURT OF APPEALS—REVERSED
NO. 115,651—NOVEMBER 16, 2018

FACTS: Martin was charged with offenses related to false charges and threatening behavior against a woman and child Martin lived with while the woman's military husband was deployed. Martin pled nolo contendere to two counts of interfering with law enforcement by falsely reporting a crime, and State dismissed all remaining counts. Sentence imposed included $10,800 restitution order. Martin appealed, claiming in part the district court erred in not granting her request for a separate hearing to challenge the restitution to resolve discrepancies in woman's and husband's victim impact statements, and to determine if claimed expenses ($30-40,000) were directly related to Martin's crime of conviction. Court of Appeals affirmed, finding Martin was present at two sentencing hearings which included $10,800 restitution order. Martin's petition for review granted.

ISSUE: Restitution

HELD: A convicted criminal defendant has a statutory right to have a hearing on the question of restitution, if desired. Under facts in this case, district court should have given Martin a separate hearing on the restitution issue. District court specifically denied Martin an opportunity at the sentencing hearings to be heard on the restitution causation issue. Dis-
The appellate court also failed to limit the claims to damages caused by Martin's crimes, and instead summarily held the appropriate amount of restitution as set forth by victims exceeded Martin's ability to pay. Reversed and remanded for district court to conduct a restitution hearing consistent with holding in *State v. Meeks*, 307 Kan. 813 (2018).

**STATUTE:** K.S.A. 2017 Supp. 21-6607(c)(2), 22-3424(d)(1) - 3424(e)(3)

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**FACTS:** Officer in unmarked car activated his red and blue emergency lights and “wig wag” lights in attempt to stop vehicle driving without lights after dark, and observed driver’s furtive movements toward console as vehicle continued without stopping. Vehicle eventually pulled into grocery store parking lot where driver (Parker) exited and locked the vehicle. Officer arrested Parker who refused consent to search of the vehicle. Parker then waited in police car approximately an hour for K9 unit to arrive and alert on the vehicle. Drug charges filed based on evidence found in subsequent search of vehicle’s console. Parker filed motion to suppress, challenging the duration of the stop and alleging incrimination statements were made in violation of *Miranda*. District court denied the motion. Jury convicted Parker as charged. On appeal, Court of appeals remanded on Parker's *Batson* jury selection claim, but affirmed on claims challenging: (1) district court's refusal to suppress evidence; (2) sufficiency of the evidence supporting the fleeing or eluding offense because the police vehicle was not properly marked; and (3) the use of Parker’s prior crimes to enhance the sentence. Review granted on these three claims.

**ISSUES:** (1) Continued seizure of Parker and the vehicle, (2) sufficiency of the evidence on fleeing, (3) sentencing

**HELD:** The seizure of Parker was lawful—the initial seizure of his person did not violate Fourth Amendment, and his extended holding in the police car did not make his seizure unlawful. Applying test for property seizure, on record in this case, the vehicle was not seized between the time Parker exited and locked it and the time of the K9 alert, and Parker was not deprived of a possessory interest in the vehicle after his arrest while it sat locked in a public parking lot.

Statutory challenge to K.S.A. 2018 Supp. 8-1568 is rejected. Officer was driving an unmarked car outfitted with standard police equipment and lights which were activated to stop Parker who did not stop for a considerable period. Sufficient evidence was presented to support the fleeing conviction.

Sentencing claim defeated with no departure from decisions rejecting this same claim.

**CONCURRENCE AND DISSENT** (Johnson, J.): Dissents on the suppression issue, finding no factual or legal support for majority's holding that the vehicle was not continually seized after Parker's arrest. Disagrees that seizure of the stopped vehicle ended when Parker exited and locked it. Would hold that State unlawfully detained Parker’s vehicle beyond the time and detention warranted by the totality of the circumstances, requiring reversal of conviction based on the ensuing unlawful search.

**STATUTES:** K.S.A. 2017 Supp. 5-1568, -1568(a)(1), -1568(d), -1568(e)(2), 22-2901(1); K.S.A. 2012 Supp. 8-262(a)(1), -1568(a), -1568(c)(1), 21-5706(a), -5706(c)(1); K.S.A. 8-1548, -1703, 20-3018(b), 60-2101(b)

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**FACTS:** Pulliam was convicted of voluntary manslaughter (of Eisdorfer), second-degree murder (of Burton), and criminal possession of a firearm. He appealed, claiming in part the jury should have been instructed on a theory of imperfect self-defense involuntary manslaughter as a lesser included crime for the charge of second-degree murder. Court of appeals affirmed, holding such an instruction was not factually appropriate because *State v. Houston*, 289 Kan. 252 (2009), required an unintentional killing for involuntary manslaughter, and there was no evidence Pulliam's killing of Burton was unintentional. Pulliam's petition for review granted on this one issue.

**ISSUE:** Jury instruction on lesser included offense of imperfect self-defense involuntary manslaughter

**HELD:** Court of appeals’ decision is affirmed, but on a different rationale. Pulliam's jury instruction claim was reviewed for clear error in this case. Court of appeals’ decision relied on outdated law because *Houston* was based on an earlier version of the crime defining statute. The amended involuntary manslaughter statute and a new culpable mental states statute, K.S.A. 2017 Supp. 21-5202, govern this case. Conviction of involuntary manslaughter under an imperfect self-defense manslaughter theory pursuant to K.S.A. 2017 Supp. 21-5405(a)(4) does not require proof of a reckless or unintentional killing. On evidence in this case, a lesser included offense instruction on the imperfect self-defense form of involuntary manslaughter was legally and factually appropriate. District court erred in not giving it, but no clear error found.
Pulliam’s second-degree murder conviction is affirmed.

STATUTES: K.S.A. 2017 Supp. 21-5109(b)(1), -5202(a)-(j), -5203(b), -5402(a)(2), -5405(a)(1)-(4), 22-3414(3); K.S.A. 21-3201, -3201(b)-(c), -3404(c), -3761(a)(2)

CONSTITUTIONAL LAW—CRIMINAL LAW—CRIMINAL PROCEDURE—EVIDENCE—FIFTH AMENDMENT—SEARCH AND SEIZURE
STATE V. REGELMAN
GEARY DISTRICT COURT—AFFIRMED IN PART—REVERSED IN PART—REMANDED;
COURT OF APPEALS—AFFIRMED IN PART—REVERSED IN PART
NO. 116,398—DECEMBER 7, 2018
FACTS: Officers conducting a welfare check smelled raw marijuana at Regelman’s front door. Officers ordered Regelman to remain outside while search warrant was obtained, and handcuffed him to prevent him from putting hands in his pockets. Search warrant affidavit included incriminating statements Regelman made. Execution of the warrant disclosed drug related items inside a thick wooden box by a couch, several feet from front door. Regelman arrested and Miranda rights given for first time. Regelman filed motion to suppress. District court granted the motion, finding Regelman’s statements about drug use occurred during questioning in violation of Miranda. District court further held the smell of marijuana by itself does not provide probable cause for a search, and good-faith exception to the exclusionary rule did not apply. State filed interlocutory appeal. Court of appeals affirmed in unpublished opinion. State’s petition for review granted.

ISSUES: (1) Statements about drug use, (2) marijuana odor and probable cause

HELD: Regelman’s drug use statements are scrutinized under Fifth Amendment. Miranda warnings were required when questioning of Regelman turned into a custodial interrogation by ordering him to stop walking away and either sit on the steps or in a patrol car. The search warrant affidavit contained this unlawfully obtained information, but under State v. Fisher, 283 Kan. 272 (2007), the affidavit as a whole is not invalid if it supplied a substantial basis for finding probable cause without the unlawfully obtained information.

State v. Hubbard (decided this same date), held the totality of circumstances surrounding a police officer’s detection of the smell of raw marijuana emanating from a residence can provide probable cause to believe the residence contains contraband or evidence of a crime. District court holding to the contrary was error as a matter of law. Applying Fisher, even without the drug-use statements, information remaining in the affidavit provided a substantial basis for finding a fair probability that evidence of a crime would be found in the home. Affirmed in part, reversed in part, and remanded for further proceedings.

CONCURRENCE (Beier, J.): Concurs in the result because Regelman made no effort to challenge admission of officer’s testimony at the suppression hearing on the basis that he was not qualified to give an expert opinion on the existence or strength of the odor of raw marijuana. Does not concur in majority’s rationale, which turns a blind eye to gatekeeping requirement under K.S.A. 2017 Supp. 60-456(b).

DISSENT (Johnson, J., joined by Rosen, J.): Agrees with Justice Beier’s criticism of majority’s rationale, but cannot concur with majority’s result. Would affirm district court’s suppression of the evidence. Because this case involved the long-range detection of odor of raw marijuana in a closed container, questions whether State could make the required foundation for the officer’s testimony by establishing the officer was in a position that would rationally allow him to perceive odor of raw marijuana.

STATUTES: K.S.A. 2017 Supp. 60-456(a), -456(b); K.S.A. 20-3018(b), 22-3216(2), 60-2101(b)

CRIMINAL PROCEDURE—SENTENCES—STATUTES
STATE V. RICE
WYANDOTTE DISTRICT COURT—REVERSED AND REMANDED
NO. 117,322—NOVEMBER 30, 2018
FACTS: Rice’s 1992 conviction for first-degree premeditated murder and hard 40 sentence were affirmed on appeals. Some twenty years later, Rice appealed from his unsuccessful attempt to seek collateral relief on a claim of ineffective assistance of counsel. Court of appeals affirmed the conviction but found ineffective assistance during the penalty phase. Sentence was vacated and remanded for a new penalty phase hearing and resentencing. At resentencing, district court ordered a life sentence with possibility of parole after 15 years. Two months later, Rice filed pro se motion to modify or reduce his sentence, arguing he should have been given an updated PSI that accounted for his failing physical condition. He also argued the court could have ordered probation. District court denied modification, holding that Rice received the only sentence available under the law and that his motion for a new PSI was rendered moot. Rice appealed claiming: (1) district court had jurisdiction to modify or reduce his sentence and that reduction is mandatory with a recommendation from the Secretary of Corrections; and (2) district court erred in concluding that probation was not an available option.

ISSUES: (1) Jurisdiction to modify or reduce the sentence on remand, (2) availability of probation

HELD: Statutes applicable to Rice’s motion to modify his pre-KSGA sentence are reviewed. The resentencing court was correct in not modifying Rice’s sentence to a lesser term of years, but under State v. Sargent, 217 Kan. 634 (1975), if sec-
Appellate decisions

Secretary of corrections unequivocally recommended reducing Rice's life sentence to a term of years, the court would have to modify it unless best interest of the public would be jeopardized or Rice's welfare would not be served by the reduction. As to whether the resentencing court was required to order an updated PSI that may have resulted in a facility recommendation that Rice should serve a lesser sentence, there is precedent for finding no error in district court's refusal to do so.

Court of appeals vacated Rice's original sentence, so on remand the district court was imposing Rice's sentence anew. Probation is a possibility for a person convicted of a Class A felony. The 2016 resentencing court abused its discretion by not understanding its own authority and being unable to consider exercising it. On remand for resentencing, district court should exercise its discretion to consider probation on the record.


APPEALS—COURTS—CRIMINAL LAW—CRIMINAL PROCEDURE—EVIDENCE—JURY INSTRUCTIONS—MOTIONS
STATE V. SIMS
WYANDOTTE DISTRICT COURT—AFFIRMED
NO. 115,038—NOVEMBER 30, 2018

FACTS: Sims convicted of premeditated first-degree murder and criminal possession of a firearm. On appeal he challenged: (1) district court's denial of motion for mistrial after State witnesses violated orders in limine prohibiting mention of Sims' battery; (2) the sequential ordering of jury instructions for degrees of homicide; (3) district court's failure to give a limiting instruction to accompany Sims' stipulation to a prior felony conviction; and (4) cumulative error denied him a fair trial.

ISSUES: (1) Mistrial, (2) ordering language in instructions, (3) prior felony limiting instruction, (4) cumulative error

HELD: On facts of case, district court did not abuse its discretion when it denied Sims' motion for mistrial. State witnesses made three brief, cryptic references to material prohibited by orders in limine; and the judge recognized the errors and issued a curative admonition in one instance and moved the trial immediately to other topics in the second and third instances.

The simultaneous consideration rule in State v. Graham, 275 Kan. 831 (2003), and the exception to that rule as recognized in State v. Bell, 280 Kan. (2005), are reviewed. Bell's mutual exclusivity test is problematic, and the simultaneous consideration rule in Graham is is overruled. In this case, the district court's instructions were legally appropriate.

Even if evidence in a stipulation to a prior felony conviction is subject to K.S.A. 2017 Supp. 60-455 and its requirement that a district judge give a limiting instruction, the failure to give such an instruction in this case was not clear error.

Errors discerned or assumed in this case were discrete and did not compound one another. On the record presented, the totality of circumstances did not prejudice Sims or deprive him of a fair trial.

CONCURRENCE (Beier, J., joined by Lukert and Johnson, JJ.): Concurs with the result and all rationale but for majority's reasoning regarding sequential and simultaneous jury consideration of degrees of homicide. Agrees that Bell and following cases are infected with a logical fallacy and would overrule them, but would not overrule Graham. Would hold the ordering language in the district court's instructions was error, but not reversible error standing alone or under the cumulative error doctrine.

STATUTES: K.S.A. 2017 Supp. 22-3414(3), 60-455; K.S.A. 2012 Supp. 21-5109(b); K.S.A. 22-3423, -3423(c)

CONSTITUTIONAL LAW—CRIMINAL LAW—EVIDENCE—JURY INSTRUCTIONS—STATUTES
STATE V. WILLIAMS
SEDGWICK DISTRICT COURT—AFFIRMED;
COURT OF APPEALS—AFFIRMED
NO. 108,394—NOVEMBER 30, 2018

FACTS: Williams forcibly entered residence of a woman he had been dating where Williams had spent some nights the previous two weeks. Jury convicted him on charges of aggravated burglary, aggravated battery, aggravated assault, and domestic battery. Williams appealed. Court of appeals affirmed in unpublished opinion. Review granted on six claims as reordered and combined by the court: (1) insufficient evidence supported his aggravated burglary conviction; (2) the aggravated burglary and domestic battery convictions were inconsistent and mutually exclusive; (3) district court erroneously instructed jury on aggravated assault when it told jury the State had to prove Williams used "a deadly weapon, a baseball bat;" (4) district court failed to instruct on lesser included offenses of assault and battery; (5) Kansas' aggravated battery statute, K.S.A. 2011 Supp. 21-5413(b)(1)(B), is constitutionally vague; and (6) cumulative error denied him a fair trial.

ISSUES: (1) Sufficiency of the evidence, (2) mutually exclusive verdicts, (3) jury instruction - aggravated assault, (4) jury instruction—lesser included offenses, (5) constitutionality of statute, (6) cumulative error

HELD: No authority supports argument that authority to enter is a property right tied to status of Williams' residence. Aggravated burglary statute does not require state to prove (or disprove) a burglar's residence. Whether Williams and the victim both had a property interest in the residence is a closer question because no direct evidence about property interests of the two parties, but there was circumstantial evidence the
victim had to give permission for Williams to enter and that he recognized or acquiesced in victim’s right to exclude him. Sufficient evidence presented that Williams entered the house without authority.

Court of appeals’ elements approach is a valid method for determining if verdicts are mutually exclusive. Under facts in case, Williams did not establish mutually exclusive verdicts.

District court did not err in setting out state’s claim that Williams used baseball bat as a deadly weapon. *State v. Sutherland,* 248 Kan. 96 (1991), and *State v. Sisson,* 302 Kan. 123 (2015), are reviewed. Here, district court did not explicitly state a baseball bat is a deadly weapon, but rather stated what the state had to prove. *State v. Ingham* (this day decided) is distinguished. District courts are cautioned in constructing this type of instruction.

District court erred in failing to instruct on assault and battery as lesser included offenses of aggravated assault and aggravated battery. Instructions on the lesser included offenses were legally appropriate, and under standard in *State v. Haberlein,* 296 Kan. 195 (2012), were factually appropriate. On facts in this case, however, no clear error.

K.S.A. 2011 Supp. 21-5413(b)(1)(B) is not unconstitutionally vague. Individuals of ordinary intelligence can understand what is meant by “can be inflicted” language. Court of appeals’ reasoning in cases rejecting constitutional challenges to the statute is approved.

Cumulative effect of the two instructional errors did not deny Williams a fair trial.

CONCURRENCE (Rosen, J., joined by Nuss, C.J. and Stegall, J.): Agrees the convictions should be affirmed, but disagrees with majority’s opinion that district court was required to instruct jury on the lesser included offenses. Consistent with his concurring and dissenting opinions in cases relating to application of K.S.A. 22-3414(3), no error in not instructing jury on lesser included offenses of misdemeanor battery and misdemeanor assault.

CONCURRENCE (Johnson, J., joined by Beier, J.): Would hold the district court’s aggravated assault elements instruction was erroneous, but even if jury had been clearly told to find the baseball bat met the definition of a deadly weapon, the result would have been the same.


**APPEALS—CONSTITUTIONAL LAW—EVIDENCE—MOTIONS—PROSECUTORS—SENTENCES—STATUTES**

**STATE V. WILSON**

**RENO DISTRICT COURT—REVERSED ON ISSUE SUBJECT TO REVIEW AND REMANDED COURT OF APPEALS—AFFIRMED ON ISSUE SUBJECT TO REVIEW**

**NO. 114,567—DECEMBER 14, 2018**

FACTS: Wilson was convicted in 2007. State filed 2015 motion to correct an illegal sentence, arguing it was error not to impose lifetime post release supervision. Citing *State v. Freeman* 223 Kan. 362 (1978), Wilson claimed lifetime supervision was cruel and unusual punishment. District court granted the state’s motion. Wilson appealed, claiming in part he was denied a fair sentencing hearing when prosecutor misstated facts of Wilson’s case and mischaracterized facts in an unpublished opinion Wilson cited in support of his *Freeman* claim. A divided court of appeals panel affirmed in an unpublished opinion, finding appellate review was appropriate of claim of prosecutorial error in the context of a hearing on a motion to correct an illegal sentence, and applying test in effect prior to *State v. Sherman,* 305 Kan. 88 (2016). State’s petition for review was granted. State claimed the prosecutorial error challenge was not preserved for appeal because Wilson did not object to the alleged misstatements during the sentencing hearing.

ISSUES: (1) Preservation of the appeal, (2) prosecutorial error

HELD: Because the state’s petition for review advances only a merit-based challenge to the prosecutorial error question, it waived review of panel majority’s conclusion on preservation.

Prosecutorial error may occur during a sentencing proceeding before a judge. The two-step analytical framework in *Sherman* applies in both the guilt and penalty phases of any trial —whether before a jury or judge. Applying the *Sherman* test, there was reversible error at Wilson’s sentencing hearing. Prosecutor’s factual misstatements about Wilson’s underlying crime fell outside the wide latitude afforded when arguing state’s motion to correct an illegal sentence, and the state failed to show there was no reasonable possibility this prosecutorial error contributed to the district court’s decision. State concedes the prosecutor misstated facts in the unpublished case Wilson cited, but no further need in this case to explore alleged error in a prosecutor’s discussion of caselaw. The case is remanded to district court to consider again the question under *Freeman*—whether imposing lifetime post release supervision on Wilson would be grossly disproportionate to his offense.

STATUTE: K.S.A. 20-3018(b), 21-3501(1), 60-261, -2101(b)
FACTS: Jones was convicted of failing to register as a drug offender. Prison term imposed with a 24-month period of post-release supervision, and a dispositional departure for 36 months’ probation. Revocation sentence pronounced from bench was 51-month prison term with no mention of post-release supervision, but journal entry of probation revocation ordered 85-month prison term with 24-months post-release supervision. Jones appealed. Court of Appeals ordered remand, finding the sentence effective when pronounced from the bench. On remand, district court filed journal entry nunc pro tunc ordering 51-month prison term with 24-month post-release supervision. Jones filed motion to correct an illegal sentence, arguing the post-release supervision term should be vacated. District court denied the motion. Jones appealed, arguing in part for first time that district court's silence on the post-release supervision term at the revocation hearing constituted a lawful modification of her sentence under K.S.A. 2017 Supp. 22-3716(b). Supplemental briefing ordered on what effect, if any, K.S.A. 2017 Supp. 21-6804(e)(2)(C) had on the appeal.

ISSUE: (1) Probation revocation sentence, (2) K.S.A. 2017 Supp. 21-6804(e)(2)(C)

HELD: Based on State v. McKnight, 292 Kan. 776 (2011), State v. Sandoval, 308 Kan. 960 (2018), and State v. Roth, 308 Kan. 970 (2018), district court erred when it later included a 24-month post-release supervision term in the journal entry. Although the district court may not have intended to vacate the post-release provision term upon revoking Jones’ probation, the court was authorized to do so and the new lawful sentence was effective when pronounced from the bench.

K.S.A. 2017 Supp. 21-6804(e)(2)(C) does not apply to a sentence that is lawfully modified at a probation revocation hearing under K.S.A. 2017 Supp. 22-3716(b) because a post-release supervision term is not required by law as part of the sentence when the district court sentences a defendant anew after revoking probation. Here, the district court imposed a lawful lesser sentence of a 51-month prison term with no post-release supervision period. This sentence was effective when pronounced from the bench at the revocation hearing and cannot later be modified.

FACTS: Highway trooper stopped Lees’ car for having a left rear brake light out. The stop resulted in Lees’ arrest for DUI and operating a vehicle without a court ordered ignition lock. Lees filed motion to suppress all evidence obtained through an illegal stop, arguing his functioning center and right rear brake lights satisfied K.S.A. 8-1708(a) which require two working brake lights. State argued the trooper's mistake about the brake lights was objectively reasonable, and stop was lawful under the trooper's inspection power as authorized in K.S.A. 8-1759a. District court granted the motion, finding the trooper had no legal grounds to stop Lee's vehicle whose brake lights complied with Kansas law, and the trooper's mistake of law in this instance was not objectively reasonable. District court also found K.S.A. 8-1759a did not authorize the stop. State filed interlocutory appeal.

ISSUES: (1) Fourth Amendment—traffic stop, (2) statutory inspection authority

HELD: Trooper made a mistake of law on whether Lees committed a traffic infraction for brake light violation. In light of 10 year-old holding in Martin v. Kansas Dept. of Revenue, 285 Kan. 625 (2008), trooper's mistake was not objectively reasonable. This traffic stop was an unreasonable seizure in violation of Fourth Amendment, and exclusionary rule requires suppression of evidence resulting from the illegal stop.

K.S.A. 8-1579a authorizes a trooper to stop a vehicle for inspection and to issue a written notice of defect to the driver only if the vehicle is in unsafe condition or if any required equipment is missing or is not in proper repair or adjustment. District court correctly found this authority does not extend to equipment that is outside what is already required by statute.
APPEALS—CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—JUVENILES—SENTENCES—STATUTES

STATE V. ROBINSON

JOHNSON DISTRICT COURT—AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

NO. 117,957—DECEMBER 14, 2018

FACTS: Robinson was convicted of aggravated robbery and kidnapping. His case was initially filed as a juvenile offender proceeding, and then moved to adult court where charges were amended to add kidnapping. On appeal, Robinson claimed he was denied his constitutional right to a speedy trial. He also claimed the state could not add charges once the case moved from juvenile to adult court, and claimed the state’s service of the arrest warrant was so late that the statute of limitations had expired.

ISSUES: (1) Speedy trial—juvenile proceedings, (2) amended charges, (3) statute of limitations

HELD: Speedy-trial rights apply to juvenile-offender proceedings. On facts in this case, Robinson did not lose his constitutional right to a speedy trial by his delayed filing of his motion to dismiss. Delay from the time the state brought formal charges in the juvenile court until Robinson's trial in an adult proceeding must be analyzed under factors in Barker v. Wingo, 407 U.S. 514 (1972). Case is remanded to district court to make the required factual findings under those factors.

When a criminal charge first made in juvenile proceedings is refiled as an adult proceeding, the state is not precluded from amending the charge. No departure from rule in State v. Randolph, 19 Kan.App.2d 730 (1994). Here, Robinson made no showing that adding the kidnapping charges substantially prejudiced his ability to defend himself at trial.

Statute-of-limitation defenses are waived if not timely raised. Even assuming Robinson could have raised the statute-of-limitation defense after the case had moved to adult proceedings, his failure to do so waived the defense. On remand, the district court may consider the state's delay in serving the warrant, its cause, and any resulting prejudice when weighing the Barker factors to decide Robinson's speedy-trial claim.

STATUTES: K.S.A. 2017 Supp. 22-3208(4), 38-2303(d), -2303(g), -2347, -2347(b)(1), -2347(d)(1)-(3); K.S.A. 22-3201(e)

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