2013 Lawyer and Law-Trained Legislators

In this issue:

Successful Expert Discovery in Kansas State Court Civil Litigation

Fair Game or Out of Bounds: Tackling Expert Discovery in Kansas Federal Courts
The Easiest Way to Get Paid!

- Accept Visa, MasterCard, Discover & Amex
- Save up to 25% off processing fees
- Control cash flow & increase business
- Accept credit cards for retainers
- Avoid commingling client funds

LawPay’s unique processing program correctly separates earned and unearned transactions keeping your firm compliant.
The process is simple. Begin accepting payments today!

LawPay.com

Accept payment online through our Secure Payment Link

866.376.0950
Our Mission

The Kansas Bar Association is dedicated to advancing the professionalism and legal skills of lawyers, providing services to its members, serving the community through advocacy of public policy issues, encouraging public understanding of the law, and promoting the effective administration of our system of justice.
# 2012-13 KBA Officers and Board of Governors

## President
Lee M. Smithyman  
(913) 661-9800  
Overland Park  
lsmithyman@ksbar.org

## President-elect
Dennis D. Depew  
(620) 325-2626  
Neodesha  
ddepew@ksbar.org

## Vice President
Gerald L. Green  
(620) 662-0537  
Hutchinson  
ggreen@ksbar.org

## Secretary-Treasurer
Natalie G. Haag  
(785) 270-6165  
Topeka  
nhaag@ksbar.org

## Immediate Past President
Rachael K. Pirner  
(316) 630-8100  
Wichita  
rpirner@ksbar.org

## Young Lawyers Section President
Brooks G. Severson  
(316) 267-7361  
Wichita  
bseverson@ksbar.org

## District 1
Toby J. Crouse  
(913) 498-2100  
Overland Park  
tcrouse@ksbar.org  
Gregory P. Goheen  
(913) 371-3838  
Kansas City, Kan.  
ggoheen@ksbar.org  
Kip A. Kubin  
(816) 531-8188  
Kansas City, Mo.  
kkubin@ksbar.org  
Mira Mdivani  
(913) 317-6200  
Overland Park  
mmdivani@ksbar.org

## District 2
Charles E. Branson  
(785) 841-0211  
Lawrence  
cbranson@ksbar.org

## District 3 (Con’t.)
Rep. Paul T. Davis  
(785) 331-0300  
pdavis@ksbar.org  
Eric L. Rosenblad  
(620) 232-1330  
erosenblad@ksbar.org

## District 3
Chad D. Giles  
(620) 221-1120  
cgiles@ksbar.org

## District 4
Terri S. Bezek  
(785) 296-2639  
tbezek@ksbar.org  
Cheryl L. Whelan  
(785) 296-3204  
cwhelan@ksbar.org

## District 5
Bruce W. Kent  
(785) 556-2019  
Manhattan  
bkent@ksbar.org

## District 6
Matthew C. Hesse  
(316) 858-4924  
mhesse@ksbar.org  
J. Michael Kennalley  
(316) 268-7933  
mkennalley@ksbar.org  
Calvin D. Rider  
(316) 267-7361  
crider@ksbar.org

## District 7
John B. Swearer  
(620) 662-3331  
jswarer@ksbar.org

## District 8
David J. Rebein  
(620) 227-8126  
drebein@ksbar.org

## District 9
Jeffery A. Mason  
(785) 890-6588  
Goodland  
jmason@ksbar.org

## District 11
Nancy Morales Gonzalez  
(816) 936-5788  
Kansas City, Mo.  
gonzalez@ksbar.org

## District 12
William E. Quick  
(816) 360-6335  
Kansas City, Mo.  
wquick@ksbar.org

## At-Large Governor
Christi L. Bright  
(913) 239-9966  
Overland Park  
cbright@ksbar.org

## KDJA Representative
Hon. Mike Keeley  
(620) 793-1863  
Great Bend  
mkeeley@ksbar.org

## KBA Delegate to ABA
Sara S. Beezley  
(620) 724-4111  
Girard  
sbeezley@ksbar.org

## KBA Delegate to ABA
Linda S. Parks  
(316) 265-7741  
Wichita  
lparks@ksbar.org

## ABA Board of Governors
Thomas A. Hamill  
(913) 491-5500  
Overland Park  
thamill@ksbar.org

## ABA State Delegate
Hon. Christel E. Marquardt  
(785) 296-6146  
Topeka  
cmarquardt@ksbar.org

## Executive Director
Jordan E. Yochim  
(785) 234-5696  
Topeka  
jeyochim@ksbar.org
2013 Lawyers and Law-Trained Legislators

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

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

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

For more information or to volunteer, contact Kelsey Schrempp, KBA manager of public services, at (785) 234-5696 or at kschrempp@ksbar.org.

The Journal of the Kansas Bar Association 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 ISSN 0022-8486 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 rate is $25 a year, which is included in annual dues. Nonmember subscription rate is $45 a year. POSTMASTER: Send address changes to The Journal of the Kansas Bar Association, 1200 SW Harrison St., Topeka, KS 66612-1806.

The Kansas Bar Association and the members of the Board of Editors assume no responsibility for any opinion or statement of fact in the substantive legal articles published in The Journal of the Kansas Bar Association.

For display advertising information contact Bill Spillman at (877) 878-3260 or email bill@innovativemedia solutions.com. For classified ads contact Beth Warrington at (785) 234-5696 or email bwarrington@ksbar.org. Publication of advertisements is not to be deemed an endorsement of any product or service advertised unless otherwise indicated.

The rule of law is about process. Lawyers work within the judicial process on a daily basis. We understand that a fair and even-handed process promotes a fair and even-handed result, typically the correct result.

Americans have faith in the checks and balances within our democracy. We elect our legislators to enact the statutes desired by the majority. We elect our gubernatorial and presidential executives to enforce those statutes. However, the critical check upon the majority’s control of statutory enactment and enforcement is a fair, impartial, and independent judiciary. That fairness and impartiality is achieved through a judicial selection process which concentrates solely upon judicial, and not political, qualifications.

The Kansas merit selection system has come under increasing attack over recent months. Proponents for change argue that the 1958 Kansas constitutional amendment, which adopted merit selection, places too much power in the hands of attorneys because attorneys constitute a one-person majority of the panel seats. Proponents for change advocate elections or a gubernatorial appointment system premised on the federal model as a means of avoiding this perceived ‘attorney control’ of the merit selection panel.

On December 7, 2012, the Board of Governors of the Kansas Bar Association adopted a daring and innovative resolution, a resolution reinforcing our faith in a fair and even-handed process. The KBA adopted the following resolution:

RESOLVED, that the Kansas Bar Association supports the merit selection system for appellate judges and justices, independent of how merit panel members are selected. The present application, interview, questioning and selection process provides the best available information to identify and select the most qualified appellate judges and justices, independent of political considerations.

Our merit selection process requires that each open appellate position be advertised to all Kansas registered attorneys. Typically, 20 or more attorneys apply. Applicants file detailed questionnaires. A detailed investigatory process ensues, with panel members contacting each applicant’s references, opposing attorneys and judges on the applicant’s recent and most important cases, local attorneys and business contacts, neighbors, and persons within the charitable and institutional organizations which the applicant serves. Background checks on the applicant’s credit history, criminal record, and civil record are performed.

At the conclusion of this most thorough investigation, the panel conducts oral interviews of the leading candidates. After consultation and discussion, the committee forwards a panel of the three most worthy candidates to the governor for selection.

The process is thorough and complete. It generates information unavailable to the executive and legislative branches and to the general public. It promotes applications from the best and the brightest legal minds across the state of Kansas. The process, while thorough and public, is not subject to the slings and arrows of a legislative confirmation hearing or to the half-truths or outright lies of one’s political opponents.

Attorneys know that the process can reduce the vagaries imposed by personality, political affiliation, or popular belief. The Kansas Bar Association’s resolution reflects that belief. By adopting the resolution, the KBA has endorsed a process that works. We, as lawyers, know that the merit selection process will work, whether attorneys are appointed to selection panels or not. One need not be an attorney to vote one’s conscience for the three candidates who could best serve our appellate judiciary. The KBA’s recent resolution reinforces its faith in the merit selection process, a process that has generated a remarkably fine Kansas appellate judiciary for the more than 50 years.

KBA President Lee M. Smithyman may be reached by email at lsmithyman@ksbar.org, by phone at (913) 661-9800.
As I have mentioned previously, there will, on occasion, be times that I have to fly the KBA YLS flag in my articles. Well, now is one of those times. This is my shameless promotion of a brand new program that we are pleased to debut in the summer of 2013. Keep reading, because you may know law school students who would be interested in applying!

The KBA YLS board is extremely excited to announce the official start-up of a Judicial Internship Program created for first- and second-year law students at University of Kansas School of Law, Washburn University School of Law, and UMKC School of Law. Being a member of the KBA is not a requirement to apply for the program. The goal of the Judicial Internship Program is to match law students with appellate and trial court judges throughout the state that have already agreed to accept clerks. Students will then be placed with the judge for six- or 12-week unpaid assignments.

The idea for such a program was sparked by Rachael Pirner during her term as president of the KBA. Vincent Cox, now past president of the KBA YLS, took initiative to contact judges throughout the state to see if they would be interested in such a program. Upon determining that they were, a committee was formed consisting of myself, Vince, Jeffrey Gettler, and Stacy Burrows. We were tasked with getting the program up and running.

All of the materials have now been prepared and uploaded to the KBA’s website. They can be located at www.ksbar.org on the KBA Young Lawyers Section Page under the heading “Mentoring Program.” There, law students can find application instructions, the application itself, and information about the program.

Even though this program does not officially begin until the summer of 2013, the application deadline is right around the corner on February 1, 2013. Although Vince, Jeff, and Stacy have been actively promoting this program to the law schools, we want to be sure to do everything we can to get the word out to law students. So, if you know someone who does not have work plans lined up for the summer or is potentially interested in clerking for a judge after completing law school, this would be a great program for them.

After the February 1 deadline passes, all application packets will be thoroughly reviewed, and students will be matched with judges in the districts in which they expressed an interest in clerking. The judges will then review the applications and make the final determination on who they want to accept as a clerk. Assignments will be announced the week of March 18, and students have until April 1 to accept or decline the assignment. All assignments will be made final the week of April 8.

I know many law school students read the KBA Journal, and I am hoping this will be yet another avenue to try to spread the word as well as to educate the membership about the new program that YLS has worked so hard to bring to fruition. I hope you will tell others and encourage students to get those applications in! We really want this to be a program that the YLS can continue for years to come! If you have specific questions about the program or about the application process, you can contact Danielle Hall at the Kansas Bar Association at dhall@ksbar.org or Jeffrey Gettler at jgettler@sehc-law.com.

About the Author

Brooks G. Severson is a member of Fleeson, Gooing, Coulson & Kitch LLC in Wichita, where she practices in civil litigation. She currently serves as president of the KBA YLS. Brooks can be reached at bseverson@fleeson.com.
Electronic Voting Coming in 2013

The Kansas Bar Association is introducing electronic voting for the 2013 Officers and Board of Governors elections. The goal of e-voting is to increase the security of the ballot, speed up the process of the results, and, ultimately, make the voting process easier.

What can you expect?

- Anonymous voting through the use of a unique username and password sent via email.
- Optional paper ballots that may be requested with a simple click of the mouse.
- Candidate biographies and photos that are viewable as voting is in progress.
- An easier, faster, and more authentic voting process.
- And much more!

All ballot information will be sent via email. Make sure the KBA has your correct email by logging into the website at www.ksbar.org and updating your contact information.

---

13th Annual CLE Slam-Dunk

Tuesday, January 22, 2013
Wednesday, January 23, 2013

Clarion Hotel
530 Richards Drive • Manhattan, Kan.

Co-sponsored by
KANSAS STATE UNIVERSITY FOUNDATION

Earn 12.0 hours CLE, including 2.0 hours ethics and professionalism credit and 1.0 hour law practice management credit in both Kansas and Missouri
It’s not too early to start thinking about KBA leadership positions for the 2013-14 leadership year.

Advance Notice
Elections for 2013 KBA Officers and Board of Governors

The KBA Nominating Committee, chaired by Rachael K. Pirner, of Wichita, is seeking individuals who are interested in serving in the positions of Vice President, Secretary-Treasurer, and KBA Delegate to the ABA House of Delegates.

Officers

President: Lee M. Smithyman, 2012-13; Dennis D. Depew, 2013-14
President-elect: Dennis D. Depew, 2012-13; Gerald L. Green, 2013-14
Vice President: Gerald L. Green, 2012-13; Natalie G. Haag, 2013-14; and nominations welcome
Secretary-Treasurer: Natalie G. Haag, 2012-13; open
KBA Delegate to ABA House of Delegates: Sara S. Beezley, 2012-13; open

If you are interested, or know someone who should be considered, please send detailed information to Jordan Yochim, KBA Executive Director, at 1200 SW Harrison St., Topeka, KS 66612-1806, or at jeyochim@ksbar.org by Friday, January 18, 2013. This information will be distributed to the Nominating Committee prior to its meeting on Friday, January 25, 2013. In accordance with Article V, Elections, Section 5.2 of the Kansas Bar Association Bylaws, candidates for Vice President, Secretary-Treasurer, and KBA Delegate to the ABA House may be nominated by petition bearing 50 signatures of regular members of the KBA with at least one signature from each Governor district.

Board of Governors

There will be four positions on the KBA Board of Governors up for election in 2013. Candidates seeking a position on the Board must file a nominating petition, signed by at least 25 KBA members from that district, with Jordan Yochim by Friday, February 15, 2013. If no one files a petition, the Nominating Committee will reconvene and nominate one or more candidates for open positions. KBA districts with seats up for election in 2013 are:

• District 1: Nominations welcome; incumbent Kip A. Kubin is not eligible for re-election. Johnson County.
• District 2: Nominations welcome; incumbent Paul T. Davis is not eligible for re-election. Atchison, Brown, Doniphan, Douglas, Franklin, Jackson, Jefferson, Leavenworth, Miami, Nemaha, Osage, Pottawatomie, and Wabaunsee counties.
• District 7: Incumbent J. Michael Kennalley is eligible for re-election. Sedgwick County.

For more information
To obtain a petition for the Board of Governors, please contact Christa Ingenthron at the KBA office at (785) 234-5696 or via email at cingenthron@ksbar.org. If you have any questions about the KBA nominating or election process or about serving as an officer or member of the Board of Governors, please contact Rachael K. Pirner at (316) 630-8100 or via email at rpirner@ksbar.org or Jordan Yochim at (785) 234-5696 or via email at jeyochim@ksbar.org.
The KBA Awards Committee is seeking nominations for award recipients for the 2013 KBA Awards. These awards will be presented at the KBA Annual Meeting from June 19-21 in Wichita. Below is an explanation of each award, and a nomination form can be found on the next page. The Awards Committee, chaired by Hon. Michael B. Buser, of Topeka, 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.

**Distinguished Service Award:** This award recognizes an individual for continuous long-standing service on behalf of the legal profession or the public, rather than the successful accomplishment of a single task or service.
- The recipient must be a lawyer and must have made a significant contribution to the altruistic goals of the legal profession or the public.
- Only one Distinguished Service Award may be given in any one year. However, the award is given only in those years when it is determined that there is a worthy recipient.

**Phil Lewis Medal of Distinction:** The KBA’s Phil Lewis Medal of Distinction is reserved for individuals or organizations in Kansas who have performed outstanding and conspicuous service at the state, national, or international level in administration of justice, science, the arts, government, philosophy, law, or any other field offering relief or enrichment to others.
- The recipient need not be a member of the legal profession or related to it, but the recipient's service may include responsibility and honor within the legal profession.
- The award is only given in those years when it is determined that there is a worthy recipient.

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

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

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

**Pro Bono Award:** This award recognizes a lawyer or law firm for the delivery of direct legal services, free of charge, to the poor or, in appropriate instances, to charitable organizations whose primary purpose is to provide other services to the poor. In addition to the Pro Bono Award, the KBA awards a number of Pro Bono Certificates of Appreciation to lawyers who meet the following criteria:
- Lawyers who are not employed full time by an organization that has as its primary purpose the provision of free legal services to the poor;
- Lawyers who, with no expectation of receiving a fee, have provided direct delivery of legal services in civil or criminal matters to a client or client group that does not have the resources to employ compensated counsel;
- Lawyers who have made a voluntary contribution of a significant portion of time to providing legal services to the poor without charge; and/or
- Lawyers whose voluntary contributions have resulted in increased access to legal services on the part of low and moderate income persons.

**Distinguished Government Service Award:** This award recognizes a Kansas lawyer who has demonstrated an extraordinary commitment to government service. The recipient shall be a Kansas lawyer, preferably a member of the KBA, who has demonstrated accomplishments above and beyond those expected from persons engaged in similar government service.

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

**Diversity Award:** This award recognizes a law firm; corporation; governmental agency, department, or body; law-related organization; or other organization that has significantly advanced diversity by its conduct, as well as by the development and implementation of diversity policies and strategic plans, which include the following criteria:
• A consistent pattern of the recruitment and hiring of diverse attorneys;
• The promotion of diverse attorneys;
• The existence of overall diversity in the workplace;
• Cultivating a friendly climate within a law firm or organization toward diverse attorneys and others;
• Involvement of diverse members in the planning and setting of policy for diversity;
• Commitment to mentoring diverse attorneys, and;
• Consideration and adoption of plans to continue to improve diversity within the law firm or organization, whereas;
• Diversity shall be defined as differences of gender, skin color, religion, human perspective, as well as disablement.

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

---

KBA Awards Nomination Form

Nominee’s Name ____________________________

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

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

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

Nominator’s Name ____________________________

Address ____________________________________________

Phone ____________________________ E-mail ____________________________

Return Nomination Form by Friday, March 1, 2013, to:

KBA Awards Committee
1200 SW Harrison St.
Topeka, KS 66612-1806
KBA Diversity Committee Chair Eunice Peters: As Far as Diversity Goes, Actions Speak Louder Than Words

By Mira Mdivani, Mdivani Law Firm, Overland Park, mmdivani@ksbar.org

Eunice, could you tell us about yourself?
I was born and grew up in Illinois. I went to the University of Illinois for my undergraduate degree in kinesiology and athletic training. As an athletic trainer, I worked with people with disabilities. It turned out that at the end of the day I was more interested in courts and law than in athletic training, though. Even before law school, I worked for courts as a clerk and it was only natural for me to go to law school. I clerked for the Hon. Stephen D. Hill and that was a wonderful experience. He was very influential in shaping my style as an attorney. He was also an incredible boss, being very supportive of me when my mom was going through leukemia treatment. I also worked in a small practice, learning a lot about being more confident. Now I am with the Kansas Office of Revisor of Statutes, which I love. Lawyers should really pay attention to how legislatures are working; it is really important. We are a non-partisan agency, so I can't take a side in issues, such as judicial selection. So one of the reasons I wanted to be chair of the Diversity Committee is that I could really help my profession but not be engaged in any kind of conflict of interest because of my job.

Tell us about your family.
I am married to Clayton Peters, a Kansas native, who is the reason I moved to Kansas in the first place. But Clayton has a big warm family, so I really don't miss Illinois. We live in Carbondale, which is about 15 miles south of Topeka, on our 40 acres. I met Clayton in my pre-law life when I worked with people with disabilities. We were friends for a year before we started dating. He played wheelchair basketball at the University of Illinois. Today, he continues to play in Kansas with the Kansas Wheelhawks. We have two dogs adopted from two different cocker spaniel rescue groups and they love living in the country.

Tell us about the KBA Diversity Committee and your involvement in diversity issues.
We have evolved over the years. We have a diverse number of lawyers from all over Kansas. We have all kinds of diversity represented on the committee: both in terms of areas of expertise and career paths, background and geographical diversity. I met great friends and mentors through the committee. For example, our previous chair, Karen Hester, with whom we have worked on CLEs and other project-diversity related together, Mark Dodd from Topeka, president of the Indian Law Section, and Keith Greiner, who flies in from Washington, D.C., to still serve his clients in Kansas and who is one of the oldest members of the committee, to mention just a few.

I am first generation American; my parents were from Taiwan. The process of becoming an attorney gave me a chance to take time to think through what it means to be not just an American, but specifically what it means to be an Asian American. In Kansas, I have met people who have treated me like I am a foreigner. An example of that would be going to Dillons with my husband, where the checkout clerk would ask my husband (not me): “Where is she from?” My husband keeps saying, “Chicago,” and the clerk would repeat the question. Kansas has a lot of amazing stories and potential for people from diverse backgrounds, being famous as “Bleeding Kansas” and for its support of women's right to vote. Being different from the rest makes you think about those issues. When I was a law student, a friend of mine and I put together a Diversity Week at Washburn Law where we had different events and also we had people wear lanyards that would encourage people to take about what they wanted to talk about. Someone came up to me and said, “I feel like this is an anti-white week.” I said, “Then write it on your lanyard and let’s talk about it.” I had a lot of time to think about diversity issues, and even wrote a law article on diversity issues for the Washburn Law Journal. I have learned that as far as diversity goes, actions speak louder than words: a lot of people say a lot of things, but what matters to me is how they act. When someone tells a diverse attorney, “I support you,” what does that mean? To me, it means, I would put my name on the line, to help you grow professionally, to mentor you, to help you with establishing professional connections.

What are the benefits of the KBA Diversity Committee? Why should people support it?
We are making a real difference. We are helping the bar to understand diverse attorneys, and we help diverse attorneys to navigate being a lawyer in Kansas. We have great events.
I am excited that electronic filing is finally within reach for Kansas. My legal career has focused on that particular law practice management and technology issue and it is rewarding to see it on the horizon. Electronic filing offers more than a new delivery system for information to and from the courts; it can fundamentally alter the legal system and change how participants view their roles. Those changes are worth anticipation, review, and evaluation about how to address them before they take root in unexpected ways.

In a prior article, I discussed Atul Gawande’s book, “The Checklist Manifesto.” He explores the problem of complexity in professions and how that complexity can lead to failures of the system that we might carelessly diagnose as failures of practitioners. In one section of the book, he mentions scientific research into how people and systems fail – a multidisciplinary field called human factors that designs processes and equipment to fit human capacities and account for our frailties. One of the more accessible surveys of the field is a joint paper from 2004 with the abbreviated title, Operating at the Sharp End: the Human Factors of Complex Technical Work (available at http://bit.ly/S7vWrR).

Summarizing Operating at the Sharp End very broadly draws out several points:

• Complex systems (i.e., our legal filing system) contain mixtures of failures inherently; “The complexity of these systems makes it impossible for them to run without multiple flaws being present.”

• Therefore, such systems generally “run as broken systems” and function “… because it contains so many redundancies and because people can make it function, despite the presence of many flaws.”

• Hindsight biases are the biggest impediment to error correction because “Knowledge of the outcome makes it seem that events leading to the outcome should have appeared more salient to practitioners at the time than was actually the case.”

• Practitioners create redundancy and keep “broken systems” functional. “That practitioner actions are gambles appears clear after accidents; in general, post hoc analysis regards these gambles as poor ones. But the converse – that successful outcomes are also the result of gambles – is not widely appreciated.”

Human Factors in Electronic Filing

Move this research over to court filing and, especially, electronic filing. It appears deceptively simple to file an order and get it signed by a judge when it is actually a complex interaction between officers of the court, each with collaborative responsibility for a sound outcome. An attorney signs and presents based on “knowledge, information, and belief” (K.S.A. 60-211) while a clerk, under supervision (Code of Judicial Conduct Rule 2.12), records and forwards to the judge. The court then competently and diligently (Rule 2.5) reviews and signs independently (Rule 1.2) complying with applicable law (Rule 1.1). The end result of all making the right decision is a correct order, properly noted in the court record, and appropriately issued. It only seems easy because we each make it work and work together.

A potential risk of electronic filing for which we ought to prepare is the diminution of team in that process. Electronic filing and “business logic” can make it humanly possible to review more and increase accuracy in filing. It is not an excuse for any participant to press “start” and walk away. We must be alert to weakened redundancies. For example, K.S.A. 60-703 indicates garnishment orders shall be issued by a judge while the order approved by the Supreme Court has no judge’s signature line. This simple oversight potentially removes a judicial check from the system. Untested “business logic” in the case management system could derail the clerk review, rolling items through directly from attorney or to the judge without adequate context. There have also been instances where lawyers stepped away from electronic filing supervision, unaware of what was submitted in their names.

Shared Risk = Smooth System

Some suggest the whole process should rest on the attorneys’ shoulders and we ought to bear all risk and responsibility for filings. I believe that is unprofessional. Our clients may be adversaries but we attorneys (including opposing counsel), judges, and clerks are all on the same side. We are officers of the court with sworn duties to back each other up in catching and correcting errors and ensuring the proper functioning of the legal system. Electronic filing will aid in that aim if each participant is attentive to the risks and assumes a shared responsibility for the outcome.

About the Author

Larry N. Zimmerman, Topeka, is a partner at Valentine, Zimmerman & Zimmerman P.A. and an adjunct professor teaching law and technology at Washburn University School of Law. He has spoken on legal technology issues at national and state seminars and is a member of the Kansas Credit Attorney Association and the American, Kansas, and Topeka bar associations. He is one of the founding members of the KBA Law Practice Management Section, where he serves as president-elect and legislative liaison.
Thoughts on the Future of Citation: Bluebook, ALWD, and ?

By Jeffrey D. Jackson, Washburn University School of Law, Topeka,

Here’s a question: What form of legal citation do you use? If your answer is “Bluebook, of course,” I have another question for you: Are you sure? The reason that I’m skeptical is that, in real life, almost no one actually uses the current prescribed method of Bluebook citation. While it’s true that most lawyers learned to cite through the Bluebook, and their method of citation generally follows something like the Bluebook’s prescribed method, there are a number of factors that cause actual citation and “Bluebook citation” to diverge.

The Bluebook did not invent citation. It began in 1926 as simply an attempt to codify existing practice to serve as a guide for editors of the Harvard Law Review. It became the standard for citation because it was the only book to pull the citation methods together in a way that was easily accessible. Because it was first, it became the go-to place to learn the rules of citation and “Bluebook citation” to diverge.

The Bluebook frequently publishes a new, and more lengthy, edition. While this would be of little consequence if you should be using the typeface conventions in blue-colored pages. The ones in the white-colored pages are for law reviews, and thus became the standard reference book for those students when they entered the profession.2

However, while the Bluebook is still the main way in which law students learn legal citation, and is still the most consulted reference book on how to cite, the truth is that most practitioners don’t actually use the Bluebook—at least, not the way it is actually intended. This is not due to laziness or lack of attention to detail. Rather, there are a number of factors that conspire to cause practicing attorneys to deviate from the Bluebook format.

First, there is the matter of the Bluebook’s 19 editions. Because the number of type of sources that lawyers cite have been evolving quickly, (and because new editions are needed to generate revenue), the Bluebook frequently publishes a new, and more lengthy, edition.3 While this would be of little consequence if the editors, who are law review students at Columbia, Harvard, Penn, and Yale, simply added the new sources, there appears to be an almost irresistible urge for each new group of editors to tinker with the existing rules.4 The most egregious example of this was the 16th Edition, published in 1996, where the editors took it upon themselves to change the definition of “see” so as to require that virtually every cite a practitioner might use contain a “see” signal before it.5 Fortunately, this change went unobserved by most attorneys, and the uproar from those who did notice it was so great that it was immediately changed back in the 17th Edition in 2000.6 While most of the changes are not as substantive as the “see” change, the cumulative effect of tinkerings means that the 19th edition isn’t quite the same as the 18th, which isn’t quite the same as the 15th. Thus, even those practitioners who religiously use the Bluebook might not be using the most recent rule.

Second, most courts have conventions that cause their rules to differ from the generic rules in the Bluebook.7 Any Kansas attorney who has cited the Kansas statute regarding summary judgment as K.S.A. 60-256 rather than the Bluebook-mandated “Kan. Stat. Ann. § 60-256” will easily see the distinction. In most jurisdictions, these state conventions outweigh the Bluebook, at least among practitioners who realize that their documents will be read by the courts that use those conventions.

Finally, most practitioners are actually using the wrong part of the Bluebook. If you are modeling your citations after the typeface in the white-colored pages, well, according to the Bluebook, you’re doing it wrong. In court documents, you should be using the typeface conventions in blue-colored pages.8 The ones in the white-colored pages are for law reviews and other “academic” writing.

All of this is not to say that lawyers still don’t need to know the Bluebook, or that law students shouldn’t learn it. A firm grounding on the basics of legal citation is essential for the practicing lawyer, and the Bluebook is one of the most popular reference tools for that skill, occupying the same niche that the PC does in the world of computing. Rather, it is to highlight that, just as PCs aren’t the only form of computer, legal citation exists independent of the Bluebook.

The biggest competitor to the Bluebook in the teaching and reference world of legal citation is the ALWD Manual, written by Darby Dickerson and the Association of Legal Writing Di-

Footnotes
1. See Byron D. Cooper, Anglo-American Legal Citation: Historical Development and Library Implications, 75 Law Libr. J. 3, 21 (1982).
5. Id. at 1268-71.
6. Id. at 1272 (examining the “laudable changes” in the 17th Edition).
7. See id. at 1264 (noting that courts treat the Bluebook “more like a model code than a statute”).
8. See The Bluebook: A Uniform System of Citation 3 (19th ed. 2010).
9. See id. at 62 (providing “TYPEFACES FOR LAW REVIEWS”).
involved in the Diversity Committee. which is important and makes this the right time to become leadership is supporting efforts of the Diversity Committee, our members of the differences within our profession. KBA grounds connected and to promote understanding among behalf of KBA. My goal is to get people with diverse back-law students of color to offer support and mentorship on their minority student bar association; we have reached out share success. We have liaisons to the Kansas law schools and going to pair up experienced and new attorneys in efforts to (Con't. from Page 12)

KBA Diversity Committee Chair Eunice Peters
(Cont. from Page 12)

planned, including a speed networking event in April. We are going to pair up experienced and new attorneys in efforts to share success. We have liaisons to the Kansas law schools and their minority student bar association; we have reached out to law students of color to offer support and mentorship on behalf of KBA. My goal is to get people with diverse backgrounds connected and to promote understanding among our members of the differences within our profession. KBA leadership is supporting efforts of the Diversity Committee, which is important and makes this the right time to become involved in the Diversity Committee. ■

About the Author

Jeffrey D. Jackson is a professor of law at Washburn University School of Law in Topeka, where he teaches Legal Analysis, Research and Writing, Constitutional Law, Constitutional History, and Comparative Constitutional Law. He is the new co-author of the “Interactive Citation Workbook for the Bluebook and ALWD Citation Manual.” Before teaching at Washburn, he was staff attorney for Death Penalty and Constitutional issues at the Kansas Supreme Court. Prior to that, he was a law clerk for the Hon. Mary Beck Briscoe in the U.S. Court of Appeals for the Tenth Circuit, law clerk to the Hon. Justice Robert E. Davis at the Kansas Supreme Court, an associate at Bennett & Dillon LLP in Topeka, and staff attorney for the Kansas Court of Appeals. Jackson received his B.B.A. in economics from Washburn University in 1989, his J.D. from Washburn Law in 1992, and his LL.M. in constitutional law at Georgetown University Law Center in 2003. At Washburn Law, Jackson was assistant editor for the Washburn Law Journal. He is a member of the Kansas Judicial Council Death Penalty Advisory Committee.

About the Author

Mira Mdivani serves on the KBA Board of Governors and as president of the KBA Immigration Law Section. She practices corporate immigration law at the Mdivani Law Firm in Overland Park.

10. Association of Legal Writing Directors and Darby Dickerson, ALWD Citation Manual: A Professional System of Citation (4th ed. 2010).

11. For an example of an article noting this dilemma, see Ian Gallacher, Cite Unseen: How Neutral Citation and America’s Law Schools can Cure our Strange Devotion to Bibliographical Orthodoxy and the Constriction of Open and Equal Access to the Law, 70 ALB. L. REV. 491 (2007).
“Mind the Gap” to Bridge the Gap

By Catelyn H. Kostbar, Washburn University School of Law, Topeka

O

ver-packed, anxious and weary from 11 hours of travel from Kansas to London, I sought to find my way into the large city where I would live for the next four months. As I stood waiting for the train, I noticed the words “MIND THE GAP” neatly painted at my feet. And then, over the intercom came a melodic voice speaking the same phrase: “Mind the gap.” I recognized immediately that this was a warning to passengers traveling on the train to watch for the gap between the train and platform. This phrase, however, captured my imagination.

Studying abroad in law school gave me a greater perspective and deeper understanding of how culture is so invariably reflected in the law. And with this consideration, I came to better appreciate the matters that, in reality, I will be facing in the legal profession such as conflict of laws and building rapport with clients. Ultimately, those in the legal profession must be especially mindful of the “gap” that may exist culturally among individuals, legally among states, and even socially among colleagues. And in doing so, it enables us to build a notional bridge of understanding in diverse situations.

At the start of January 2012, I began my six-month experience abroad, where I expanded my personal understanding of diversity and the law. I lived my first four months in London studying at the Florida State University Centre, followed by a two-month stint at the University of the West Indies in Cave Hill, Barbados. Each study abroad program offered unique opportunities for students, professors, and practicing lawyers to exchange ideas about how to solve legal problems. From that experience, I learned that the individual characteristics of persons and in states create gaps that must be overcome with consciousness and respect for cultural and social differences.

When I moved to England, I was fascinated by the fact that our own American legal system was fashioned from the English common-law system. And so I felt privileged that the London program offered students a clinical opportunity to observe the practices and procedures of the English legal system through a “mini-pupillage” with an English barrister. I was paired with Miles Bennett, whose accomplished background in advocacy made him a wealth of information. He allowed me to read court documents and attend various court proceedings. All the while, he challenged me through the process to consider the law in context of our respective legal systems. One day, while in chambers with Bennett and three other barristers, we sat around a large conference table having our afternoon tea while in chambers with Bennett and three other barristers, we

The program continued to foster this revelation by offering a faculty-led trip to Istanbul, Turkey. On one of the days, the Istanbul Bar Association (IBA) invited us to speak with a panel of distinguished attorneys. It was truly a riveting experience as a couple of the IBA attorneys did not speak English, and a translator interpreted the communications. Despite the language barrier, the setting permitted an open and fruitful dialogue between the attorneys and students discussing cultural, political, and legal ideologies unique to our respective countries.

From these experiences, I became enthralled with the romantic notion of traveling and meeting individuals with different cultural backgrounds. So, after discovering an opportunity to study in Barbados for the summer, I impulsively booked my flight and exchanged my “wellies” (rain boots) and umbrella for sandals and a wide-brimmed hat.

“Quite neatly, my experiences in Barbados continued the theme of “minding the gap.” In Barbados, I experienced an influential fusion of ideas from the Barbadian students. The peer-to-peer communication opened an avenue for discussions that benefitted both sides. Again, I recognized that disparities in our laws were due to the clear reflection of our cultural differences. Americans may, in one instance, value the First Amendment’s freedom of speech over the protection of an individual from hate speech; the Barbadian values and law reflected the opposite.

Although many students do not get this opportunity, especially in law school, I recommend that law students seek international opportunities to broaden their education. I found studying abroad one of the most valuable and practical experiences of my law school career. I learned a great deal about myself, but more so, I gained a better understanding of culture and the law. We, as human beings, do not have a united point of view on a given matter; we each hold our own understanding of the world. From my experiences abroad I now actively strive to be mindful of differences and to create a cooperative atmosphere to bridge any “gaps.” This lends itself not only to my interactions with my peers, professors and attorneys but also to my future legal career in relating to clients and interacting with the law.

About the Author

Catelyn H. Kostbar, a third-year student at Washburn University School of Law, received her Bachelors of Arts in English literature at Kansas State University. She is interested in pursuing a career in intellectual property law, particularly in copyright and trademark law. From her experiences abroad, she may explore these areas of law on an international or global scale. She can be reached at catelyn.kostbar@gmail.com.
Recently I started reading “The Happy Lawyer, Making a Good Life in the Law” by University of Missouri-Kansas City law professors Nancy Levit and Douglas Linder. Their book has been featured in the ABA Journal and joins a growing list of publications examining the state of the profession and the mood of our fellow professionals. Nancy and I were classmates at KU, class of 1984, and reading her book has been on my to-do list for some time. While this publishing deadline hasn’t allowed me the luxury of finishing it yet, some of the early chapters give me fodder for a column.

Chapter One asks a basic question that has been posed in this space before – “Are Lawyers Unhappy?” This discussion is the best summary I’ve seen of the various surveys which, generally speaking, show that lawyers are less happy than members of other professions. As the authors note: “Members of the clergy, travel agents, architects, scientists, engineers, airline pilots, physicians, financial planners, and detectives are all happier than lawyers.” Levit and Linder (L&L) add this finding to the mix: “Even repair persons, housekeepers, and butlers report higher levels of happiness than do members of the legal profession.” Who is below attorneys? Try roofers and gas attendants.

The authors review the scientific literature, including ABA Young Lawyers Division findings, that showed between 20 and 27 percent of lawyers said they were either “dissatisfied or very dissatisfied with their work.” The chapter sorts through all the conclusions and notes that there are pockets of professionals, specifically associates at large law firms that are miserable, but when the question is directed to more broad populations, a much larger group of respondents were proud to be attorneys and found the practice to be intellectually invigorating.

L&L summarized all the various surveys in this way: “Good news! If you are an attorney who is over fifty years old and work at a smaller firm, or work in-house or for the government, or work part-time, chances are you are among the happiest of lawyers. If you work part-time for a small branch of government, you could be in lawyer nirvana. On the other hand, if you are a mid-level associate at a large firm who is stuck in a library with fourteen crates of discovery documents, then you have been thinking about jumping ship, haven’t you?”

While the conclusions don’t fit nicely into my column’s word limit, there are several observations by L&L that, while perhaps obvious to most, bear repeating here: “Everybody needs somebody sometime. For many who practice law, the deeper connections established in the workplace are likely to be with fellow lawyers rather than with clients. The quality of those connections is closely linked to our happiness. Everyone longs to belong.”

Other sensible conclusions from L&L’s work – identify your strengths and what you do well. Focusing your practice on subjects and areas that dovetail with your best practices is a formula for greater satisfaction. It also helps to work in areas that reflect your passion. “The happiest lawyers tend to be those who do work that they think make the world at least a marginally better place.” The authors note that firms that offer pro bono opportunities give attorneys ways to balance their approach.

Studies and corresponding conclusions of “what makes people happy” will continue, and I will promise to share other pertinent observations from “The Happy Lawyer” in this space, and I invite you to share your own observations about what keeps your practice uplifting.

About the Author

Matthew Keenan has practiced with Shook, Hardy & Bacon since 1985. He may be reached at mkeenan@shb.com.
**Changing Positions**

Jeffrey S. Bell, Kevin D. Hyland, D. Scott Lindstrom, Erin D. Schilling, and Holly A. Streeter-Schaefer have been elected as shareholders for Polsinelli Shughart P.C., Kansas City, Mo. Cullin B. Hughes has joined the firm's Kansas City, Mo., office as an associate.

James R. Biles has been appointed as district judge for Kingman County.

Melanie D. Bingham has been appointed to fill the unexpired term of county attorney for Cherokee County, Baxter Springs.

Tyson R. Eisenhauer has joined Johnston & Eisenhauer, Pratt, as a partner.

Nicole Forsythe has joined Kutak Rock LLP, Kansas City, Mo.

Allison M. Hardy has joined Stinson Morrison Hecker LLP, Omaha, Neb.

Jordan E. Kieffer has joined the firm's Wichita office. Mark A. Salle has joined the firm's Kansas City, Mo., office as a partner.

Stacy N. Harper has joined Lathrop & Gage LLP, Overland Park, as of counsel.

Andrew D. Holder has joined Fisher, Patterson, Saylor & Smith, Topeka, as an associate. Michael Kopit has joined the firm's Overland Park office.

Michael P. Joyce was has been appointed as a district court judge in Johnson County, Olathe.

William H. Kariker has joined Morton Reed Counts Briggs & Robb LLC, St. Joseph, Mo.

Matthew T. Kincaid has joined Martin, Pringle, Oliver, Wallace & Bauer LLP, Overland Park.

Richard J. Lejuerne Jr. has joined Taddiken Mack Law Firm, Topeka.

Dane C. Martin has joined Shank & Hamilton P.C., Kansas City, Mo., as an associate.

Allison H. Maxwell has joined the Sloan, Eisenbarth, Glassman, McEntire & Jarboe Law Firm, Topeka, as an associate.

William T. Nichols has joined Denison State Bank, Holton, as general counsel, assistant compliance officer and assistant board secretary.

Jacob E. Peterson has joined Clark, Mize & Linville Chtd., Salina, as an associate.

Christina M. Pyle has joined Husch Blackwell LLP, Kansas City, Mo., as an associate.

Bill H. Raymond has joined the Sedgwick County Counselor's Office, Wichita, as city attorney.

Jessica M. Shannon has joined Hinkle Law Firm LLC, Wichita.

Lindsay A. Shepard has joined Sunflower Electric Power Corp., Hays, as associate general counsel.

Sandra J. Smith has joined Bryan Cave LLP, Kansas City, Mo., as counsel.

**Changing Locations**

Kay S. Prather has opened her own practice, Prather Law Office, 106 E. Main, Beloit, KS 67420.

**Miscellaneous**

The Depew Law Firm, Neodesha, was honored as “Business of the Year” at the Neodesha Annual Chamber of Commerce Dinner.

Nola Tedesco Foulston, Wichita, has been awarded a Lifetime Achievement Award by the Kansas County and District Attorneys Association.

Johnston & Eisenhauer, Pratt, has changed its name to Johnston, Eisenhauer & Eisenhauer.

Hon. Thomas E. Malone, Topeka, has been named Chief Judge of the Kansas Court of Appeals succeeding Hon. Richard D. Greene.

Douglas A. Matthews, Great Bend, was re-elected to a third term as the Barton County attorney.

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

Donald C. Krueger

Donald C. Krueger, 66, of Emporia died October 2 in Kansas City, Kan. He was born December 20, 1945, in Emporia, the son of Charles William Sr. and Rita Marie Kuhlmann Krueger.

He graduated from Olpe High School in 1963 and received his Bachelor of Arts in geography from Emporia State University. Krueger served in the U.S. Air Force and was commissioned as a staff sergeant. His military service began at Norton Air Force Base in San Bernardino, Calif., and he completed his duties in Goosebay, Labrador, as a medical corpsman.

Krueger practiced as a criminal defense and civil attorney in Emporia for 37 years after his graduation from Washburn University School of Law in 1975. He was a member of the Lyon/Chase Counties Bar Association, Kansas Bar Association, Kansas Trial Lawyers Association, and the National Association of Criminal Defense Lawyers.

Krueger is survived by his life partner, Debra O’Connor, of the home; her children, Jarod O’Connor, of Buckeye, Ariz.; and Shannon Presti, of Oklahoma City; brothers, Ronald F. Krueger, of Alexandria, Va., Larry Krueger, of Bentley, and Carl Krueger, of Olpe; and sisters, Beth Peterson, of Kansas City, Mo., and Rita McFadden, of Lawrence. He was preceded in death by his parents and brothers, Charles W. (Bill) Krueger Jr. and James (Jim) Krueger.

Elizabeth Michelle Myers

Elizabeth Michelle Myers, 37 of Bonner Springs, died November 28 at her home. She was born July 21, 1975, in Kansas City, Kan., to Bill and Nancy Huntsman.

She was an associate with Ronald W. Nelson P.A. in its Lenexa offices, where she joined the firm in 2012. Myers attended Washburn University School of Law and obtained her juris doctorate in 2004. She was a member of the Johnson County Bar Association, Kansas Bar Association, American Bar Association, Phi Delta Phi legal fraternity, Women Attorneys of Manhattan, Kansas Women Attorneys Association, and the Kansas Child Support Enforcement Association.

Myers is survived by her husband Greg Myers, of the home; two children, Keaton and Evelyn; parents, Bill and Nancy Huntsman; brothers, Steve Johnson and Joe Huntsman; and nieces and one nephew.

2013 KBA Government & Administrative Law Institute

- Running the Administrative Gauntlet: Helpful Hints for Rule and Reg. Approval
- Anatomy & Physiology of Administrative Hearings Before the Kansas State Board of Healing Arts
- Two Worlds Collide: Social Media Meets the First Amendment
- The Second Amendment – Reloaded
- What the _____ Were They Thinking? A Modern Approach to the Ancient Problem of Unethical Behavior

Lunch is included in the registration fee.

When registering, please indicate any special dietary needs.

Register at https://m360.ksbar.org/ViewForm.aspx?id=41503 or call (785) 234-5696

This seminar has been approved for 6.0 hours of continuing legal education (CLE) credit, including 1.0 hour of ethics & professionalism credit for this seminar in Kansas and Missouri
I have had the privilege for more than 10 years to be associated with the Kansas Bar Foundation’s IOLTA committee, either through participation on the Board or the IOLTA committee itself. Now that I am the president of the Kansas Bar Foundation, the importance, excellence, and dire need for IOLTA funds is all the clearer.

For those who do not know what IOLTA is, the concept is simple and timeless. Since lawyers cannot mix their funds with client’s funds, lawyers and/or firms must set up trust accounts for such proceeds. Once these funds are deposited, if they draw interest (in most situations) they would create a “mixing” of client/attorney funds. Because of this ethical situation, IOLTA was created. IOLTA stands for “interest on lawyers’ trust accounts,” and it is a special trust account that is legislated to create a thoughtful, useful, and charitable resolution to this issue.

Lawyers can set up IOLTA accounts that will allow banks to automatically transfer interest funds on trust accounts to the IOLTA fund. This fund builds, and yearly the foundation selects charitable awardees through a grant process to receive grant proceeds. These grants have been made for decades to such worthy causes as Kansas Legal Services, CASA, Youth Courts, public educational materials regarding legal issues such as living wills, and many other charitable causes that promote access to justice for all.

There was a time when participation by lawyers and firms was high, and interest rates were too. During those times we were able to grant hundreds of thousands of dollars to such worthy causes on a yearly basis. With interest rates at an all time low, and participation waning with interest free banking account alternatives, our IOLTA funds have been drastically reduced to approximately one third of our highest disbursement years. With low funding to grant, many honorable and worthwhile grant applicants are not able to be funded anywhere close to their need level — or funded at all.

We can help fix that. There seems to be a misunderstanding of IOLTA participation out there, and I hope that this article will shed light on the issue for those who read this and do not participate in IOLTA. IOLTA accounts are simple to set up; in fact your banking institution does most if not all of the work for you. A request simply needs to be made to convert the trust account to an IOLTA account. There is a basic form to fill out, and then the bank will automatically deduct and transfer interest payments at regular intervals — no further action on your firm’s part is required.

Every single dollar in a trust account not transferred to IOLTA is potentially depriving a very worthwhile charity a dollar in funding. Such a simple act can produce huge results in our IOLTA funding, our charitable legal causes (past, present, and future), as well as our community as a whole — state wide.

Please review your firm’s trust account, and if you are not already an IOLTA participant please take the time to consider the change. It’s the beginning of a new year; help us give a new-invigorated fresh start to our IOLTA funding. Thank you for your kind consideration of these requests.

By Joni J. Franklin, Franklin Law Offices P.A., Wichita, Kansas Bar Foundation president, joni@franklinlaw.com

---

**Court Bonds: service, service, service...**

“The Bar Plan is the best place to go for court bonds. They have experience with bond underwriting from application through termination. The process is easy and fast. I know that they can help me identify trouble before it happens, and that protects my client and my reputation before the court.”

Gerry Nester
Public Administrator
St. Louis, MO

THE BAR PLAN

We help lawyers build a better practice™

Lawyers’ Professional Liability Insurance • Court Bonds • Risk Management
Practice Management • Workers’ Compensation • Lawyers’ Business Owner’s Policy

877-553-6376
www.courtbonds.thebarplan.com

---

How can we help you build a better practice? Join the conversation...

Find us on Facebook

facebook.com/TheBarPlan
Don’t Miss Out – Renew Today!

By Meg Wickham, Kansas Bar Association, Topeka, member services director, mwickham@ksbar.org

Happy New Year! With the New Year the Kansas Bar Association is always looking for ways to make your membership more valuable. We are reaching out to new possible partners for 2013 and beyond to give you the best deals and services possible. In 2013 one of the greatest benefits of being a KBA member is the opportunity to join a Section. The KBA has 25 Sections with specific practice area focus. Belonging to a Section keeps you connected with other attorneys in the field through e-communication, newsletters, and the opportunity to be listed in our public KBA attorney search on our website ksbar.org. When you renew or join the KBA, your membership will include enrollment in one Section at no additional fee if you are a non-government attorney admitted to the Kansas Bar before 2008 – your choice! Other sections are available to you as well for a minimal fee. Belonging to more than one section will help you enhance your practice.

Casemaker is our most popular member benefit saving lawyers and firms thousands of dollars a year in online research tools. Casemaker is absolutely free to all KBA members. Casemaker is a Google-like search engine that gives you access to case law, constitutions, and statutes of all 50 states, including the District of Columbia. Members are provided a KBA customized library that contains ethics opinions, federal and state court rules, workers’ compensation decisions, and the KBA Journal. Live webinar training is also available by logging into Casemaker. You can also have Casemaker with you at all times with Casemaker mobile (http://mobile.lawriter.net), which is available for iPhones, Androids, and Blackberry. On staff, we have Danielle Hall, a Casemaker expert who offers one-on-one training or even lunch hour CLE training programs on how to use Casemaker to its highest potential. You may contact Danielle directly at dhall@ksbar.org.

CoreVault provides automated and centrally managed data backup and recovery services that help businesses protect critical data. Service portfolio includes off-site protection, regulatory compliance, encryption, restoration, enhanced security, and highly regarded customer service.

ISI (Insurance Specialists Inc.) is an insurance brokerage service that includes medical, accident and disability, term life, long-term care, and much more. These are insurance plans available to members, employees, spouses, and family members.

GEICO Insurance can save you money on car insurance. Plus, you’ll enjoy savings for multi-car policies, good students, safety features, and more.

ALPS is a comprehensive industry-leading professional liability program that protects and guides lawyers toward a more successful and risk-free practice environment.

Go Next provides KBA travelers the opportunity of traveling well at an affordable price to new and exotic places.

ABA Retirement Funds offers tax-qualified retirement plan services to qualified law professionals. This includes full-service, cost effective plans, such as 401k and profit sharing.

Office Depot offers the 200 most-ordered supply items at highly discounted prices and receive 5 percent off low prices on all other items excluding technology.

Principal Financial Group is an A+ rated insurance company offering discounted disability income, DI retirement security, and/or overhead expense insurance.

VISA card provides exclusive member benefits that include low introductory APR on purchases and balance transfers for first six months, then competitive variable rate. No annual fee and enhanced Visa benefits and privileges.

What else, you ask? Discounts on world-class KBA CLEs and handbooks. Not to mention the KBA Journal, a 10-time per year publication keeping you in-the-know with the hottest topics in law. No, you may not get a free set of knives when you renew your membership, but with all of these benefits, how can you say no? ■

2012 Journal Authors Recognition

The Kansas Bar Association and its Journal Board of Editors would like to extend a special thank you to the following authors who gave their time and expertise in writing substantive legal articles for the Journal of the Kansas Bar Association. Your commitment and contribution is greatly appreciated.

Tim Alvarez – “The 2011 Kansas Workers Compensation Act: Too Sharp A Right Turn?” (January)

Rick A. Fleming – “Helping the Small Business Raise Capital in Kansas” (February)

Teresa James – “Real Property Interests Subject to Oil and Gas Interests” (April)

Scott Johnson – “The ADAAA: Congress Breathes New Life into the Americans with Disabilities Act” (March)

Calvin J. Karlin and Anna Smith – “Spendthrift Trust Clauses and Kansas Divorces: Does a Settlor’s Intent Still Matter?” (May)

Prof. Lori McMillan – “Recent Developments in U.S. Nonprofit Taxation: The Pension Protection Act Takes Effect” (June)

Joseph Molina III – “2012 Legislative Update” (July/August)

Eva N. Neufeld, John C. Peck, and Adam C. Dees – “Water Allocation Law and the Oil and Gas Industry in Kansas: An Update to the 1981 Neufeld Article” (September)

Ron Smith – “A Kansas Lawyer Who Kept Kansas a Free State and Saved Lincoln’s Presidency” (November/December)

Shawn P. Yancy – “The History and Future of Offender Registration in Kansas” (October)
Is it your decision to evaluate the premium-marketing site for your law offices advertising dollar?

Look no more, the ‘BLUE BOOK’ combines statewide advertising exposure and efficient up-to-date resources for your daily office procedures, all in the ‘legal marketplace information provider’.

With over 70 years of publishing expertise the KANSAS LEGAL DIRECTORY offers each and every attorney an opportunity to notably increase your law office’s exposure in the legal profession, while maintaining minimal advertising expenditures.

The Blue Book
the legal marketplace information provider

To order your copy or to be included in the next edition contact us at 1-800-447-5375
Legal Directories Publishing Company, Inc - www.LegalDirectories.com
The “Cancer on the Presidency”
Presenting Watergate in Overland Park on February 8

By Beth Warrington, Kansas Bar Association, Topeka, communications manager, bwarrington@ksbar.org

Editor’s note: The following is based on an email question-and-answer exchange with John Dean and James (Jim) Robenalt.

In history, John Dean was the person who revealed that President Richard Nixon was deeply involved in the Watergate cover-up. He blew everything up because he had failed to convince the president and his colleagues to end the cover-up. By breaking rank, this would cause Nixon and others to attempt to blame him for everything that had gone wrong.

“I had only been following orders,” said Dean. “I had no interest in being a scapegoat.”

Dean is currently in the process of trying to find the true answers why he was the scapegoat by transcribing the Watergate recordings. While the telephone conversations are good quality, most of the Watergate conversations took place in the Oval Office or his Executive Office Building office and are difficult to transcribe. He is currently in the process of going over more than 1,000 relevant conversations.

“I am just starting on conversations in which the president and my former colleagues are trying to figure out what to do with me after I told them I was going to the prosecutors to end the cover-up,” said Dean.

It was in November 1972 that Dean realized they were obstructing justice; when he told his superiors, they told him there was no criminal intent.

“My breaking point came because President Nixon was trying to get me to write a bogus report about Watergate, which I was refusing to write,” he said.

When Watergate burglar James McCord was arrested and began talking, Dean had hoped that it would be a moment of truth for everyone involved. He broke rank from everyone, telling his colleagues that he was going to the prosecutors with the hope that they would follow.

“I thought they would tell the truth, and Nixon might save his presidency,” he said. “Instead, they doubled down on the cover-up.”

Dean was only 34 when Watergate fell apart and testified about what actually happened. It was his word against the words of the White House chief of staff, assistant to the president of domestic affairs, the former attorney general, a former special counsel to the president, and the president of the United States. Dean said that had he not told the Senate Watergate Committee that he believed he had been secretly recorded then who knows how these events would have been resolved.

The aftermath of Watergate made lasting changes on legal ethics. When Dean was White House counsel the rules of professional responsibility could be summarized as don’t lie, cheat, or steal, avoid conflicts of interest, and do not advertise. His testimony before the Senate committee prompted the American Bar Association to re-examine ethics and responsibility.

“Had those rules [Model Rules of Professional Responsibility] existed during Watergate,” said Dean, “I truly believe that it would have been very different for many lawyers who had no interest in doing anything wrong yet found themselves on the wrong side of the law.”

With James Robenalt, Dean created the Watergate CLE to teach lawyers about the new rules and to show how those rules played out in the Watergate setting. Dean wanted to take the mistakes of Watergate and make them relevant to practicing lawyers today.

“The central point is this: As uncomfortable as it might be, a lawyer has duties beyond the duty of confidentiality to stop or report client crime or fraud that is ongoing,” said Robenalt. “Lawyers have duties to the public, though they are highly circumscribed.”

The Watergate CLE will be presented at no cost on Friday, February 8 at the KU Edwards Campus (also available live via webcast). This seminar will focus on the background of the discovery of the tapes; a review of the Watergate cover-up; and a breakdown of the taped conversations between President Nixon and John Dean. For more information, including how to register, visit http://bit.ly/KBAWatergate.

The Kansas Bar Association has applied for 4.5 hours of CLE credit, including 4.5 hours of ethics and professionalism credit.
Traditionally the Kansas Legislative Session begins on the second Monday of January. This year is no different with the Capitol opening on January 14, 2013. The start of the legislative season will see a very similar number of Republicans and Democrats with a 92-33 Republican advantage in the House and a 32-8 Republican stranglehold in the Senate. However, that is where the similarities with the 2012 Legislature end. The main difference is the composition of the Kansas Senate in which conservative Republicans, bolstered by a near sweep in the primaries, gained a significant advantage over the moderate Republican/Democrat coalitions of the past. Conservative Republicans were backed by a number of well-financed interests in the August primary and those groups pushed on to ensure their efforts were not sidetracked by Democrats in November.

The Kansas House would appear to be very similar to the 2012 membership but court-ordered redistricting has allowed a number of new individuals into the Capitol. At first glance there appear to be 58 new House members. The high turnover rate can be attributed to a record number of “incumbent vs. incumbent” match ups following redistricting, open districts, retirements, and election losses. However, even with these new members it is difficult to see the moderate Republicans and Democrats combining for 63 votes, the number needed to hold a majority.

In 2013 these new legislators will be trying to figure out some very heavy tax issues before the tax cut plan goes into effect in July. Projections have not been as generous as previously hoped. The Kansas Consensus Revenue Estimating Group has projected a sharp drop in revenue for the 2014 fiscal year. The number tops out at $705 million, which is more than 11 percent from prior estimates. This fall off will eat up most of the banked money from cuts in 2012, which stands at $470 million. As such our elected officials will have to figure out how to balance the FY 2014 budget that looks to be $370 million upside down. The full report can be found at http://budget.ks.gov/files/FY2014/CRE_Long_Memo_Nov2012.pdf.

One way to balance the budget, in part, would be to extend the 1-cent sales tax put in place in 2010. A portion of the sales tax is due to expire this session but if it could be reauthorized the state could see revenue increase by $200 million. However, it could be a heavy lift, with so many legislators who ran on low tax or no tax platforms this election cycle. How the message is crafted and what other services the Legislature views as expendable will have a significant impact on keeping the sales tax.

Besides taxes this Legislature will take a very hard look at reforming the process for selecting appellate court judges. This reform has been in the making for a decade but until this past election the numbers always sided with those who would prefer the current merit selection system and the Supreme Court Nomi-
Sen. Franklin T. (Terry) Bruce (R-Nickerson)
Senate District No. 34
Sen. Bruce is of counsel with the law firm of Forker, Suter and Rose in Hutchinson. He was first elected to the Kansas Senate in 2004 and again in 2008 and 2012. He previously served as an assistant county attorney in Reno County. Bruce is a member of the Senate Committees on Agriculture, Judiciary, Natural Resources and Utilities and is a member of other joint committees. He received his J.D. from the University of Kansas School of Law.

Sen. Jay Scott Emler (R-Lindsborg)
Senate District No. 35
Sen. Emler is a partner in the law firm of Weelborg & Emler in McPherson. He was elected to the Kansas Senate in 2000 and re-elected in 2004, 2008 and 2012. Emler currently serves as chair of the Senate Committee on Ways and Means and is a member of the Senate Committees on Commerce and Utilities. He also serves as chair of the Joint Committee on Kansas Security and is a member of other joint committees. Emler received his J.D. from the University of Denver.

Sen. David Haley (D-Kansas City)
Senate District No. 4
Sen. Haley is the managing partner of Village East, a redevelopment company in Kansas City, Kan. He served in the Kansas House of Representatives from 1994-2000 and was elected to the Kansas Senate in 2000. He was re-elected in 2004, 2008 and 2012. Senator Haley is the Ranking 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. Haley received his J.D. from Howard University.

Sen. Jeff King (R-Independence)
House District No. 15
Sen. King is the owner of King Law Offices of Independence. He was elected to the Kansas House of Representatives in 2008 and re-elected in 2008 and 2010. He was appointed to fill the vacancy in the Kansas Senate when Derek Schmidt ascended to Kansas attorney general. King was re-elected to Senate District 15 this past election cycle. He received his J.D. from Yale Law School.

Rep.-elect John Barker (R-Abilene)
House District No. 70
Rep.-elect Barker is a farmer, retired district court judge, and U.S. Army veteran. Barker served 25 years as a judge for the 8th Judicial District covering Dickinson, Geary, Marion, and Morris counties. He 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. Barker and his wife of 30 years live in Dickinson County where they raised their two children.

Rep.-elect Steve Becker (R-Buhler)
House District No. 104

Rep.-elect Edwin Bideau III (R-Chanute)
House District No. 9
Rep.-elect Bideau is a country lawyer practicing at Chanute. He is a long-time KBA member and is currently serving as chair of the Unauthorized Practice of Law Committee. He previously served as Neosho County attorney for two terms, followed by two terms in the Kansas House from 1985 through 1989, chairing the House Reapportionment Committee during his second term. He decided not to run for re-election in the 1988 election to devote time to his growing family, law practice, and family farm operation. Following legislative service, he served as chair of the Kansas Law Enforcement Training Commission during the Hayden administration. He is very interested in rural Kansas, the rural economy across Kansas, rural education and the property tax load on Main Street and commercial businesses in small communities.

Rep. Robert Bruchman (R-Overland Park)
House District No. 20
Robert Bruchman was elected to the Kansas House in 2010. He is a principal in his own law firm specializing in business law, including business formation, mergers and acquisition, financing, and complex business planning. Bruchman is a member of the House Judiciary Committee, House Commerce Committee, and House Utilities Committee. He received his J.D. from the University of Kansas School of Law.

(Con’t. on next page)
Rep. Paul T. Davis (D-Lawrence)
House District No. 46
Rep. Davis is a partner in the law firm Fagan, Emert & Davis in Lawrence. He was appointed to the Kansas House of Representatives in 2003 and elected in 2004, 2006, 2008, 2010, and 2012. He serves as the House Minority Leader and is a member of the House Committees on Calendar and Printing and Judiciary, as well as several joint committees, including the Legislative Coordinating Council, a House/Senate Leadership Committee. Davis received his J.D. from Washburn University School of Law.

Rep.-elect Blaine Finch (R-Ottawa)
House District No. 59
Rep.-elect Finch is 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. He 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.

Rep.-elect Mark Kahrs (R-Wichita)
House District No. 87
Rep.-elect Kahrs is a small business owner and practices law in his own law firm in the area of creditor law. His clients include small businesses, corporations, partnerships, government agencies, and individuals. Kahrs is a member of the NRA and the Federalist Society. He has been active in Kansas politics for more than 20 years, serving in various offices within the Kansas Republican Party, including former chairman of the Sedgwick County Republican Party. He currently serves as chairman of the 4th District Republican Committee. Kahrs received his J.D. from Washburn School of Law in 1991.

Rep.-select Charles Macheers (R-Shawnee)
House District No. 39
Rep.-elect Macheers has 12 years of experience in private practice and has assisted clients with a wide range of issues, including estate planning, trust, probate administration, and real estate, which includes site acquisition, leasing, and zoning. Most recently, Macheers worked for a Fortune 500 company, where he focused on complex landlord, real estate, and contract negotiations. He received his J.D. from Thomas M. Cooley Law School.

Rep.-elect Craig McPherson (R-Overland Park)
House District No. 8
Rep.-elect McPherson attended Claremont McKenna College. McPherson attended George Mason University, a school that emphasized economics, in addition to the normal law school curriculum and interned in the Justice Department. Today, he owns the McPherson Law Firm PLLC, which focuses on small business formation and business litigation. He is also a deacon at the Presbyterian Church of Stanley.

Rep. Jan Pauls (D-Hutchinson)
House District No. 102
Rep. Pauls is a sole practitioner with a law office in Hutchinson. She was first appointed to the Kansas House of Representatives in 2001 and elected in 1992 and re-elected every two years through 2010. Prior to her appointment to the Kansas Legislature, she served as a district court judge in Reno County from 1984-1988 and an assistance
county attorney in Reno County. She serves as the ranking member of the House Judiciary Committee, vice chair of the Committee on Rules and Journal, and member of the Committee on Corrections and Juvenile Justice and a joint committee. She received her J.D. from the University of Kansas School of Law.

Rep.-elect Emily Perry (D-Overland Park)  
House District No. 24
Rep.-elect Perry is a lifelong resident of Johnson County, where she attended Shawnee Mission schools and graduated from Shawnee Mission East. She obtained her undergraduate degree from Miami University. Prior to running for office, Perry interned for Wagstaff & Cartmell LLP and the U.S. District Court of Kansas. Perry received her J.D. from University of Kansas School of Law.

Rep. John Rubin (R-Shawnee)  
House District No. 18
Rep.-elect Rubin is a former federal administrative law judge and FDIC regional counsel. He was elected to the Kansas House of Representatives in 2010 and re-elected in 2012. Rubin is a member of the House Judiciary Committee. He received his J.D. from Washington University School of Law in St. Louis.

Rep.-elect James Todd (R-Overland Park)  
House District No. 29
James Todd was born in Shawnee spent two years at Johnson County Community College, where he earned an associate degree before transferring to the University of Kansas to complete the last two years of his bachelor’s degree, graduating in 2004. Currently, he is a small business owner working to build his legal practice in Overland Park. Todd is focusing his legal practice on small business start-ups. He attended the University of Kansas School of Law and graduated with a Juris Doctor in 2009.

Rep. Jim Ward (D-Wichita)  
House District No. 86
Rep. Ward is the owner of the Law Offices of James Ward in 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 re-elected every two years through 2012. Ward serves 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.
2012 Outstanding Speakers Recognition

The Kansas Bar Association would like to extend a special thank you to and recognition of the following individuals who gave so generously of their time and expertise in speaking at our Continuing Legal Education seminars from September through December 2012.

Your commitment and invaluable contribution is truly appreciated.

Christina Lewis Abate, The Bar Plan, St. Louis

Thomas A. Adrian, Adrian & Pan-kratz P.A., Newton

Hon. Alok Ahuja, Missouri Court of Appeals, Kansas City, Mo.

Matthew D. All, Blue Cross & Blue Shield of Kansas, Topeka

Mark A. Andersen, Barber Emerson L.C., Lawrence

Hon. Karen Arnold-Burger, Kansas Court of Appeals, Topeka

Tony L. Atterbury, Depew Gillen Rathbun & McInteer L.C., Wichita

J. Nick Badgerow, Spencer Fane Britt & Browne LLP, Overland Park

Hon. Richard T. Ballinger, Sedgwick County District Court, Wichita

Rudolf H. Beese, SNR Denton US LLP, Kansas City, Mo.

Russell A. Berland, Stinson Morrison Hecker LLP, Kansas City, Mo.

Susan A. Berson, The Banking and Tax Law Group LLP, Leawood

Hon. Dan Biles, Kansas Supreme Court, Topeka

Stephine Bowman, Kansas Coalition Against Sexual and Domestic Violence, Topeka

Kylar W. Brodus, Lincoln University, Jefferson City, Mo.

Scott R. Brown, Hovey Williams LLP, Overland Park

Hon. Terry L. Bullock, Judge Terry L. Bullock Mediation Services, Topeka

Christopher F. Burger, Stevens & Brand LLP, Lawrence

Hon. Michael B. Buser, Kansas Court of Appeals, Topeka

Karen K. Cain, Bryan Cave LLP, Kansas City, Mo.

Link Christin, Legal Professionals Program, Center City, Minn.

Brent N. Coverdale, Seyferth Blumen- thal & Harris LLC, Kansas City, Mo.

Dr. Ian Curry-Sumner, Voorts Juridische Diensten, The Netherlands

Lisa Epps Dade, Spencer Fane Britt & Browne LLP, Kansas City, Mo.

J. Philip Davidson, Hinkle Law Firm LLC, Wichita

Adam C. Dees, Vignery & Mason LLC, Goodland

John R. Dietrick, Creative Business Solutions, Topeka

Kristina Dietrick, Creative Business Solutions, Topeka

Emily A. Donaldson, Stevens & Brand LLP, Lawrence

Rick Evrard, Bond Schoeneck & King PLLC, Overland Park

Jerry D. Fairbanks, Fairbanks Law P.A., Goodland

Prof. Theodore A. Feitshans, North Carolina State University, Raleigh, N.C.

Shawn Gaylord, GLSEN (Gay, Lesbian & Straight Education Network), Washington, D.C.

Karen R. Glickstein, Polsinelli Shughart P.C., Kansas City, Mo.

Paul Grahamov, Prosoco Inc., Lawrence

Carol Gilliam Green, Clerk of the Kansas Appellate Courts, Topeka

Cathleen A. Gulledge, Law Office of Cathleen Gulledge LLC, Wichita

Danielle M. Hall, Kansas Bar Association, Topeka

Kathleen A. Harvey, Harvey Immi- gration Law Office, Overland Park

Stefani K. Hepford, Office of Kansas Attorney General Derek Schmidt, Topeka

Erin Herbold-Swalwell, Beving, Swanson & Forrest P.C., Des Moines, Iowa

Michael A. Hodgson, The Hodgson Law Firm LLC, Overland Park

Prof. Michael Hoefflich, University of Kansas School of Law, Lawrence

Nathan R. Hoffman, Depew Gillen Rathbun & McInteer L.C., Wichita

Ryan A. Hoffman, Kansas Corporation Commission, Wichita

Paul M. Hoffmann, Stinson Morris- son Hecker LLP, Kansas City, Mo.

Hon. Victor C. Howard, Missouri Court of Appeals, Kansas City, Mo.

Stacey L. Janssen, Stacey Janssen Law, Lenexa

Joseph Mark Jarvis, Polsinelli Shughart P.C., Kansas City, Mo.

Mark P. Johnson, SNR Denton US LLP, Kansas City, Mo.

Jill M. Katz, Jill M. Katz LLC, Kansas City, Mo.

David M. Kight, Spencer Fane Britt & Browne LLP, Kansas City, Mo.

Schuyler M.P. Kurlbaum, Duggan Shadwick Doen & Kurlbaum P.C., Overland Park

Jason P. Lacey, Foulston Siefkin LLP, Wichita

Douglas S. Laird, Polsinelli Shughart P.C., Kansas City, Mo.

Heather M. Lake, Constangy Brooks & Smith LLP, Kansas City, Mo.

Chad Lamer, Spencer Fane Britt & Browne LLP, Kansas City, Mo.

Hon. Steve Leben, Kansas Court of Appeals, Topeka

Eunique Lee-Ahn, KU Med-Legal Partnership Clinic, Lawrence

Carole Levitt Esq., Internet for Law- yers, Rio Rancho, N.M.

Terrance G. Lord, Clerk of the Western District of Missouri Court of Appeals, Kansas City, Mo.

Thomas B. Luebbering, Hovey Williams LLP, Overland Park

Hon. Kate Lynch, Wyandotte County District Court, Kansas City, Kan.

William P. (Bill) Matthews, Foulston Siefkin LLP, Wichita

Rolando Mayans, First National Bank of Hutchinson, Hutchinson

Mira Mdivani, The Mdivani Law Firm LLC, Overland Park

Kent Meyerhoff, Fleeson Gooing Coulson & Kitch LLC, Wichita

Kelly M. Nash, Littleter Mendelson P.C., Kansas City, Mo.

Patrick R. Nichols, ADR & Associates, Lawrence

David W. Nickel, Depew Gillen Rathbun & McInteer L.C., Wichita

Erick E. Nordling, Kramer Nordling & Nordling LLC, Hugoton

Jennifer L. Osborn, Polsinelli Shughart P.C., Overland Park

Timothy P. O’Sullivan, Foulston Siefkin LLP, Wichita

Prof. John Peck, University of Kansas School of Law, Lawrence
Kathy Perkins, Kathy Perkins LLC, Lawrence
Kursten A. Phelps, Kansas Coalition Against Sexual and Domestic Violence, Topeka
Prof. David Pierce, Washburn University School of Law, Topeka
Hon. Sally D. Pokorny, Douglas County District Court, Lawrence
William E. (Bill) Quick, Polsinelli Shughart P.C., Kansas City, Mo.
Mark Rosch, Internet for Lawyers, Rio Rancho, N.M.
Prof. David S. Rubenstein, Washburn University School of Law, Topeka
Rusty Rumley, National Agricultural Law Center, Fayetteville, Ark.
Larry R. Rute, Associates in Dispute Resolution, Topeka
Jason Salinardi, BridgeBuilder Plans for Life, Leawood
Damien M. Schiff, Pacific Legal Foundation, Sacramento, Calif.
Michael Sharma-Crawford, Sharma-Crawford Attorneys at Law LLC, Kansas City, Mo.
Trip Shawver, Law Office of N. Trip Shawver, Wichita
Karen Shumate, Lawrence Memorial Hospital, Lawrence
Steve Six, Stueve Siegel Hanson LLP, Kansas City, Mo.
P. Jay Skolaut, Hinkle Law Firm LLC, Wichita
Scott A. Smith, Kansas Insurance Department, Topeka
Stanford J. Smith, Martin Pringle Oliver Wallace & Bauer LLP, Wichita
Steven P. Smith, Hinkle Law Firm LLC, Wichita
Steven R. Smith, Gates Shields & Ferguson, Overland Park
William W. Sneed, Polsinelli Shughart P.C., Topeka
Marty M. Snyder, Office of Kansas Attorney General Derek Schmidt, Topeka
Jennifer R. Sourk, Kansas Insurance Department, Topeka
Holly A. Streeter-Schafer, Polsinelli Shughart P.C., Kansas City, Mo.
David J. Stucky, Adrian & Pankratz P.A., Newton
Chadwick Jonathan Taylor, Shawnee County District Attorney, Topeka
Arthur J. Thompson, Office of Judicial Administration, Topeka
Lauren E. Tucker McCubbin, Polsinelli Shughart P.C., Kansas City, Mo.
Christopher J. Tymeson, Kansas Department of Wildlife, Parks and Tourism, Topeka
Alleen C. Van Bebber, McDowell Rice Smith & Buchanan, Kansas City, Mo.
Brian M. Vazquez, Kansas Department of Health & Environment, Topeka
Matthew B. Walters, Hovey Williams LLP, Overland Park
Hon. David J. Waxse, U.S. District Court, District of Kansas, Kansas City, Kan.
Hon. James E. Welsh, Chief Judge, Missouri Court of Appeals, Kansas City, Mo.
Gary C. West, Kansas Coalition Against Sexual and Domestic Violence, Topeka
Angela L. Williams, The Law Office of Angela L. Williams, Kansas City, Mo.
Molly M. Wood, Stevens & Brand LLP, Lawrence
Sara Zafar, Kansas Coalition Against Sexual and Domestic Violence, Topeka
Joseph W. Zima, Topeka
Fair Game or Out of Bounds: Tackling Expert Discovery in Kansas Federal Courts

by Matt Corbin and Casey Tourtillott

Endnotes begin on Page 33.
L

itigation is in some ways much like football. There are rules governing the game and penalties for violations. Winning requires careful study of the opponent’s strengths and weaknesses. And, most relevant to this article, players have specialized roles based on their individual talents.

A lawyer, like any good coach, must recognize how to capitalize on each player’s area of expertise. Some players appear only for a down or two in the game, and others never get on the field. Still others are expected to play every down. Yet other “players” may not be players at all, but merely fans who offer their advice and support—solicited or unsolicited. In the litigation arena, the way an attorney uses his or her experts dictates how many pages of the playbook the opposing side is able to see. An astute attorney will therefore know precisely how his or her experts will be used and the corresponding consequences in discovery.

This article will briefly discuss the different roles that experts play in federal litigation. It will then examine a number of expert discovery issues that the District of Kansas has faced in recent years. Tackling these matters head-on will enable the federal practitioner to maximize privilege and confidentiality protections when dealing with experts.

I. Kickoff: Identifying Expert Roles

Not all experts play the same position. Generally, they may be split into four categories: (1) testifying; (2) retained consulting; (3) non-retained consulting; and (4) experts whose information was not acquired in anticipation of trial.1 The type of expert determines the content of discovery, if any, that a party must disclose.

A. Testifying experts

A “testifying expert” is one who may testify at trial. Under Federal Rule of Civil Procedure 16(a)(2), a party must disclose the identity of any expert that it may use at trial. The expert must also prepare and sign a written report—which must accompany the party’s initial disclosure—if the expert is (1) retained to provide expert testimony in the case; (2) specially employed to provide expert testimony in the case; or (3) employed by the party, and his or her duties regularly involve giving expert testimony.2 The report must include the components listed in Rule 26(a)(2)(B).3 The timing for these disclosures is governed by Rule 26(a)(2)(D).4 Lawyers who delay the game with late disclosures potentially risk penalties.

Rule 26(a)(2)(B) requires a party to disclose to opposing parties the “facts or data considered” by its testifying expert in formulating an expert report.5 An expert is deemed to have considered materials within the scope of Rule 26(a)(2)(B) if the expert “has read or reviewed the privileged materials before or in connection with formulating his or her opinion.”6 This standard clarifies that production is not limited to only those situations where an expert actually depends upon the information to form his or her opinion.7 The result is that information furnished to a testifying expert must be disclosed even if the information is ultimately rejected by the expert.8 With the adoption of a broad view of “considered” in the District of Kansas, opposing counsel are afforded the opportunity to determine the full range of influences for an expert’s report.9 By the same token, the other side is given fair notice that anything authored, generated, received, read, or reviewed by the expert is considered between the uprights and subject to disclosure.10 One cautionary note: do not try to punt the issue by simply submitting a self-serving affidavit from the testifying expert as to what material she considered in formulating the opinion. This tactic is not deemed controlling by the court.11

B. Retained consulting experts

When a party retains or specially employs12 an expert to prepare for trial or in anticipation of litigation, but does not expect to call the expert at trial, the expert is known as a “retained consulting expert.”13 Facts known or opinions held by such experts are generally not discoverable by interrogatories or deposition.14 Also protected from discovery are the expert’s identity and “other collateral information.”15 But this “discovery immunity” is no steel curtain defense.16 There are two exceptions to the general rule: (1) discovery allowed by Rule 35(b), which deals with physical and mental examinations; and (2) when a party shows “exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.”17

The burden for showing exceptional circumstances is heavy.18 The District of Kansas has declined to find exceptional circumstances several times: In MGP Ingredients Inc. v. Mars Inc., the court held that the defendants had not shown “exceptional circumstances” when they argued that they needed to know the identities of plaintiff’s retained consulting experts because there was a risk of disclosing confidential information to competitors.19 In Disidore v. Mail Contractors of America Inc., the court rejected the plaintiff’s argument that a consulting expert became a fact witness because he was one of only a few people—and the only engineer—who inspected a fifth-wheel trailer before its condition changed.20 But “exceptional circumstances” did exist in Clark v. Associates Commercial Corp., where the plaintiff hired a psychiatrist to examine the plaintiff before a new psychiatrist diagnosed the plaintiff as having a mental disorder.21 In Clark, the court held that the consulting psychiatrist’s test results were the only means by which the defendant could challenge the plaintiff’s mental condition closer to the time of the incident at issue.22 As Clark demonstrates, meeting the “exceptional circumstances” test is not the equivalent of completing a “Hail Mary” pass, but practitioners should call their best plays on third and long.

C. Non-retained consulting experts

A non-retained consulting expert is true to its name: an expert who has been informally consulted in preparation for trial, but is not retained or specially employed. Rule 26(b)(4)(D) implicitly prohibits discovery of these experts’ identity, collateral information, and “information and opinions developed in anticipation of litigation.”23 So, disputes usually pivot on whether an expert was “informally consulted.” To make this determination, the Tenth Circuit counsels that courts should consider several factors:

(1) the manner in which the consultation was initiated; (2) the nature, type and extent of information or material provided to, or determined by, the expert in connection with his review; (3) the duration and intensity
of the consultative relationship; and, (4) the terms of the consultation, if any (e.g., payment, confidentiality of test data or opinions, etc.).

D. Experts whose information was not acquired in anticipation of trial

The final category of experts includes those who a party did not intentionally involve in the case: actors in or viewers of the events that gave rise to the lawsuit and regular employees not specially employed on the case. In this situation, blitz away! These experts are treated as ordinary witnesses, so all facts and opinions are freely discoverable as with any ordinary witness. Written reports are unnecessary under Rule 26(a)(2)(B), but the party must still disclose (1) the subject matter of the witness's expected testimony under Federal Rules of Evidence 702, 703, or 705; and (2) a "summary of the facts and opinions to which the witness is expected to testify."26

II. Special Issues Flagged in the District of Kansas

A. First down: Where does your expert fall in the lineup?

Two of the most hotly litigated issues arise when an expert serves more than one role, or flips roles in the midst of the lawsuit.

1. Wearing two helmets

In litigation involving complex and specialized areas, a witness may perform dual roles as both a testifying expert and a consulting expert. Given that Federal Rule of Civil Procedure 26(a)(2)(B) applies only to material disclosed to and considered by an expert in his capacity as a testifying expert witness, the question arises as to whether, and to what extent, a litigant fumbles the discovery restrictions for a consulting expert when the same expert is also offered as a testifying expert.

The short answer is that information exclusively considered by a "dual expert" in his role as a consulting expert need not be produced under Rule 26(a)(2)(B). That said, a court will recognize this dichotomy only if it is convinced that the materials considered for consulting expert purposes were not also considered within the expert's testifying capacity. When documents cannot be split into these neat categories, the court will resolve any ambiguity in favor of full disclosure.

2. Switching positions

Suppose that an attorney identifies a witness as a testifying expert throughout the majority of the litigation. Late in the fourth quarter, the attorney calls an audible and benches the designation after receiving a notice of deposition from opposing counsel. Can the attorney retroactively invoke the exceptional circumstances standard under Rule 26(b)(4)(D) to halt the deposition of the newly-branded consulting expert?

Recognizing that the intent behind Rule 26(b)(4)(A) is to allow opposing counsel the opportunity to adequately prepare for cross-examination of a testifying expert's trial testimony, the majority of federal district courts hold that the conversion of a testifying expert to a consulting expert restores the protective padding of discovery immunity provided by Rule 26(b)(4)(D). In Cooper v. Ciccarelli, the court quashed a deposition notice for a prior testifying expert who had just switched to consulting expert status. This result is also supported by the primary design of Rule 26(b)(4)(D), which is to prohibit unwarranted access to a party's careful trial preparation.

B. Second down: Keeping the game plan confidential

Another area of dispute centers on the relationship between experts, attorneys, and the privileges and protections that can become tangled. Two key areas of scrimmage are the attorney-client privilege and the work product doctrine.

1. Attorney-client privilege

Material possessed or created by experts may be further blocked from discovery if it meets the requirements for protection under the attorney-client privilege. The privilege may be available for experts if they qualify as an "authorized representative" of the client. As a rationale for extending the privilege to the context of experts, courts have noted that "there undoubtedly are situations ... in which too narrow a definition of 'representative of the client' will lead to attorneys not being able to confer confidentially with nonemployees who, due to their relationship to the client, possess the very sort of information that the privilege envisions flowing most freely.

The party seeking to protect the material bears the burden of establishing that the attorney-client privilege applies and that it has not been waived. Advocates should take care, though: courts do not lightly apply this privilege. In Western Resources Inc. v. Union Pacific Railroad Co., the court held that the privilege applied under the specific circumstances of the case, but cautioned, "What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from a lawyer."

2. Work product doctrine

Both Federal Rule of Civil Procedure 26(b)(3)—governing the attorney work product doctrine—and Rule 26(b)(4)—governing the discovery of information related to experts—apply to facts or data within the scope of Rule 26(b)(1) that was prepared in anticipation of trial. The discovery shield afforded to consulting experts under Rule 26(b)(4)(D), however, is distinct and independent from work product protection. And, prior to the Rule's amendment in 2010, materials prepared or generated by an expert were simply not bestowed the protections provided by the attorney work-product rule.

Momentum has recently shifted in cases addressing an attorney's disclosure of work product materials to a testifying expert. Rule 26(b)(4)(C) now explicitly protects communications between an attorney and a testifying expert, except in three circumstances: (1) when the communications relate to the expert's compensation; (2) when the communications identify "facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed"; or (3) when the communications reveal assumptions provided by the attorney and relied on by the expert. This change likely renders irrelevant prior law in the District of Kansas holding that the disclosure of documents protected by the work product doctrine to a testifying expert, followed by that expert's consideration of those materials, waived the protected status of the documents. Add this protective gear to the new protection found in Rule 26(b)(4)(C): Now, parties need not disclose a draft of an expert report or disclosure required by Rule 26(a)(2). It's a whole new ball game.

C. Third down: Call a timeout for inadvertent production

Sometimes attorneys make mistakes. Sometimes they overlook items that should be discovered or accidentally produce

32 January 2013 | The Journal of the Kansas Bar Association

www.ksbar.org
items that are not discoverable. What happens when an attorney fumbles by inadvertently producing expert information that he or she was not required to produce?

In the District of Kansas, the accidental disclosure of consulting expert documents is treated the same as the unintentional production of information protected by the attorney-client privilege or the work product doctrine. To determine whether the protection afforded by Rule 26(b)(4)(D) is waived, a court will consider the following five factors: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of discovery; (4) the extent of disclosure; and (5) the overriding issue of fairness. With respect to the fifth factor, the court focuses on the policies favoring the insulation of non-testifying experts from discovery. The bottom line is that a lawyer should immediately seek a protective order if the opponent refuses to play ball.

D. Fourth down: Does a new lawsuit begin a new game?

If an expert qualifies for immunity, how long does it last? In other words, if a consulting expert was provided discovery immunity during one case, but he redshirts during subsequent, closely-related litigation, does the immunity extend to the second lawsuit? The District of Kansas has said yes. In Employer’s Reinsurance Corp. v. Clarendon National Insurance Co., the court considered a situation where one party inadvertently produced an affidavit prepared by an expert who had been a retained consulting expert in a prior, closely-related case. The party sought return of the affidavit as privileged. The court compared the protections afforded by Rule 24(b)(4)(B) (now numbered Rule 24(b)(4)(D)) to those afforded attorney work-product material under Rule 26(b)(3). Based on that comparison, the court concluded that Rule 26(b)(4)(B) discovery protection extends, at a minimum, to closely-related litigation. Ultimately, the court ordered the affidavit returned.

E. Overtime: Fees for expert witness deposition preparation

Expert depositions are pay-per-view events. Unless manifest injustice would result, the federal rules direct a party seeking discovery from an expert whose opinion may be presented at trial to pay the expert “a reasonable fee for the time spent in responding to discovery.” In the District of Kansas, the fee requirement is not solely limited to the time the expert spends attending the deposition, but also includes a reasonable amount of time for the expert’s deposition preparation. As a general rule, a party should not be charged for time spent on a preparation activity that it did not request or encourage, such as reading and signing the deposition transcript. Experts’ travel expenses are normally compensable, including the expert’s expenses in shipping documents to produce for a deposition by Federal Express. One district court has even awarded compensation for the time an expert spent meeting with his client’s counsel to prepare for the deposition.

There is no bright-line formula or ratio for determining a reasonable amount of deposition preparation time that may be compensated. What constitutes a reasonable fee for an expert’s deposition preparation time rests within the court’s sound discretion. Courts have approved 5.7 hours of preparation time for a deposition lasting 3.0 hours, and 3.5 hours of preparation for a 1.5-hour deposition. In other instances, courts have reduced the compensable preparation time when the expert spent 30 hours to prepare for a deposition lasting 4.25 hours, and when the expert claimed 16 hours of compensable deposition preparation time even though he had spent the same amount of time (16 total hours) preparing his actual opinions and written report for the lawsuit. Ultimately, the party seeking reimbursement bears the burden of demonstrating the reasonableness of the requested fee.

To avoid unnecessary and costly motion practice over fees for expert witness deposition preparation, careful game planning is essential. Under Rule 26(a)(2), a party presenting a testifying expert at trial must produce “a statement of the compensation to be paid for the study and testimony in the case” as part of the written report. The parties’ discussion(s) about expert deposition costs should proceed from there, with a further appreciation that an expert’s time spent preparing for the deposition may not always be compensable at the same hourly rate for actual deposition time. As aptly stated by one magistrate judge in the District of Kansas, “It is important that the parties understand the expected charges before the deposition, and apply to the Court for relief, if necessary, before the deposition occurs.”

III. End Zone

Pragmatic and wise strategy is important regardless of whether an expert will ultimately testify at trial. Federal practitioners who understand how to manage the rules governing expert discovery are more likely to call the right plays and avoid a costly turnover during a critical part of the game.

About the Authors

Matt Corbin is a partner in the business litigation and appellate practice departments at Lathrop & Gage LLP in Overland Park. Corbin previously served as a law clerk for the Hon. Mary Beck Briscoe, U.S. Court of Appeals for the Tenth Circuit, and for the Hon. G.T. VanBebber, U.S. District Court for the District of Kansas.

Casey Tourtillott is a career law clerk for the Hon. Carlos Murguia in the U.S. District Court for the District of Kansas and an adjunct professor of law at the University of Missouri-Kansas City School of Law. She is also a former career law clerk for the Hon. G.T. VanBebber.

Endnotes

2. Fed. R. Civ. P. 26(a)(2)(B). “Every witness who offers expert testimony is not necessarily ‘retained or specifically employed’ to provide
expert testimony.” Full Faith Church of Love West Inc. v. Hoover Treated Wood Prods. Inc., No. 01-2597, 2002 U.S. Dist. LEXIS 25449, at *4 (D. Kan. Jan. 23, 2002). Application of Fed. R. Civ. P. 26(a)(2)(B)’s requirements depends on the scope of the expert’s testimony. Id.; see, e.g., Spraggins v. Sumner Reg’l Med. Ctr., No. 10-2276, 2010 U.S. Dist. LEXIS 117282, at *9-10 (D. Kan. Nov. 3, 2010) (explaining that when a treating physician’s proposed opinion testimony relates only to the care and treatment of the patient, the physician is not considered a specially retained expert, but if the “physician’s proposed testimony extends beyond the facts made known to him during the course of the care and treatment of the patient and the witness is specifically retained to develop specific opinon testimony, he becomes subject to the provisions of Fed. R. Civ. P. 26(a)(2)(B)); Capital Solutions LLC v. Konica Minolta Bus. Solutions U.S.A. Inc., No. 08-2191-JWL, 2010 U.S. Dist. LEXIS 12891, at *6-8 (D. Kan. Feb. 12, 2010) (rejecting the plaintiff’s argument that it was not required to provide a report under Rule 26(a)(2) for the principal of plaintiff’s company, as the proposed expert opinions went beyond the principal’s observations while working for the company and instead addressed opinions he formed specifically for the litigation); Full Faith Church, 2002 U.S. Dist. LEXIS 25449, at *4-5 (holding that no expert reports were required for general contractors offering expert opinions when their testimony was based only on facts learned during the course of their work as contractors).


4. Rule 37(c)(1) adds teeth to the disclosure obligation by stating in unequivocal terms that “[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1). “The determination of whether a Rule 26(a) violation is ‘substantially justified’ or ‘harmless’ is entrusted to the broadband discretion of the district court.” A. H. v. Knowledge Learning Corp., No. 09-2517-DJW, 2010 U.S. Dist. LEXIS 113465, at *13 (D. Kan. Oct. 25, 2010); see also ClearOne Commc’ns Inc. v. Biamp Sys., No. 08-2191-JWL, 2010 U.S. Dist. LEXIS 12891, at *6-8 (D. Kan. Feb. 12, 2010) (rejecting the plaintiff’s argument that it was not required to provide a report under Rule 26(a)(2) for the principal of plaintiff’s company, as the proposed expert opinions went beyond the principal’s observations while working for the company and instead addressed opinions he formed specifically for the litigation); Full Faith Church, 2002 U.S. Dist. LEXIS 25449, at *4-5 (holding that no expert reports were required for general contractors offering expert opinions when their testimony was based only on facts learned during the course of their work as contractors).


11. W. Res. Inc., 2002 U.S. Dist. LEXIS 19111, at *34, *37. 12. “Specially employed”: a partner at an accounting firm who was asked by the law firm representing the accounting firm to assist a possible
yer’s representative for the purpose of ... securing legal services or advice. ...” K.S.A. 60-426(c)(1).
38. See, e.g., Coffeyville Res. Ref. & Mktg. v. Liberty Surplus Ins. Corp., No. 08-1204-WEB, 2009 WL 790180, at *3, *3 n.4 (D. Kan. Mar. 24, 2009) (holding that the plaintiff failed to demonstrate that the expert was an “authorized representative” or that the consultation was made “in confidence”); Stallings v. Werner Enters., Inc., No. 07-1387-WEB, 2008 WL 4078783, at *2-3 (D. Kan. Aug. 28, 2008) (determining that an independent contractor was not an “authorized representative,” but that he was merely a factual witness to an accident).
40. Under Fed. R. Civ. P. 26(b)(3), a party may obtain documents prepared in anticipation of litigation only if “the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.” Fed. R. Civ. P. 26(b)(3)(A). Even if a party establishes a substantial need, the Rule instructs the court to “protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.” Id. 26(b)(3)(B). Accordingly, there are two categories of work product: “factual work product—the gathering of facts in anticipation of litigation; and opinion work product—the development of mental impressions, opinions or legal theories in anticipation of litigation.” Hamel v. Gen. Motors Corp., 128 F.R.D. 281, 282-83 (D. Kan. 1989). The party raising work product immunity bears the burden of proving that the material is protected. BarclaysAmerican Corp. v. Kane, 746 F.2d 653, 656 (10th Cir. 1984).
41. Employers Reinsurance Corp. v. Clarendon Nat’l Ins. Co., 213 F.R.D. 422, 427 & n.14 (D. Kan. 2003); see also Coffeyville Res. Ref. & Mktg., 2009 U.S. Dist. LEXIS 24803, at *13 n.7 (observing that Rule 26(b)(4)(B) [now 26(b)(4)(D)] is in “one sense” broader than Rule 26(b)(3) in that facts are still discoverable under the work product doctrine, as opposed to Rule 26(b)(4)(B) [now subsection (D)] which prohibits “facts known or opinions held” by a consulting expert absent exceptional circumstances).
42. 26(b)(4)(B) [now 26(b)(4)(D)].
46. Id. (citing Wallace v. Beech Aircraft Corp., 179 F.R.D. 313, 314 (D. Kan. 1998)).
Complex litigation is not limited to federal court practice. Expert witnesses are increasingly used in state court litigation. This article is intended to provide an understanding of state court expert discovery practice that is not dependent on prior knowledge of federal practice. Kansas courts do not follow federal practice in evaluating the admissibility of expert testimony, and the state rules track only parts of the federal discovery rules relating to expert witnesses. Rather than comparing and contrasting Kansas rules with federal practice, the plan here will be to offer a self-contained explanation of the mechanics of state court expert discovery that should help both lawyers and trial judges get through the process with the least likelihood of reversible error.

I. The Purposes of Expert Discovery

Pretrial discovery serves more than one purpose. It is not like practicing for a sporting event. The purpose of pretrial discovery is not just to run though a series of drills to get in shape for the contest and refine technique. A deposition is more than a trial run at the cross examination you will use in the courtroom.

There are four general purposes for conducting any discovery:

1. Factual investigation – the need to learn things you don’t already know;
2. Creating a record for summary judgment;
3. Creating a record for evidentiary objections; and
4. Creating a record for cross examination at trial.

A winning trial strategy requires adequate knowledge of the testimony to be expected from each witness and the exhibits that will be offered. Expert testimony is especially suitable for pretrial discovery, because the experts’ opinions generally are not already present in the factual investigation available to the lawyers at the start of the litigation.

A civil suit is unlike a sporting event because you may win or lose without ever taking the field, through use of the motion for summary judgment. Few cases that involve expert witnesses go to trial without the filing of a motion for summary judgment. Summary judgment procedures require consideration of the discovery record to determine whether the evidence establishes a genuine issue of material fact. The motion is certain to fail if the discovery record is inadequate to allow the judge to see that there is no such genuine issue. Often the only way to avoid summary judgment for your opponent is to present a credible attack on the opposition’s expert.

A pretrial record of expert opinions may also be critical even in cases where there is no reasonable chance of a successful summary judgment motion. Some experts are not qualified to give an opinion, and some opinions are not admissible in evidence no matter who gives them. Any objection to an expert opinion that is not based on a discovery record is unlikely to succeed, because a judge can’t exclude an opinion that has never been stated in plain language.

Waiting until the witness is talking to the jury before you hear what he has to say is not a winning game plan. If pretrial discovery has been done as well as it should be, you should have wealth of material to discuss with the opposing expert on cross examination, ranging from a curriculum vitae to an expert report to a deposition transcript, and copies of any learned articles authored by the witness or relied upon by him.

II. Where’s the Rule Book?

Basic rules concerning expert discovery appear at K.S.A. 60-226(b)(5) and (6). The rules relating to discovery of expert opinions were revised in 1997. It is error to apply expert discovery rules that have been superseded by legislative amendment. So cases that interpret and apply old versions of the discovery rules have limited usefulness. A special rule concerning disclosure of the results of a medical expert by an expert are found at K.S.A. 60-235. The authority of trial judges to impose deadlines for discovery and to limit the number of expert witnesses is found in K.S.A. 60-216.

There are also local discovery rules in some judicial districts, so be aware of the special requirements of those courts.

III. The Black Letter Rules of Expert Discovery

Expert discovery is addressed primarily in K.S.A. 60-226, paragraphs (5) and (6). The most basic rule is the requirement that the parties disclose to one another the “identity of any person who may be used at trial to present expert testimony.”

If a witness may be used by a party to present an expert opinion at trial, then that person’s identity must be disclosed.

The rules impose additional disclosure requirements if the witness is someone who was hired to testify in the case, or if the witness is a party’s full time employee who regularly testifies as an expert. Parties are required to disclose the subject matter of the testimony, the facts and opinions to be covered, and a summary of the grounds for each opinion, for this category of expert witness.

Every expert witness who will testify at trial is subject to deposition. The party who offers the expert witness must first provide the required disclosures about the nature of the testimony to be offered, before the deposition is to occur.

The rule does not expressly require the expert to prepare and personally sign a written report, but the required disclosures must be in writing and signed by the party or by counsel, unless the court orders another method of disclosure.

There are also benchwarmers, “an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial.” Discovery relating to these witnesses is restricted, and is available only on special showing.

Not every person who might give an expert opinion at trial must necessarily fall within one of the classes defined by the rules. There are times when an expert opinion is unexpectedly elicited at trial from someone who was not previously known to be qualified as an expert, or from a person who was not expected to testify as an expert, but only as a fact witness. These witnesses may not be subject to the special disclosure rules of K.S.A. 60-226. Just as you can’t put a player in the lineup before you acquire him in a trade, you can’t disclose the opinions of an expert before you have determined that he is on your team and will testify at trial.

The key event that triggers the special discovery rules for
experts is the express identification of the witness as someone who may testify to an expert opinion at trial. If a party knows that a person listed on a witness list is qualified to give an expert opinion, then that witness is subject to deposition as stated in K.S.A. 60-226(b)(5). There is an exception for specially retained experts hired to act as nontestifying consultants. A special consultant need not appear for deposition unless there is no other way to discover material information, “upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.” If you find out that your opponent has a consultant who possesses uniquely valuable information, or who has unique qualifications, be prepared to prove that this information is not available from another source if you expect to have the court grant you the right to ask the consultant directly.

Experts are professionals, entitled to be paid at professional rates, not amateurs. If an expert is required to appear for deposition, then the witness is entitled to receive “a reasonable fee for time spent in responding to discovery.”13 Although there may be times when a litigant may obtain a refund of the fees spent to discover an expert’s opinions, the plan must be to pay the expert up front to hear what he has to say.

Not every witness who is expected to testify at trial is subject to the full range of expert disclosure obligations. Some experts are not on either team’s roster. Members of the team owe an expert report, while persons who are merely incidentally expected to testify do not. If the expert witness is a person who “is retained or specially employed to provide expert testimony in the case” or if the expert is an employee of a party “whose duties as an employee of the party regularly involve giving expert testimony,” then an expert report must be provided. So an unpaid expert who is not employed by a party (such as a treating physician) must be identified, but no further disclosure of the expected testimony is owed during discovery. And an employee whose job responsibilities do not regularly require appearances as an expert witness also is exempt from the requirement of a written report.

When an expert report is required, it must set forth (1) “the subject matter on which the expert is expected to testify”; (2) “the substance of the facts and opinions to which the expert is expected to testify”; and (3) “a summary of the grounds for each opinion.” The clear implication of the rule is that each properly admissible expert opinion should have an identifiable subject matter, consist of a mixture of facts and opinions, and be grounded in some way, rather than merely being stated as an unexplained conclusion. The disclosure is not required to reveal “every detail of testimony that an expert is expected to give.”14 A party has the right to demand a proper written report prior to the deposition of a witness who is obligated to produce one, but the rules do not also expressly require the production of all materials reviewed by the expert in advance of the deposition. Demands for production of materials relied on by an expert ordinarily would appear to be subject to the rules for other requests for production, if that subject has not been addressed in a case management order.15 Ordinarily any materials relied upon by an expert to reach conclusions that will be offered at trial will be discoverable.16

Although the rule concerning expert disclosures requires reports to be “written, signed, and served” as well as “filed with the court in accordance with subsection (d) of K.S.A. 60-205,” the rule does not expressly state that the report must be solely the work of the witness. If an expert report is written by counsel, the disclosure would appear to satisfy the rule as long as the key information is present in it and it is properly served.

IV. Timing and Sequence of Expert Discovery

The timing and sequence of discovery is ordinarily controlled through a case management conference, which should occur within 45 days of the filing of the defendant’s answer.17 In the absence of a case management conference, the rules assume that expert discovery will relate solely to the minimal disclosures needed to permit the orderly presentation of evidence at trial, with preliminary expert disclosures due no later than 90 days before trial and rebuttal disclosures due 30 days later.18 Supplementation and amendment of expert disclosures is permitted under the rules.19 All supplemental expert disclosures (including rebuttal opinions) are due no later than 30 days before trial, unless a scheduling order imposes a different deadline.20 Don’t expect the judge to let your witness testify at trial to a substantially revised list of conclusions, or to rely on new facts, if you have missed these deadlines for supplementing disclosures.

Much earlier deadlines will be appropriate if the parties know there will be a challenge to the admissibility of expert testimony, or if summary judgment motions are contemplated. It is difficult though not always impossible to address summary judgment or admissibility issues before expert discovery is complete and a pretrial order has been drafted. If an expert clearly is not legally qualified to testify, the details of the opinion may not control, so completion of discovery will not be necessary. But a well-reasoned decision concerning qualifications and substantive admissibility is most often based on a fully complete discovery record.

Lawyers should not expect to complete expert discovery too close to trial, if they contemplate detailed briefing of expert issues. Few trial judges are able to decide a complex challenge to expert testimony from the bench, so a reasonable length of time should be allowed for the judge to take the issue under advisement. Don’t expect the judge to let you call time out at the last second just because an expert issue has come to mind at the last minute.

The consequences of a failure to comply with expert discovery obligations are not automatic, but they can be extreme. Just as a fistfight between athletes can result in expulsion from the game, a litigant who fails to comply with the expert discovery rules can suffer anything from a minor admonition to the extreme sanction of dismissal. Examples include the following:

1. Dismissal of a lawsuit due to unexcused failure to comply with discovery deadlines related to expert opinions.21
2. Summary judgment granted because an expert’s report did not refer to a key conclusion.22
3. Testimony of rebuttal witness excluded at trial because witness was never identified in discovery as an expert.23
4. Directed verdict against plaintiff who sought to rely on expert opinions that were outside scope of discovery disclosures.24
Not every technical noncompliance with discovery rules will be fatal. As long as the other party has a reasonable opportunity to discover the substance of the offered testimony, there may be discretion to overlook a technically objectionable nondisclosure.

1. Discretion to admit testimony of physician at second trial when substance was already known from earlier trial.25
2. Abuse of discretion to dismiss a lawsuit when failure to identify expert excusable due to realignment of parties.26
3. Harmless error to admit undisclosed expert testimony when another properly disclosed witness testified to same conclusions.27

V. Applying the Unwritten Rules

Our sports metaphor breaks down when it comes time to apply the rules. Judges are not limited to the same extent as a sports official. They are expected to employ discretion when the circumstances of the case call for it, rather than blindly and mechanically following a black letter rule. The discretion of judges requires the lawyers to be ready to make adjustments to their own game plans if an unexpected ruling is handed down.

Endnotes
1. (5) Trial preparation: Experts. (A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a disclosure from the expert is required under subsection (b) (6), the deposition shall not be conducted until after the disclosure is provided.
(B) A party, through interrogatories or by deposition, may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in K.S.A. 60-235, and amendments thereto, or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.
(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subsection; and (ii) with respect to discovery obtained under subsection (b)(5)(B) the court shall require, the party seeking discovery to pay the expert a reasonable fee for time spent in responding to discovery under this subsection; and (ii) with respect to discovery obtained under subsection (b)(5)(B) the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.
(D) Disclosure of expert testimony.
(A) A party shall disclose to other parties the identity of any person who may be used at trial to present expert testimony.
(B) Except as otherwise stipulated or directed by the court, this disclosure, with respect to a witness (i) whose sole connection with the case is that the witness is retained or specially employed to provide expert testimony in the case or (ii) whose duties as an employee of the party regularly involve giving expert testimony, shall state the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.
(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (b)(6), within 30 days after the disclosure made by the other party. The party shall supplement these disclosures when required under subsection (e)(1).
(D) Unless otherwise ordered by the court, all disclosures under this subsection shall be made in writing, signed and served. Such disclosures shall be filed with the court in accordance with subsection (d) of K.S.A. 60-205, and amendments thereto.

About the Author
Steve R. Fabert graduated from Harvard University in 1975 and the University of Kansas School of Law in 1979. He practiced law for 32 years with the firm of Fisher, Patterson, Sayler, & Smith LLP in Topeka. He now defends civil litigation for the state of Kansas in the office of Attorney General Derek Schmidt.
tion does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.

(c) Reports of other examinations. Any party shall be entitled upon request to receive from a party a report of any examination, previously or thereafter made, of the condition in controversy, except that the party shall not be required to provide such a report if the examination is of a person not a party and the party is unable to obtain a report thereof. Reports required to be provided under this subsection shall contain the same information as specified for reports under subsection (b).

(d) Order requiring delivery of report. The court on motion may make an order against a party requiring delivery of a report under subsection (b) or (c) on such terms as are just. If an examiner fails or refuses to make or deliver such a report, the court may exclude the examiner’s testimony if offered at the trial.

5. K.S.A. 60-216. Pretrial conferences; case management conference:

(a) Pretrial conferences; objectives. In any action, the court shall on the request of either party, or may in its discretion without such request, direct the attorneys for the parties to appear before it for a conference or conferences before trial to expedite processing and disposition of the litigation, minimize expense and conserve time.

(b) Case management conference. In any action, the court shall on the request of either party, or may in its discretion without such request, conduct a case management conference with counsel and any unrepresented parties. The conference shall be scheduled by the court as soon as possible and shall be conducted within 45 days of the filing of an answer. However, in the discretion of the court, the time for the conference may be extended or reduced to meet the needs of the individual case.

At any conference under this subsection consideration shall be given, and the court shall take appropriate action, with respect to:

(1) Identifying the issues and exploring the possibilities of stipulations and settlement;

(2) whether the action is suitable for alternative dispute resolution;

(3) exchanging information on the issues of the case, including key documents and witness identification;

(4) establishing a plan and schedule for discovery, including setting limitations on discovery, if any, designating the time and place of discovery, restricting discovery to certain designated witnesses or requiring statements be taken in writing or by use of electronic recording rather than by stenographic transcription;

(5) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(6) any issues relating to claims of privilege or of protection as trial preparation material, including, if the parties agree on a procedure to assert such claims after production, whether to ask the court to include their agreement in an order;

(7) requiring completion of discovery within a definite number of days after the conference has been conducted;

(8) setting deadlines for filing motions, joining parties and amendments to the pleadings;

(9) setting the date or dates for conferences before trial, a final pretrial conference, and trial; and

(10) such other matters as are necessary for the proper management of the action.

If a case management conference is held, except as provided in subsection (a)(2)(B) of K.S.A. 60-230, and amendments thereto, no depositions, other than of the parties to the action, shall be taken until after the conference is held, except by agreement of the parties or order of the court. If the case management conference is not held within 45 days of the filing of an answer, the restrictions of this paragraph shall no longer apply.

If discovery cannot be completed within the period of time originally prescribed by the court, the party not able to complete discovery shall file a motion prior to the expiration of the original period for additional time to complete discovery. Such motion shall contain a discovery plan and shall set forth the reason why discovery cannot be completed within the original period. If additional time is allowed, the court shall grant only that amount of time reasonably necessary to complete discovery.

(c) Subjects for consideration at pretrial conferences. At any pretrial conference consideration may be given, and the court may take appropriate action, with respect to:

(1) The simplification of the issues;

(2) the determination of issues of law which may eliminate or affect the trial of issues of fact;

(3) the necessity or desirability of amendments to the pleadings;

(4) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(5) the limitation of the number of expert witnesses;

(6) the advisability of a preliminary reference of issues to a master; and

(7) such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.

In the discretion of the court, any pretrial conference may be held by a telephone conference call.

(d) Final pretrial conference. In any action, the court shall on the request of either party, or may in its discretion without such request, conduct a final pretrial conference in accordance with procedures established by rule of the supreme court.

(e) Pretrial orders. After any conference held under this section, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only by agreement of the parties, or by the court to prevent manifest injustice.

(f) If a party or party’s attorney fails to obey a pretrial order, if no appearance is made on behalf of a party at a pretrial conference, if a party or party’s attorney is substantially unprepared to participate in the conference or if a party or party’s attorney fails to participate in good faith, the judge, upon motion or the judge’s own initiative and after opportunity to be heard, may make such orders with regard thereto as are just, and among others any of the orders provided in subsections (b)(2)(B), (C) and (D) of K.S.A. 60-237, and amendments thereto. In lieu of or in addition to any other sanction, the judge shall require the party or the party’s attorney, or both, to pay the reasonable expenses incurred because of any noncompliance with this section, including attorney fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

6. For example, see Third Judicial District Rules 3.203 and 3.211; Fourth Judicial District Rules 4.203 and 4.206; Eleventh Judicial District Rule 26; Eighteenth Judicial District Rule 206.


12. See K.S.A. 60-226(b)(5)(B) and 60-235.


15. See K.S.A. 60-234(c).


17. See K.S.A. 60-216(b).


19. See K.S.A. 60-226(e).

ATTORNEY DISCIPLINE

DISBARMENT
IN RE MATTHEW M. DIAZ
ORIGINAL PROCEEDING IN DISCIPLINE

FACTS: This is an original proceeding in discipline filed by the Office of the Disciplinary Administrator against the respondent, Matthew M. Diaz, of Forest Hills, N.Y., an attorney admitted to the practice of law in Kansas in 1995. On October 20, 2010, the Office of the Disciplinary Administrator filed a formal complaint against the respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC). Diaz was convicted in court-martial proceedings in the U.S. Navy on May 17, 2007, for (1) violating a lawful general regulation by wrongfully mailing classified secret information, (2) wrongfully and dishonorably transmitting classified documents to an unauthorized individual, (3) knowingly and willfully communicating classified secret information relative to national defense to a person not entitled to receive the information that could be used to injure the United States or to the advantage of a foreign nation, and (4) knowingly removing materials containing classified information without authority and with the intention to retain such materials at an unauthorized location. Diaz’s convictions were the result of his release of information concerning the detainees at Guantanamo Bay, Cuba, for possible habeas corpus proceedings.

HEARING PANEL: A hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on October 19, 2011, where the respondent was personally present and represented by counsel. The hearing panel determined that respondent violated KRPC 1.6(a) (2011 Kan. Ct. R. Annot. 480) (confidentiality) and 8.4(b) (2011 Kan. Ct. R. Annot. 618) (commission of a criminal act reflecting adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer). The hearing panel unanimously recommended that the respondent be suspended for a period of three years.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator recommended that, based upon the respondent’s convictions, the conclusions of the judge advocate general, and the conclusions of the military courts, the respondent be disbarred.

HELD: Court held the evidence before the hearing panel established the charged misconduct of the respondent by clear and convincing evidence and supported the panel’s conclusions of law. Court agreed with the U.S. Navy-Marine Corps Court of Criminal Appeals that he negatively impacted public trust in the fidelity of our military personnel but, more fundamentally, the conduct strikes directly at core democratic processes and that one who elects to serve mankind by taking the law into his own hands thereby demonstrates his conviction that his own ability to determine policy is superior to democratic decision making. Court stated the disclosure of the classified information about which team was assigned to each detainee could increase the chances of their individual members being publicly identified. Given the nature of their work, such identification could put them at personal risk by any Guantanamo Bay detainee’s supporters around the world. Court held that based upon the number and nature of respondent’s violations and criminal convictions, the conclusions of the military courts, the decision of the Judge Advocate General permanently revoking respondent’s certification as a lawyer in the naval service, respondent’s admitted selfish reasons for the clandestine disclosure of classified information, and the ethics standards, disbarment was the appropriate sanction. A minority of the Court would impose the lesser sanction of indefinite suspension.

ORDER OF REINSTATEMENT
IN RE MICHAEL A. MILLETT
NO. 104,199 – NOVEMBER 14, 2012

FACTS: On October 15, 2010, the Kansas Supreme Court suspended the respondent, Michael A. Millett, from the practice of law in Kansas for a period of two years. See In re Millett, 291 Kan. 369, 241 P.3d 35 (2010). Before reinstatement, the respondent was required to pay the costs of the disciplinary action, comply with Supreme Court Rule 218 (2011 Kan. Ct. R. Annot. 379), and comply with Supreme Court Rule 219 (2011 Kan. Ct. R. Annot. 380). On October 15, 2012, the respondent filed a petition with this court for reinstatement to the practice of law in Kansas.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator affirmed that the respondent met all requirements set forth by the court.

HELD: The Court, after carefully considering the record, granted the respondent’s petition for reinstatement. When the respondent has complied with the annual continuing legal education requirements and has paid the fees required by the clerk of the appellate courts and the Kansas Continuing Legal Education Commission, the clerk is directed to enter respondent’s name upon the roster of attorneys engaged in the practice of law in Kansas.

CIVIL

CHILD SUPPORT
IN RE MARRIAGE OF BROWN
SEDGWICK DISTRICT COURT – REVERSED AND CASE IS REMANDED WITH DIRECTIONS
COURT OF APPEALS – REVERSED
NO. 103,758 – OCTOBER 26, 2012

FACTS: In February 2006, Kristin L. Brown petitioned for a divorce from her husband, John Jared Brown. The couple had two young daughters at that time. Jared fell behind in his child support
payments, and eventually his wages were garnished. In November 2009, Jared owed $15,524 in unpaid child support and Kristin requested a judgment against Jared for the child support arrearage and for other monies she claimed Jared owed her, including $15,000. Kristin had provided to erase spousal maintenance and child support obligations that Jared owed to his previous spouse. Jared countered with a number of arguments, including the contention that Kristin was trying to get him to pay her separate bills. Jared also claimed a right to the proceeds from the sale of the parties’ home. After hearing the parties’ arguments, the district judge ruled that Kristin could keep all of the money from the proceeds from the sale of the house and all arrearage would be covered by that and the court “called it good.” The Court of Appeals affirmed the district court’s orders.

ISSUE: Child support

HELD: Court stated that a district court’s authority to discharge or vacate child support that was due under an interlocutory order, other than an ex parte order, is limited. If a motion for modification has not been filed, any court-ordered modification operates prospectively only, and the district court is not authorized to vacate or discharge past-due child support. Court held that although several motions to modify were filed while the divorce was pending, the district court did not make findings that were tied to a motion to modify. Consequently, contrary to the Court of Appeals’ holding in this case, the district court could enter only a prospective order regarding child support and was not authorized to vacate the temporary child support order that had resulted in an arrearage of $15,524. It was not entirely clear that the district court modified or vacated the order. Court found it was unable to state with any certainty which one of the two alternatives was intended by the district court. As a result, Court remanded so the district judge can clarify his intent and make further findings that are consistent with this decision.


**DRIVER’S LICENSE SUSPENSION AND SERVICE OF SUSPENSION NOTICE**

**BYRD V. KANSAS DEPARTMENT OF REVENUE ATCHISON DISTRICT COURT – REVERSED AND REMANDED**

**COURT OF APPEALS – AFFIRMED IN PART, REVERSED IN PART, AND CASE IS REMANDED WITH DIRECTIONS**

**CRAWFORD DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND CASE IS REMANDED WITH DIRECTIONS**

**NO. 106,660 – OCTOBER 26, 2012**

FACTS: Adamson was stopped in traffic at a railroad crossing and noticed a truck rapidly approaching from behind. Adamson tried to move, but the truck, driven by Bicknell, impacted her vehicle and forced her to also collide into the rear of another vehicle in front of her. Officers smelled both burnt and raw marijuana in Bicknell’s vehicle. Bicknell apparently entered a diversion agreement for DUI and participated in a drug treatment program. Adamson sued Bicknell for negligence. The trial court failed to address Bicknell’s motion for an order of protection of deposition before trial. The trial court denied Adamson’s motion to amend the claim of punitive damages. Regarding Bicknell’s motion in limine, the trial court ultimately permitted introduction of expenses paid by Medicaid, PIP benefits, and Adamson’s out-of-pocket expenses. A trial was held on the sole issue of damages. Bicknell claimed Adamson’s injuries were not caused by the accident. The jury found that Adamson sustained damages of $11,100 in medical expenses, $7,500 in economic loss, and $5,000 in present non-economic loss, for a total award of $23,600. The trial court denied Adamson’s motion for a new trial on juror misconduct, prejudice by Bicknell’s counsel, denial of punitive damages, and exclusion of medical evidence. Court of Appeals reversed the trial court’s denial of Adamson’s motion for punitive damages. Court of Appeals also stated there was sufficient evidence to support a finding that the medical evidence of adjustment was related to Medicaid reimbursement and the trial court did not err in excluding evidence of the Medicaid write-off.

ISSUES: (1) Negligence, (2) punitive damages, and (3) medical evidence

HELD: Court found the Court of Appeals failed to address whether Bicknell knew the risk and drove with knowledge of a dangerous condition. Court stated that the district court must consider all the evidence cited by Adamson in her motions seeking punitive damages, not just Bicknell’s testimony. But the evidence of Bicknell’s knowledge of his impairment presents a closer question than in the mail. However, Court of appeals reversed the district court, concluding that Clark had accomplished the purpose of the statute and could be deemed to have mailed the DC-27 form under the doctrine of substantial compliance.

**STATUTES**: K.S.A. 20-1001, -1002(c), -1433; K.S.A. 20-3018; K.S.A. 31-150a; K.S.A. 43-166; K.S.A. 58-30a15; and K.S.A. 60-103, -303, -304, -2803

**NEGLIGENCE, PUNITIVE DAMAGES, AND MEDICAL EVIDENCE**

**ADAMSON V. BICKNELL**

**CRAWFORD DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND CASE IS REMANDED WITH DIRECTIONS**

**COURT OF APPEALS – AFFIRMED IN PART, AND REVISED IN PART AND REMANDED WITH DIRECTIONS**

**NO. 106,660 – OCTOBER 26, 2012**

FACTS: Adamson was stopped in traffic at a railroad crossing and noticed a truck rapidly approaching from behind. Adamson tried to move, but the truck, driven by Bicknell, impacted her vehicle and forced her to also collide into the rear of another vehicle in front of her. Officers smelled both burnt and raw marijuana in Bicknell’s vehicle. Bicknell apparently entered a diversion agreement for DUI and participated in a drug treatment program. Adamson sued Bicknell for negligence. The trial court failed to address Bicknell’s motion for an order of protection of deposition before trial. The trial court denied Adamson’s motion to amend the claim of punitive damages. Regarding Bicknell’s motion in limine, the trial court ultimately permitted introduction of expenses paid by Medicaid, PIP benefits, and Adamson’s out-of-pocket expenses. A trial was held on the sole issue of damages. Bicknell claimed Adamson’s injuries were not caused by the accident. The jury found that Adamson sustained damages of $11,100 in medical expenses, $7,500 in economic loss, and $5,000 in present non-economic loss, for a total award of $23,600. The trial court denied Adamson’s motion for a new trial on juror misconduct, prejudice by Bicknell’s counsel, denial of punitive damages, and exclusion of medical evidence. Court of Appeals reversed the trial court’s denial of Adamson’s motion for punitive damages. Court of Appeals also stated there was sufficient evidence to support a finding that the medical evidence of adjustment was related to Medicaid reimbursement and the trial court did not err in excluding evidence of the Medicaid write-off.

ISSUES: (1) Negligence, (2) punitive damages, and (3) medical evidence

HELD: Court found the Court of Appeals failed to address whether Bicknell knew the risk and drove with knowledge of a dangerous condition. Court stated that the district court must consider all the evidence cited by Adamson in her motions seeking punitive damages, not just Bicknell’s testimony. But the evidence of Bicknell’s knowledge of his impairment presents a closer question than
the Court of Appeals acknowledged, and it should not have made the findings reserved to the district court. Court remanded to the district court for a rehearing on Adamson’s motion seeking punitive damages because factual findings must still be made.

On rehearing, the district court should consider the same evidence cited by Adamson in her original motion and the motion for reconsideration. Court held the Court of Appeals improperly considered the medical expenses issue because it was not preserved for appeal.

CONCURRING IN PART/DISSenting IN PART: Justice Luckert dissented from the majority’s decision to reverse the district court’s denial of Adamson’s motion to amend to add a claim for punitive damages. Justice Luckert concurred in the majority’s conclusion that Adamson did not preserve the medical expense issue for appeal.

STATUTES: K.S.A. 20-3018; and K.S.A. 60-209, -404, -3401, -3702, -3703

CRIMINAL

STATE V. BACKUS
WYANDOTTE DISTRICT COURT – AFFIRMED NO. 102,951 – NOVEMBER 2, 2012

FACTS: John Backus appeals his convictions for premeditated first-degree murder, aggravated kidnapping, and aggravated robbery in the 2005 brutal beating and death of Dollar General manager Robin Bell in Bonner Springs. Backus raised six issues: (1) the district court erred in denying Backus’ request for a lesser-included offense instruction on second-degree murder; (2) the district court erred in giving an “Allen-type” jury instruction; (3) the district court’s denial of Backus’ new trial motion was an abuse of discretion; (4) the district court erred in denying Backus’ request for a lesser-included offense instruction; (5) the district court erroneously admitted inflammatory photographs; and (6) cumulative error denied the defendant a fair trial.

ISSUES: (1) Lesser-included instruction, (2) Allen instruction, (3) motion for new trial, (4) inflammatory photographs, (5) evidence of defendant’s mental retardation, and (6) cumulative error

HELD: (1) Court held that due to the evidence of premeditation and savagery of the beating, if the jury believed that Backus participated in the killing, it had to find that it was a cold, calculated, and premeditated act. There was no reasonable possibility that a lesser-included offense instruction could have contributed to the verdict. (2) Court held that given Backus’ concession that the evidence was sufficient to prove premeditation, and in the absence of any evidence that the jury was having difficulty reaching a verdict, the defendant failed to carry his burden to convince the Court that the jury would have reached a different verdict had the Allen instruction not been given. (3) Court rejected Backus’ motion for new trial based on alibi evidence from his father. Court held that if it were to believe Backus’ father’s affidavit, Backus had to personally know that his father was a potential alibi witness and he was required to exercise diligence in producing that evidence. (4) Court held the district court thoughtfully reviewed and discussed each of the photographs, identifying permissible reasons for each photograph that was admitted over objection. Court stated the photographs were relevant and admissible, and the district court exercised its discretion in an appropriate manner. (5) Court held the trial court gave Backus two opportunities to present evidence of his mental retardation, but even viewing the evidence in the light most favorable to Backus, the evidence failed to establish that Backus even qualified as a special education student, much less as mentally retarded. (6) Court found any errors in this case were not such as would lead to the conclusion that Backus was denied a fair trial. Court held the evidence was overwhelming and the result of the trial would have been no different without the errors.

STATUTES: K.S.A. 21-4634, -4635, -4138; K.S.A. 22-3302, 3414; and K.S.A. 76-12b01

Appellate Practice Reminders...

From the Appellate Court Clerk’s Office

Motions for Extension of Time

The appellate courts process a significant number of motions for extension of time, principally to file briefs. Rule 5.02 applies to a motion for extension of time to perform any act required under the rules within a specified time. Effective July 1, 2012, Rule 5.02 more specifically states the required contents of a motion for extension of time. The motion must be served on all parties and state (1) the present due date, (2) the number of extensions previously requested, (3) the amount of additional time needed, and (4) the reason for the request. Motions for extension of time should always be filed before the present due date.

If a motion for extension of time is filed after the due date, the motion must state the reasons constituting excusable neglect for failure to file the motion in a timely manner. A motion filed after the due date should be designated “out of time” in the caption.

Filing Deadlines

Filing deadlines in the appellate rules have been amended, consistent with 2010 statutory amendments to the civil code. Most deadlines are a multiple of seven. For example, the time to file a reply brief under Rule 6.01(b)(5) changed from 15 days to 14 days after service of the brief to which reply is made. The time in which a motion for rehearing or modification in the Supreme Court can be filed under Rule 7.06 changed from 20 days to 21 days after the decision is filed. Don’t rely on your memory of filing deadlines. Check the rules to verify how many days you have in which to act.

Docket Fee

Rule 2.04(d)(1) states that the appellate docket fee is $125 in addition to any applicable surcharge. The current surcharge is $10 for a total docket fee of $135. Failure to remit the appropriate docket fee delays docketing of the appeal.

For questions about these rules or appellate procedure generally, call the Clerk’s Office and ask to speak with Carol G. Green, Clerk of the Appellate Courts, at (785) 296-3229.
STATE V. BENSON  
SHAWNEE DISTRICT COURT – AFFIRMED  
COURT OF APPEALS – AFFIRMED  
NO. 97,905 – NOVEMBER 9, 2012

FACTS: Benson was convicted and sentenced for felony DUI. He argues the district court violated his right of confrontation under the Sixth Amendment to the U.S. Constitution by admitting into evidence the certificate of calibration for the Intoxilyzer 5000 machine used to determine the level of alcohol in Benson's breath. He also challenges the use of his criminal history at sentencing.

ISSUES: (1) DUI, (2) right of confrontation, and (3) certificate of calibration

HELD: Court held the certificate of calibration in this case was routinely generated as part of regular equipment maintenance. It was not created to establish a specific element in the prosecution of Benson's case. Further, the certificate speaks only to the reliability of the evidence that Benson's blood alcohol level was above the legal limit, it does not prove or disprove that element. Consequently, Court held that the certificate of calibration is not a testimonial statement and is not subject to the Confrontation Clause requirements of Crawford. The district court did not violate Benson's Sixth Amendment rights by admitting the certificate. Court rejected Benson's criminal history challenge pursuant to Ivory.

STATUTE: K.S.A. 21-4701

STATE V. BURNS  
WYANDOTTE DISTRICT COURT – REVERSED AND REMANDED  
NO. 103,088 – OCTOBER 26, 2012

FACTS: Burns convicted of aggravated criminal sodomy and aggravated indecent liberties with a child. On appeal he claimed: (1) district court judge erred in answering jury question without Burns being present, and gave improper answer; (2) prosecutor improperly argued jury during closing argument to let victims know “they did the right thing”; (3) district court judge erred in instructing jury prior to deliberation that another trial would burden both sides; (4) cumulative error denied Burns a fair trial; and (5) insufficient evidence supported alternative means of committing aggravated criminal sodomy and aggravated indecent liberties.

ISSUES: (1) Response to jury question, (2) prosecutorial misconduct, (3) Allen-type instruction, (4) cumulative error, and (5) alternative means

HELD: Any error in Burns not being present throughout district court’s response to jury question was harmless under facts. In response to jury's request for clarification between two identical counts, judge responded by telling jury “Yes, it happened more than once,” rather than “The State has alleged it happened more than once.” Abuse of discretion for judge to answer a jury question by stating the crime happened at all, let alone that the crime happened more than once.

State concedes the “did the right thing” response was improper under later holding in State v. Martinez, 290 Kan. 992 (2010). Under facts, this error alone was not reversible error.

State concedes the Allen-type instruction was error under later holding in State v. Salts, 288 Kan. 263 (2009). This error alone was not reversible error. Interrelationship of three errors in this case significantly affected their impact. There is a reasonable probability that cumulative errors affected the verdict, substantially prejudiced Burns, and denied him a fair trial. Convictions reversed. Case remanded for new trial.

Alternative means claims addressed for guidance on remand. Inclusion of “by any body part or object” in definition of sodomy in K.S.A. 21-3502(2) does not establish two alternative means of committing aggravated criminal sodomy, K.S.A. 21-3506(a)(1), but are options within alternative means of committing that crime. Likewise, Burns’ alternative means argument regarding mental state required for aggravated indecent liberties, K.S.A. 21-3504(a), is rejected because language sets forth options within means. Burns concedes sufficient evidence of anal penetration by a body part, and of sexual intent. He is not entitled to reversal of these convictions.

STATUTE: K.S.A. 21-3501(2), -3504(a), -3504(a), -3504(a)(3) (A), -3506(a)(1)

STATE V. BRUCE  
NEOSHO DISTRICT COURT – AFFIRMED  
NO. 105,884 – NOVEMBER 2, 2012

FACTS: Bruce convicted of rape, aggravated sodomy, and aggravated indecent liberties. On appeal he claimed: (1) each conviction should be reversed because insufficient evidence supported each of the alternative means for committing the crimes as jury was instructed; (2) three statements by prosecutor constituted misconduct; (3) his Jessica’s Law life sentence violates the prohibition against cruel and unusual punishment in § 9 of Kansas Constitution Bill of Rights; and (4) district court erred in imposing lifetime post-release supervision.

ISSUES: (1) Alternative means, (2) prosecutorial misconduct, (3) Jessica’s Law sentence and Kansas Constitution, and (4) post-release supervision

HELD: Applying State v. Brown, 295 Kan. ___ (August 24, 2012), court finds no error in the jury instructions, and finds sufficient evidence supports each offense. Within first alternative means of committing aggravated criminal sodomy by oral contact, K.S.A. 21-3501(2), there are three factual circumstances that prove that crime but these do not present alternative means of committing aggravated criminal sodomy. For aggravated indecent liberties, phrase “either the child, the offender, … or both” in K.S.A. 21-3504(a)(3) (A) does not state material elements of the crime but instead outlines options within a means. And for rape, the alternative methods of penetrating the female sex organ are not alternative means, but options within a means.

In first instance, prosecutor misstated jury's options in considering credibility of victim, and intended the misstatements to improperly influence jurors to believe they had no choice other than to find victim entirely credible and convict Britt of all charges. No reversible error because no prejudice, and statements not gross and flagrant. Second, prosecutor's comment on credibility of Britt's expert witness was not error. Third, prosecutor's statement “to do the right thing” in this case was not improper. It was a general appeal for justice and not explicitly tied to the community or victim, distinguishing State v. Nguyen, 285 Kan. 418 (2007).


Parties agree that imposition of lifetime post-release supervision was error. That part of Britt’s sentence is vacated.


STATE V. BRUCE  
NEOSHO DISTRICT COURT – AFFIRMED  
NO. 105,884 – NOVEMBER 2, 2012

FACTS: Information obtained through wiretap obtained by assistant attorney general , pursuant to Kansas attorney general's signed written delegation of authority, led to prosecution of Bruce on drug charges. Bruce filed motion to suppress all evidence derived from the wiretap, arguing the wiretap order was unlawful. District court
granted motion to suppress, finding the Kansas statutory scheme for authorizing wiretaps impermissibly expanded authority in federal statute, 18 U.S.C. § 2516(2). State filed interlocutory appeal.

ISSUE: Pre-emption – wiretap authorization

HELD: Court reviews wiretap statutes, and decisions in In re Olander, 213 Kan. 282 (1973), and State v. Farba, 218 Kan. 394 (1975). District court’s suppression order is affirmed. K.S.A. 2011 Supp. 75-710, when read in conjunction with K.S.A. 2011 Supp. 22-2515(a)(1)-(2) to permit Kansas attorney general to delegate power to apply for wiretap order to an assistant attorney general is more permissive than 18 U.S.C. § 2616(2) (2006) and thus preempted. A wiretap order obtained under such a delegation violates a central provision of the federal statutory scheme, and evidence obtained or derived from the wiretap must be suppressed. Here, Bruce established a violation of federal wiretap law because the assistant attorney general was not authorized to submit the wiretap application, the violation ran afoul of a provision intended to play a central role in the statutory wiretap scheme, and that error is not subject to harmless analysis.


STATE V. JONES
WYANDOTTE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 97,696 – NOVEMBER 9, 2012

FACTS: Jones convicted of aggravated criminal sodomy, furnishing alcohol to a minor for an illicit purpose, and endangering a child. On appeal he claimed: (1) admission of nurse’s testimony regarding hospital laboratory results positive for alcohol and drugs violated Jones’ right to confrontation under federal and state constitutions; (2) child endangerment conviction was based on alternative means without jury unanimity; (3) district court erred in failing to instruct jury on lesser-included offense of criminal sodomy; and (4) sentence was unconstitutionally enhanced based on prior convictions not proved to jury beyond a reasonable doubt. Court of Appeals affirmed in unpublished opinion. Jones’ petition for review granted in part to clarify whether nurse’s testimony about hospital laboratory results was testimonial in nature within meaning of Confrontation Clause.

ISSUES: (1) Confrontation Clause – testimony about hospital laboratory results, (2) alternative means – K.S.A. 21-3680, (3) jury instruction on lesser-included offense, and (4) sentencing

HELD: There was no challenge to the Court of Appeals, addressing merits of Confrontation Clause claim raised first time on appeal. Review granted when factors in State v. Brown, 285 Kan. 261 (2007), offered best guidance in discerning testimonial nature of a statement. Subsequently, State v. Miller, 293 Kan. 535 (2011), synthesized recent U.S. Supreme Court decisions, refined concept of statements made in context of medical treatment, and adopted nonexclusive list of most relevant considerations for establishing testimonial nature of a statement. Here, Court of Appeals determined that nurse’s testimony about hospital lab results was not testimonial in nature, and opined that the evidence supported a finding that hospital lab results at issue were generated primarily for medical treatment purposes. Because Jones did not raise confrontation issue at trial, insufficient factual findings permit review of that ruling. Jones’ alternative means issue does not fit facts of this case. Court of Appeals correctly held this was not an alternative means case. Under facts of this case, where uncontested trial evidence established that victim was 12 years old at the time Jones committed oral sodomy on her, evidence was insufficient for jury to reasonably convict Jones of simple criminal sodomy. District court did not err in failing to give a lesser-included offense instruction on that crime.

Apprendi challenge to sentence is defeated by controlling Kansas Supreme Court cases.

STATUTES: K.S.A. 21-3505(a)(2), -3680; and K.S.A. 22-3414(3)

STATE V. LECLAIR
SALINE DISTRICT COURT – REVERSED
COURT OF APPEALS – REVERSED
NO. 101,201 – OCTOBER 26, 2012

FACTS: LeClair convicted in the state of Washington of statutory rape and indecent liberties. He moved to Salina and registered as sex offender in April 2007. On June 1 he left for Las Vegas and sent postcard June 5 to Salina Sheriff’s Office that he was leaving Kansas, would not return, and would contact authorities at his new location. After hitchhiking through various cities for three weeks and often being homeless, he landed in Las Vegas where he rented an apartment on June 30 and registered with Las Vegas police on July 9. Kansas charged and convicted LeClair with failing to register within 10 days of leaving Salina. Court of Appeals affirmed that conviction, 43 Kan. App. 2d 606. LeClair petitioned for review on claim that insufficient evidence supported his conviction, and asking for interpretation of “change of address of residence” in K.S.A. 22-4904(b).

ISSUE: Sufficiency of evidence – change of address of residence

HELD: Under K.S.A. 22-4904(b), an offender does not change the address of residence until obtaining a new place of habitation where the person intends to remain. Under facts of this case, LeClair never adopted a “place of habitation,” to which, whenever he was absent, he had the “the intention of returning,” and thus during that three week period did not “change the address of his residence” to a “new address.” Accordingly, he was not required to register under K.S.A. 22-4904(b). His conviction under K.S.A. 22-4904(b) of failing – within 10 days of changing his address of residence – to inform law enforcement agency where he last registered of his new address, is reversed. Subsequent legislation impacting an offender in a similar situation is noted, K.S.A. 2011 Supp. 22-4905(e).

STATUTES: K.S.A. 2011 Supp. 22-4905(e); K.S.A. 20-3018(b); K.S.A. 22-4901 et seq., -4903, -4904(b); and K.S.A. 77-201

STATE V. PHILLIPS
SEDGWICK DISTRICT COURT – AFFIRMED IN PART
AND VACATED IN PART
NO. 102,282 – OCTOBER 26, 2012

FACTS: Phillips convicted of first-degree felony murder, attempted aggravated robbery, and criminal possession of firearm. The shooting death stemmed from unarmed victim’s scuffle with Phillips after Phillips and the victim robbed two people at gunpoint at the same house. On appeal Phillips claimed: (1) district court judge erred in failing to instruct jury on lesser-included offenses of second-degree murder and voluntary manslaughter, and on self defense, (2) State failed to establish the murder was committed during the commission of the underlying felonies rather than after the underlying felonies had been completed; (3) prosecutor misstated the law during closing argument by telling jury the aggravated robberies were not completed until Phillips left the house; (4) error to allow admission of evidence showing Phillips fled from police at unrelated traffic stop months after the shooting and gave officers an alias name; and (5) district court judge improperly imposed lifetime post-release supervision.

ISSUES: (1) Jury instructions, (2) sufficiency of the evidence, (3) prosecutorial misconduct, (4) admission of flight and alias evidence, and (5) lifetime post-release supervision

HELD: Under facts of case, no clear error shown in district court’s failure to instruct jury on second-degree murder or voluntary manslaughter. And self-defense instruction not applicable where Phillips was charged with aggravated robbery, a forcible felony.
Evidence viewed in light most favorable to the prosecution was sufficient to establish beyond a reasonable doubt that the murder occurred during the res gestae of the aggravated robberies.

Prosecutor misstated the law on robbery to the extent she informed jury the aggravated robberies were not completed until Phillips left the house. This misconduct was harmless under facts of case. While statement may be considered gross and flagrant, there is no showing of ill will, and no reasonable possibility the misconduct affected the verdict.

Under facts of case, evidence of Phillips’ flight from a traffic stop and use of alias was relevant, was not more prejudicial than probative, and was admissible at trial. No abuse of discretion by the district court in admitting this evidence.

Sentencing court has no authority to order term of post-release supervision in conjunction with off-grid indeterminate life sentence. State concedes trial court erred in sentencing Phillips to lifetime post-release supervision rather than to a prison term with possibility of parole. That portion of Phillips’ sentence is vacated.

Under facts of case, the verdict in Phillips’ trial was not insupportable. Evidence viewed in light most favorable to the prosecution was sufficient to establish beyond a reasonable doubt that the murder occurred during the res gestae of the aggravated robberies. Phillips’ flight from traffic stop, under facts of case, was not the type of flight that raises issue of premeditation.

While statement may be considered gross and flagrant, there is no showing of ill will, and no reasonable possibility the misconduct affected the verdict.

STATE V. TAPIA
SEWARD DISTRICT COURT – AFFIRMED COURT OF APPEALS – AFFIRMED NO. 100,596 – NOVEMBER 2, 2012

FACTS: Tapia convicted of nonresidential burglary, vehicular burglary, and conspiracy to commit burglary. On appeal he claimed district court lacked jurisdiction to try him on the conspiracy charge because State failed to allege an overt act in furtherance of the conspiracy. He also claimed district court erred in not giving jury an accomplice instruction, and in using criminal history and aggravating factors not proven to a jury. Court of Appeals affirmed finding in part the complaint was defective but this defect did not deprive district court of jurisdiction to try Tapia on conspiracy charge. 42 Kan. App. 2d 615. Tapia’s petition for review granted.

ISSUES: (1) Sufficiency of evidence or defective charging document, (2) accomplice jury instruction, and (3) sentencing

HELD: K.S.A. 21-3302(a) is interpreted. State’s failure to allege an overt act in furtherance of a conspiracy as required by K.S.A. 21-3302(a) raises due process concerns and is subject to general rules of criminal procedure, such as analysis in State v. Hall, 246 Kan. 728 (1990), but does not require an insufficiency of evidence analysis. Holding to the contrary in State v. Marino, 34 Kan. App. 2d 857 (2006), is overruled, and contrary dicta in State v. Shirley, 277 Kan. 659 (2003), is disapproved. Court of Appeals correctly ruled that State’s error in its allegation of a specific overt act in furtherance of the conspiracy does not constitute reversible error based on argument of insufficient evidence.

Under facts of case, it was legally and factually appropriate to give PIK cautionary instruction regarding accomplice testimony. Failure to give the instruction was not clearly erroneous because accomplices’ testimony was corroborated by other evidence, Tapia’s guilt was plain, and jury was cautioned about weight to be accorded testimonial evidence.

DISSENT (Johnson, J.)(joined by Beier, J.): Believes statute defining conspiracy, K.S.A. 21-3302(a) creates a sufficiency of the evidence problem when complaint fails to allege any overt act, and continues his objection to the court’s adherence to jurisdiction-by-waiver rule manufactured from whole cloth in Hall.

STATE V. WADE
CHAUTAUQUA DISTRICT COURT – AFFIRMED IN PART, VACATED IN PART, AND REMANDED NO. 101,548 – OCTOBER 26, 2012

FACTS: Supreme Court reversed Wade’s conviction for first-degree felony murder and aggravated burglary, and remanded for retrial. 284 Kan. 527 (2007). Upon retrial, Wade convicted of premeditated first-degree murder and aggravated burglary. On appeal he claimed district court erred in: (1) failing to adequately answer jury’s question about definition of premeditation; (2) denying Wade’s request for lesser-included offense jury instruction on voluntary manslaughter; (3) imposing enhanced sentence based upon prior conviction not included in the complaint or proved to jury beyond a reasonable court; and (4) assessing attorney fees against Wade without adequately assessing his ability to pay or burden of payment.

ISSUES: (1) Response to jury question, (2) lesser-included offense instruction, (3) use of criminal history at sentencing, and (4) BIDS attorney fees

HELD: District court’s response, telling jury to focus on first paragraph of instruction that defined premeditation, is questioned, but the answer was not arbitrary, fanciful, or unreasonable.

District court properly refused to instruct jury on voluntary manslaughter as a lesser-included offense of premeditated first-degree murder. Facts in this case clearly established that shooting death of victim did not occur during a sudden quarrel, did not occur while Wade was experiencing an intense or vehement emotional excitement within meaning of heat of passion, and did not result from action on impulse without reflection.


STATUTES: K.S.A. 21-3413; and K.S.A. 22-3414(3), -3420(3), -4513
COURT OF APPEALS

CIVIL

ADOPTION
IN RE ADOPTION OF I.M.
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 107,456 – NOVEMBER 9, 2012

FACTS: J.M. wants to adopt his former stepdaughter, I.M. I.M. has always considered J.M. her father. I.M.’s mother agrees that the adoption would be in I.M.’s best interest, but does not want to give up her own parental rights to I.M. The sole issue in this case is whether Kansas law allows such an adoption. The district court dismissed the petition because of the lack of statutory authority to grant this particular type of adoption. In essence, the district court believed that because J.M. was a single person attempting to adopt I.M., the Kansas statutory scheme requires that Mother’s parental rights must be terminated if the adoption were to be granted.

ISSUE: Adoption

HELD: Court found that Kansas adoption laws do not allow a former stepparent to adopt a former stepchild while also allowing the biological parents to retain parental rights over the child. If such an adoption is to be allowed in the future it will have to be by legislative enactment. Court held the district court did not err when it dismissed J.M.’s petition to adopt I.M. for failure to state a claim.

STATUTE: K.S.A. 59-2111, -2112, -2113, -2118, -2129, -3053

CORPORATION COMMISSION, TELEPHONE COMPANY, AND JURISDICTION
THE S&T TELEPHONE COOPERATIVE ASSOC. INC. V. KCC
KANSAS CORPORATION COMMISSION – APPEAL DISMISSED

FACTS: The Kansas Corporation Commission (KCC) ordered S&T Telephone Cooperative to provide information that would be used to determine future payments to the company from the Kansas Universal Service Fund, and the telephone company provided some of that information. When the KCC failed to take further action within 30 days, the telephone company moved for an order directing increased support from the service fund based on the information the company had provided. The telephone company sought to apply a deadline found in K.S.A. 66-117(c), a Kansas statute that comes into play when a common carrier or utility has applied for some change in rates or charges. But the KCC denied the motion because it said that the telephone company had made no application under K.S.A. 66-117.

ISSUES: (1) Corporation commission, (2) telephone company, and (3) jurisdiction

HELD: Court agreed with the KCC. Court stated that an application is a request for some action or relief, not the mere filing of information in response to the order of a regulatory agency. No application was made here, and the 30-day limit found in K.S.A. 66-117(c) wasn’t at issue.

The telephone company’s assertion that the KCC took final action here is solely dependent upon its claim that the KCC’s failure to act constituted action because of the 30-day time limit in K.S.A. 66-117(c). Since that time limit has no application to this case, the KCC hasn’t taken any appealable action. Court dismissed case for lack of jurisdiction


REAL ESTATE AND EASEMENT
KOCH V. PACKARD ET AL.
BARBER DISTRICT COURT – REVERSED AND VACATED
NO. 107,585 – NOVEMBER 2, 2012

FACTS: The Kochs and Packards own adjacent property. In January 2011, Koch filed a petition for declaratory judgment in Barber County District Court claiming he had a prescriptive easement across the Packard land. Koch claimed that a roadway across the Packards’ land gave him access to his land – and that the Packards had interfered with this access by installing a gate that prevented Koch from getting to his property. Koch asked the court for an order determining he had a prescriptive easement across the Packards’ land, an award for damages sustained when the Packards interfered with his easement, and a permanent injunction enjoining the Packards from interfering with the easement. When the court looked at the actual usage of the roadway, it found Koch had been using the roadway for farming, recreational, and hunting purposes, and to generally care for his land since 1993 (a period greater than 18 years) – and this usage had been unrestricted. The court also found that Koch and his invitees frequently used the roadway and that Koch had even attempted to perform maintenance on the roadway at one point. The court noted Koch’s testimony that the roadway had also been used by the landowners that own property south of the Packards’ land, and he and others are currently using the roadway and have been for many years. The court observed that Koch admitted he was not claiming “exclusive use” of the roadway. The district court ultimately determined that Koch had acquired a prescriptive easement across the Packards’ land. In addition, the court found the Packards had committed trespass by installing a gate across the easement and by allowing cattle to graze there. The court awarded Koch damages, ordered the Packards to remove the gate, and enjoined them from interfering with Koch’s use of the roadway.

ISSUES: (1) Real estate and (2) easement

HELD: Court overturned the district court’s ruling that Koch acquired a prescriptive easement in a roadway on land owned by the Packards. Kansas case law requires exclusivity as an element for prescriptive uses. Court held the facts in this case revealed that Koch has not had the exclusive use of this roadway over the years and, therefore, the court erred when it ruled that he had a prescriptive easement. Court stated that all Koch had was a license which could not change into a prescriptive easement.

STATUTE: K.S.A. 60-503

CRIMINAL

STATE V. EDWARDS
SEDGWICK DISTRICT COURT – AFFIRMED

FACTS: Charles L. Edwards, a Wichita area high school music instructor, engaged in sexual intercourse with one of his 18-year-old high school students. In this appeal of his unlawful sexual relations conviction, Edwards contends the statute defining his conduct as a crime is unconstitutional because it infringes upon his fundamental right, while in the privacy of his home, to engage in sexual conduct with a consenting adult. In sharp contrast, the State maintains Edwards has no constitutional right to have sexual relations with one of his students and there are legitimate reasons to make such conduct a crime.

ISSUE: Sexual relations between teacher and student

HELD: Court held that the state has a legitimate interest in keeping the environment of those children required by law to attend
STATE V. DELAROSA  
FINNEY DISTRICT COURT – AFFIRMED  
NO. 105,534 – OCTOBER 26, 2012  
FACTS: Officers were on foot-patrol and came across a group of seven or eight people standing around a blue vehicle. The area was known for gang activity and illegal narcotics. As Officers approached the group, Delarosa “tossed something behind him into the grass.” Later that evening, Delarosa told Officer Burke that “earlier” he had “smoked marijuana, but that he didn’t have any on him.” During his search of that area officer discovered a blue metallic pipe. commonly used for smoking marijuana. No one claimed ownership of the pipe. A jury found Delarosa guilty of possession of marijuana and/or its active ingredient THC. Delarosa was found not guilty, however, of possession of drug paraphernalia. He was sentenced to 14 months’ imprisonment but granted a 12-month probation.  
ISSUES: (1) Sufficiency of the evidence, (2) unanimous jury verdict, and (3) duplicity  
HELD: Under the facts of this case, Court determined that (1) viewed in the light most favorable to the prosecution, there was sufficient evidence that a rational fact-finder could have found the defendant guilty beyond a reasonable doubt of possession of marijuana and/or its primary active ingredient tetrahydrocannabinol (THC); (2) given this evidence, the defendant’s right to a unanimous jury verdict was not violated; and (3) the defendant’s failure to object or raise the issue of duplicitous charging in either the district court or on appeal precludes appellate review of that issue.  
STATUTES: K.S.A. 22-3421; and K.S.A. 65-4105(d)(16),(24), -4109, -4127a, -4162  

STATE V. FROST  
SEDGWICK DISTRICT COURT – AFFIRMED  
NO. 106,375 – NOVEMBER 9, 2012  
ISSUE: Hard 25 life sentence – cruel and unusual punishment  
HELD: Hard 25 life sentence for conviction involving aggravated indecent liberties with a child, K.S.A. 2010 Supp. 21-3504(a)(3) (A), is not out of proportion. Fact that penalty for certain categories of homicide may be less severe than penalties for other nonhomicide crimes does not automatically render penalties for the nonhomicide crimes unconstitutional. A hard 25 life sentence under K.S.A. 2010 Supp. 21-4643(a)(3)(A) serves legitimate penological goals of retribution, deterrence, incapacitation, and rehabilitation. The sentence does not constitute cruel and unusual punishment under Eighth Amendment to U.S. Constitution.  

STATE V. JAMES  
FRANKLIN DISTRICT COURT – AFFIRMED  
NO. 106,083 – NOVEMBER 9, 2012  
FACTS: James was pulled over for having only one headlight. In the vehicle was an open container and several cups of mixed drinks. James was handcuffed and advised of his Miranda rights. Upon search of James’ vehicle, officers discovered marijuana in the glove box. James denied knowledge of the marijuana. James said the marijuana might be his brother’s and that his brother’s cell phone number was in his cell phone contacts. Officers found text messages relating to drug sales on James’ phone. The trial court denied James’ motion to suppress the evidence seized during the traffic stop, granted a motion to dismiss the charge of unlawfully arranging sales or purchases of controlled substances using a communication device, but found the text message evidence admissible at trial to show that James had knowledge of the marijuana and the intent to sell or distribute. The jury found James to be guilty of possession of marijuana with the intent to distribute, possession with the intent to use drug paraphernalia, possession of marijuana without a tax stamp, transporting alcohol in an open container, and operating a motor vehicle with defective equipment.  
ISSUES: (1) Search and seizure, (2) opinion testimony, (3) prosecutorial misconduct, (4) sufficiency of the evidence, and (5) cumulative error  
HELD: Court held the officer’s inspection of the text messages on James’ cell phone was a valid search incident to a lawful arrest. Court also held the two text messages at issue did not constitute hearsay and were simply questions. Court held the officer’s testimony as to the drug jargon of the text messages was based on his personal knowledge and experience and was reasonably helpful to the jury. Court held the prosecutor’s rhetorical questions in closing argument of why James objected to admission of the text message was in response to defense counsel’s closing argument and were not outside the wide latitude given the prosecutor. Court found James’ conviction was supported by sufficient evidence and there were no errors to establish a case of cumulative error.  
STATUTE: K.S.A. 60-460, -456  

STATE V. SKILLERN  
SHAWNEE DISTRICT COURT – SENTENCE VACATED AND REMANDED  
NO. 107,600 – NOVEMBER 9, 2012  
FACTS: Skillern convicted on her plea to first offense of domestic battery, a class B person misdemeanor under K.S.A. 2011 Supp. 21-5414(b)(1). District court imposed six-month jail term and ordered Skillern to serve 48 hours in custody as condition of probation. Skillern asked for suspension of the 48-hour confinement, but district court found it did not have that option under the applicable sentencing statute. Skillern appealed, arguing district court had authority to suspend 48 hours imprisonment sentence. District court stayed the 48-hour prison term pending the appeal.  
ISSUE: Interpretation of K.S.A. 2011 Supp. 21-5414(b)(1)  
HELD: Under K.S.A. 2011 Supp. 21-5414(b)(1), an offender is not required to serve 48 hours in custody before the offender is granted probation on a first-time conviction of domestic battery. District court misunderstood its authority under the applicable sentencing statute. Skillern’s sentence is vacated. Remanded for district court to exercise its discretion under the statute.  

STATE V. SNOVER  
FRANKLIN DISTRICT COURT – AFFIRMED  
NO. 105,917 – NOVEMBER 9, 2012  
FACTS: Snover convicted of nonresidential burglary, theft, and criminal damage to property. On appeal he argued: (1) for reversal of criminal damage to property conviction because aiding and abetting jury instruction created alternative means and State failed to present sufficient evidence on each alternative means for jury una-
nimity; (2) for reversal of theft conviction because statutory definition of “obtaining” or “exerting control” creates alternative means for committing that offense, and state failed to present sufficient evidence for jury unanimity; (3) trial court erred in instructing jury that it could consider the “degree of certainty” demonstrated by witness at time she identified Snover; and (4) trial court unconstitutionally used Snover's criminal history to increase sentence without proving it to jury.

ISSUES: (1) Alternative means – K.S.A. 21-3205(1), (2) alternative means – K.S.A. 21-3701(a)(1), (3) “degree of certainty” in eyewitness instruction, and (4) criminal history in sentencing

HELD: Aiding and abetting statute, K.S.A. 21-3205(1), does not create an alternative means for committing criminal damage to property. Jury instruction on aiding and abetting in this case did not deprive Snover his right to jury unanimity.

Kansas legislature under K.S.A. 2010 Supp. 21-3110(13) has defined “obtains control” and “exerts control” to mean the same thing. Jury instruction in this case, which contained these terms, did not deprive Snover his right to jury unanimity since state presented no alternative means of committing the crime.

Recent Kansas Supreme Court cases hold that eyewitness certainty factor in PIK Crim. 3d 52.20 should no longer be used. Trial court erred in giving jury PIK instruction with that language, but error was harmless under facts of this case.

Constitutional sentencing challenge is defeated by controlling Kansas Supreme Court cases.

STATUTES: K.S.A. 2010 Supp. 21-3110(13), -3205(1); K.S.A. 21-3205(1), -3701(a)(1), -3720, -3720(a)(1); and K.S.A. 22-3421
THE LAW OFFICES OF GLENN CORNISH & HANSON CHTD. will close effective December 31, 2012. For information about client files, please contact the Topeka Bar Association, Paula Huff, Executive Director, at (785) 233-3945.

DUE TO CONTINUED EXPANSION, Jacam Chemical Company LLC seeks to fill a Staff Attorney position. Qualified applicants must have graduated from an accredited law school; be licensed to practice law in Kansas; have substantive and procedural legal knowledge; be able to perform efficient, high quality legal research in varied areas and jurisdictions; provide effective legal advice to clients; have excellent reviewing and drafting skills; and be able to work in a high-paced, general practice environment. Two years private practice experience preferred. Apply online at www.jacam.com/career.html. Jacam is proud to be an EOE.

THE KANSAS SUPREME COURT is looking for a special projects attorney to perform legal work for the Supreme Court as a whole under the supervision of one or more justices. This position focuses on capital cases, including the preparation of legal research memoranda on capital case appeals. Send Judicial Branch application for employment, resume, law school transcript, and 10-page writing sample to Steve Grieb at griebs@kscourts.org or Kansas Judicial Center, 301 W. 10th, Rm. 316, Topeka, KS 66612-1507. The deadline to apply is January 21, 2013. For more information, please see http://bit.ly/ZdMDP2.

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

GOVERNMENT CONTRACTS. TINA, CFISUS, OCI, CCR, COTS, IDIQ, PIAs, FAC, COTR, CAS, BPA, CPIE, DCAA, FCA, EPLS, FAPIIS, WBS, EVMS. … Don’t speak federal government contracts? Experienced government contracts attorney available to help you and your clients when considering or performing contracts or subcontracting on federal programs. Please visit www.angelolegal.com or call John Angelo at (316) 239-6005 to learn more.

MEDICAL-LEGAL LITIGATION SUPPORT. I am an attorney practicing in Kansas, with a Bachelor of Science degree in nursing and substantial experience in critical care, burns, trauma, and nursing home care. I have consulted with attorneys in the following types of cases: health care provider malpractice, personal injury, nursing home negligence, and criminal cases involving injury or death. I offer comprehensive litigation and pre-litigation support services that include document review, causation/mechanism of injury analysis, witness interviews, and preparation for deposition or trial, and accurate, timely medical research. $35 per hour for most services. Contact David Leffingwell, JD (Washburn, 1995), BSN (Wichita State University, 1982) at (785) 484-2103 or Ddl.legalmed@live.com.

LAW PRACTICE FOR SALE. Solo practitioner with established client base of plaintiff/claimant representation of predominantly Latino clients. Call (316) 650-1510.

OFFICE SPACE AVAILABLE

DOWNTOWN TOPEKA OFFICE SPACE FOR RENT. Offices are located at 115 SE 7th, 2nd Floor. Four offices are available and may be rented individually or as a group. Receptionist desk and waiting area are also available. Conference room is available for tenants’ use. Several offices have great built-in cabinets for storage. All offices have windows. Offices are available for immediate occupancy: Office 1 – 10’7” x 13’9”/Office 2 – 10’ x 13’9”/Office 3 – 12’ x 15’2”/Office 4 – 12’ x 13’3”. Receptionist and Waiting Area – 10’8” x 16’8”. The offices are located on the second floor of the Petroleum Marketers and Convenience Store Association of Kansas building. The location is just across the street from the Shawnee County Courthouse and three blocks from the Capitol. Monthly parking is available at the Park and Shop Garage, 615 S. Quincy; metered street parking in front of the building is available for customers/clients. Call the PMCA office at (785) 233-9655 to schedule an appointment to view the offices.

LAW OFFICES located in downtown Overland Park, in remodeled historic building, free parking, reception area, kitchen, conference room, fax, scanner, copier, phones, voice mail, and high speed internet access. The offices are in walking distance of coffee shops, restaurants and retail stores. Seventeen highly respected attorneys in an office-sharing/networking arrangement. Contact Jim Shetlar at (913) 648-3220.

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

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

OFFICE SPACE AVAILABLE. One office (approximately 14” x 15”) is available in AV-rated firm located at Metcalf and 110th Street in the Commerce Plaza Building in Overland Park. Available immediately. Excellent location and a class A building. Recently redecorated. Furniture not included. Competitive price including all the amenities of a full service law firm (phone, Internet access, copier, fax, coffee galley, etc.). Staff support available if needed. Please contact Tara Davis at (913) 498-1700 or tDavis@ktplaw.com.

OFFICE SPACE AVAILABLE. Two luxury offices available with large conference room, reception area and full kitchen in SW Lawrence, KS. $1,000/month. Another law firm has the balance of the space. Call Joe at (785) 633-5465.

OFFICE SPACE for one attorney in class A, high profile building at One Hallbrook Place in Leawood. No long term least required. For more information please contact April at (913) 661-9600 ext. 125.


A TRADITION OF SUCCESS

OUR EXPERIENCE PAYS

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