The Beam and the Mote: A Review of the Lawyer's Duty to Report

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ARTICLE REVISION DUE TO RULE CHANGE

The KBA Journal for January 2013 included an article entitled “Successful Expert Discovery in Kansas State Court Civil Litigation.” The article cites to and discusses the former version of K.S.A. 60-226(b)(6). That rule was amended effective July 1, 2012, with some substantive changes. The article states that “... 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.” Under the rule as amended July 1, 2012, the above interpretation is no longer accurate.

(6) Disclosure of expert testimony.

(A) Required disclosures. A party must disclose to other parties the identity of any witness it may use at trial to present expert testimony. The disclosure must state:

(i) The subject matter on which the expert is expected to testify; and

(ii) the substance of the facts and opinions to which the expert is expected to testify.

(B) Witness who is retained or specially employed. Unless otherwise stipulated or ordered by the court, if the witness is retained or specially employed to provide expert testimony in the case, or is one whose duties as the party’s employee regularly involve giving expert testimony, the disclosure under subsection (b)(6)(A) must also state a summary of the grounds for each opinion.
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Kansas Bar Association, Topeka, Kan.
As the legislature now considers merit selection alternatives to appoint appellate court judges and justices, the recent decision of the Tenth U.S. Circuit Court of Appeals endorsing the merit selection system is instructive. Four months ago, in the unpublished opinion of *Dool et al. v. Burke et al.*, 2012 WL 4017118, the Tenth Circuit affirmed a district court decision endorsing the present Kansas merit selection panel composition of five attorneys and four non-attorneys. Speaking for the majority, Judge Terrence O’Brien stated:

Forged in the ashes of the Kansas triple play, the Commission is designed to ensure the conduct of the executive branch does not threaten the integrity of the judicial branch. Its charter concerns the distribution of power within and among the various organs of government; it is a structural body, not a representative one.

If anything, respect for the democratic process cuts against the challengers’ position, which if adopted would frustrate the will of the Kansas people, as embodied in the state constitution. The constitutional amendment creating the Commission has been in place for more than half a century; its vintage a testament to the state’s time-honored commitment to judicial independence. (*Id.* at 14.)

The opinion also addressed the need for attorneys on the panel:

Attorneys are better equipped than non-attorneys to evaluate the temperament and legal acumen of judicial candidates and more likely to base their votes on factors other than party affiliation. ... The Commission’s role in choosing from the Kansas legal community the three most qualified applicants for a judicial vacancy has a disproportionate impact on the bar relative to the general population. ... The Commission serves a limited purpose and affects attorneys more than others. (*Id.* at 17-21.)

The court’s reasoning reinforces why merit selection has been a topic in the last three president’s columns. While judicial appointments greatly affect our citizens, they have a disproportionate impact on the bar. Lawyers, more than any other entity within our society, understand the importance of good and impartial justice. Timely decisions, well reasoned and well presented, guide the district courts and lawyers in daily practice. Court funding reductions and open appellate judge positions exacerbate the need for competent, hard-working and far-sighted judges. No one in Kansas understands this better than our lawyers. That is why more than 20 resolutions have been passed by county and auxiliary bar associations as of January 4, 2013. They include the bar associations of Barton, Cherokee, Clay, Crawford, Douglas, Ellsworth, Franklin, Johnson, Ottawa, Rice, Saline, Wichita (Sedgwick), and Wilson counties. Specialty bar associations echo this belief. Resolutions have been passed by the Kansas Association for Justice, Kansas Association of Defense Counsel, and Kansas Women Attorneys Association. As this column goes to press, unaffiliated organizations are voicing that same sentiment. Witness the following resolution of the League of Women Voters of Kansas:

“RESOLVED, that the League of Women Voters of Kansas supports merit selection 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.

Ernestine Krehbiel, President”

Lawyers are solidly and fervently in support of the merit selection system. Resolutions adopted across our state uniformly conclude that the merit selection system is the single best means of selecting qualified judicial applicants. This concept is unaffected by the composition of merit selection panel members. The merit selection process does not require a majority of attorney panel members to generate qualified nominees for selection by our governor. The process has worked remarkably well for 50 years. It will work well whether attorneys constitute a majority or a minority of the panel members. Merit selection works because it strips money and politics from the process of selecting the best nominees. So long as the legal community has a voice in the merit selection of judicial nominees, the process will continue to place the best and the brightest in our appellate judiciary.

KBA President Lee M. Smithyman may be reached by email at lsmithyman@ksbar.org, by phone at (913) 661-9800.
Mock Trial Matters

By Brooks G. Severson, Fleeson, Gooing, Coulson & Kitch LLC, Wichita, bseverson@fleeson.com

During the past few years that I have served on the KBA YLS board, the individuals in charge of planning and executing the YLS’ annual Kansas High School Mock Trial Competition, sponsored by Shook, Hardy & Bacon, have never ceased to amaze me. This year is no different, and in many ways I am even more in awe of our members’ dedication to this worthwhile program.

The YLS has been lucky enough to have Jennifer Michaels serve as the mock trial chair for the past three years, and her dedication is unwavering. Jennifer is an associate attorney with Millsap & Singer LLC in Leawood. For a bit of background, Jennifer’s passion for mock trial began as far back as high school, when she participated in a mock trial program. She remained involved with mock trial through college, and following her graduation from law school, she became involved with the YLS’ mock trial program. Last year I had the opportunity to assist Jennifer at the state tournament here in Wichita and was amazed by not only her passion for the program, but also the seemingly effortless way in which she ran the tournament.

During our down time at the tournament, we brainstormed various ways not only to make the current program better, but also hopefully to grow the program in years to come. That is where the idea of a mock trial subcommittee was born. To put it bluntly, this job is simply too huge to expect one person to handle it with no help. The fact that Jennifer has done just that for the past two tournaments is pretty incredible. Accordingly, we did some recruiting, and before we knew it, Scott Gordon and Shawn Yancy, both YLS members and mock trial enthusiasts, jumped on board.

Scott is currently an attorney for the Kansas State Department of Education in Topeka. He competed in mock trial, forensics, and debate throughout high school and continued to remain involved with forensics and debate throughout his college career. Shawn is an attorney with Kansas Department of Labor in Topeka. He competed in mock trial in college and has actively worked with the Topeka/Shawnee County Youth Court since 2008. Both have volunteered to judge countless rounds at the YLS’ mock trial tournaments over the past couple of years.

The first goal of the subcommittee was to draft a formal set of Kansas mock trial rules. Over the years, adaptations had been made by various mock trial chairs, which did not necessarily carry over from one year to the next. That obviously created confusion for the coaches who routinely participated in our tournament. Accordingly, Jennifer, Scott, and Shawn crafted a set of mock trial rules specific to the Kansas program. Those rules were then reviewed by prior Kansas mock trial chairs for their input. Then, early this fall, a conference call was held in which the subcommittee, myself, and all interested mock trial coaches were invited to call in to discuss the rules and make any suggestions.

The conference call was a great success, and it gave the coaches an opportunity to tell us where changes needed to be made and what worked best for them. We also received input for potential mock trial tournament dates, since there always seem to be conflicts with things like spring break, forensic, and debate competitions, or standardized testing. Shortly thereafter, the mock trial rules were finalized and uploaded to the website, which may be found at http://bit.ly/moctrialrules.

The other big development that we are really excited about is the location of the state tournament. The regional tournaments are scheduled to take place on March 2, 2013, in Wichita and Olathe. In years past, the state tournament has alternated between Wichita and Olathe; however, this year we are pleased to announce that the state tournament will take place in Topeka! We hope this will bring an added level of excitement to the teams that are fighting for the spot to advance the national tournament.

One of our biggest goals is to continue to grow the program and get more schools involved in the program, and our long-term goal is to have a regional tournament out west. However, in order to grow, we not only need more schools, but we also need more volunteers. Obtaining judges for the tournament is one of the most difficult challenges we face. We need an average of three judges per round, which results in a total of more than 100 judges between the two days of the regional tournament. My final plea is that if you’ve never judged before, or if you’ve judged every year, please get involved and stay involved. In order to grow this program and keep it successful, we need the help of attorneys throughout the state. It won’t be long before we start soliciting volunteers to judge for the tournament. I encourage everyone to volunteer, even if only for just one round. It really means a great deal to the future lawyers of our society!

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.
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 only given in those years when it is determined that there is a worthy recipient.

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

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

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

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

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

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

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

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

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

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

Diversity Award: This award recognizes 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
☐ Outstanding Service Award
☐ Outstanding Young Lawyer Award
☐ Distinguished Government Service Award
☐ Distinguished Service Award

☐ Diversity Award
☐ Professionalism Award
☐ Pro Bono Award/Certificates
☐ Courageous Attorney 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
Process Addictions

What are they? How do they affect Kansas Lawyers? Why do I need to know about them, and why should I care?

Here’s one definition from http://www.treatmentsolutions.com/process-addiction-treatment/.

“A process addiction refers to any compulsive behavior that involves an action that, on its own, is not physically addictive, such as shopping or sex. The lack of a physical addiction separates this condition from alcohol abuse and drug addiction.

The list of process addictions is wide-ranging and can include any day-to-day activity that has become overpowering and destructive in an individual’s life. Common process addictions are sex addiction, compulsive gambling, Internet addiction, and shopping addiction.”

One frequently used definition of an addiction is that it is an action that the person continues to engage in despite negative consequences. Probably the easiest example is still alcohol: a person drinks to excess, gets a DUI with all the attendant legal consequences and expense. And a year later, the person again drinks and drives and gets a second DUI. If that person then continues to drink to excess and/or to drink and drive, despite experiencing negative consequences twice previously, there is a high probability that addiction is present. It may be early stage, middle, or even late stage addiction, but what differentiates stages is a topic for another day.

So, process addictions function similarly in that the behavior leads to negative consequences, yet the person continues to engage in it. Other characteristics common to process addictions are that they consume more and more of the person’s time, attention, energy and resources. The person is often thinking about the last time they did it, or anticipating the next time, or going out of his or her way to be in a position to do it. Gradually, other activities, including work or time with family and friends, gets crowded out, both in the mind and in real time.

Gambling addiction is the only one of these behaviors that currently has its own DSM IV classification under “Impulse Control Disorders.” But its characteristics are similar in some ways to the other behaviors so acquiring familiarity with them can, to some degree be used to assess the other process addictions.

According to the Mayo Clinic website, signs and symptoms of compulsive gambling are:

- Gaining a thrill from taking big gambling risks;
- Taking increasingly bigger gambling risks;
- A preoccupation with gambling;
- Reliving past gambling experiences;
- Gambling as a way to escape problems or feelings of helplessness, guilt, or depression (emphasis added);
- Taking time from work or family life to gamble;
- Concealing gambling;
- Feeling guilt or remorse after gambling;
- Borrowing money or stealing to gamble;
- Failed efforts to cut back on gambling; and
- Lying to hide gambling.

And the website further says it is out of control if:

- It’s affecting your relationships, your finances, or your work life;
- You’re devoting more and more time and energy to gambling pursuits;
- You’ve unsuccessfully tried to stop or cut back on your gambling;
- You try to conceal your gambling from family or health professionals;
- You resort to theft or fraud to get gambling money; or
- You ask others to bail you out of financial woes because you’ve gambled money away.

Gambling addiction is serious. For example, gambling addicts typically have a higher suicide rate than both drug and alcohol abusers. Gambling addiction also often leaves the addict’s entire family completely bankrupt.

Michael J. Burke lost his Michigan law license and was sent to prison after he misappropriated $1.6 million of his clients’
money to feed his blackjack and slot machine habit. He now travels the country speaking to groups about the dangers of problem gambling, and has written a book, “Never Enough.”

Here’s something from the Mayo website that struck me because it may describe a lot of lawyers: “Certain factors are more often associated with compulsive gamblers: ... Certain personality characteristics. Being highly competitive, a workaholic, restless, or easily bored may increase your risk.”

Process addictions do affect Kansas lawyers though I don’t have any statistics, only anecdotal knowledge. Experience suggests that they remain hidden longer than alcohol addiction and they often coexist with other conditions like depression or alcoholism.

Why do we care? Well, in addition to having ordinary concern for other members of our profession, lawyers (in Kansas and elsewhere) suffering from untreated gambling or sex addiction have gone down in flames quite publicly in recent years, causing great anguish for them, their families, and firms and putting the profession in a bad light. Most have lost their law licenses and some have been faced with criminal charges.

Since some addictions involve every day activities, such as eating, shopping, or using the Internet, it may be difficult to tell when the behavior has crossed over the line. And with gambling or sex, the activity will more often be conducted in secret. But there will be signs that something is amiss. Withdrawal, isolation, financial problems, relationship problems, and similar red flags are usually present to the discerning observer.

As with other addictions and conditions, there is hope, help, and a bright future for those who will work with KALAP or other agencies to obtain treatment.

About the Author

Anne McDonald graduated from the University of Kansas School of Law in 1982 and spent most of her legal career as court trustee in Wyandotte County. After she retired in 2006, she served as a judge pro tem in Kansas City, Kan., Municipal Court and in Wyandotte County District Court. She is a member of four boards or commissions and three book clubs, along with the Sierra Club.

She frequently hikes or backpacks with her husband and other Sierra Club members.

She is a prior chair of the KBA Committee on Impaired Lawyers and has been a KALAP commissioner from its inception, and now serves as Executive Director.

Advance Notice
Elections for 2013 KBA Board of Governors

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.

**District 9:** Incumbent David J. Rebein is eligible for re-election. Clark, Comanche, Edwards, Finney, Ford, Grant, Gray, Greeley, Hamilton, Haskell, Hodgeman, Kearny, Kiowa, Lane, Meade, Morton, Ness, Pawnee, Rush, Scott, Seward, Stanton, Stevens, and Wichita counties.

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.
M ost parents, at some point, become skilled at story telling. Lawyers, particularly trial lawyers, are even more adept at this art. In the former case, the audience may start as toddlers, but eventually they become teenagers. It’s my experience that the toughest audience are teenage boys. They can be living, breathing skeptics of most things that any father wants to sell them. So as both a parent and a litigator, I refined my art and discovered the best stories were ones that had an undeniable part of truth, with a sprinkle of fiction, which also had the potential to scare the heck out of them.

Now, as you may know, growing up in western Kansas always provides the inventory of tornado stories, which dovetails nicely with the “Wizard of Oz.”

The best stories were, without question, ones that arose from Larned and that city’s largest employer, Larned State Hospital (LSH). LSH was real, of course, having been established in 1914 to provide care and treatment for the mentally ill in the western half of Kansas, but gained additional responsibilities with the opening of State Security Hospital in 1939.

So Larned is where the truly crazy people were sent. And calling it a hospital added to the mystique. That moniker conjures up notions of prisoners coming and going through waiting rooms, showing their insurance cards, and then heading out of the emergency room to do more violence. And in truth from time to time people would “escape” from the place and head to the nearest “big town” — Great Bend. For some reason, they would take off on those days when my two brothers and I were out on the town for nine to 10 hours, taking care of whatever business occupied us that day. That happened pretty much every day.

Based on my own focus groups, there were always a couple stories that were true home runs. One was the night my older brother, Tim, and I were fishing in the Walnut Creek, adjacent to the hospital. The same night, some prisoners decided to take a stroll outside the prison boundaries for some hands-on clinical research. We were clueless. We were fishing, had no radio, and not a worry in the world. It was past midnight, the moon was full, and the catfish were biting. When we got home, my parents had already planned our funerals. That was a grade B-/C+ story.

But the one A+ story was too good to be true. And it wasn’t true. Not in the least. And that was the story of Psycho Santa — the worker who had a penchant for disposing of boys at the local mall — which for purposes of my story was always Metcalf South Mall. And one day “Santa’s helper” had his share of spoiled kids and gave them a Christmas present a couple days early. So the nut case was convicted of murder and sent to, you guessed it, LSH. The story went that Santa escaped in full costume, along with the long knife, which he kept in his bag of toys, of course. Psycho Santa ended up in our front yard, on Christmas Eve, circa 1965. And my 4-year-old brother, Marty, went ahead and opened the front door. Just when Santa started to show my kid brother his sack of “goodies,” the cops arrived, and he was sent back to show proof of insurance. And over scout campouts, bonfires, and school retreats, Psycho Santa became urban legend.

In the summer of 1999, two of my sons were in summer camp, leaving my third son, Robert, bored out of his mind. He was 9 years old, and when I suggested we head west, he jumped at the notion. The trip agenda included a stop at Fort Larned, where we saw where Gen. Custer stayed and other things of interest. The trip was already magical. But what happened next I could not have expected.

It was time for the Larned Hospital visit. I myself had not seen it in maybe 30 years. As we drove up to it, I circled my car to the front entrance. In red brick, sitting at the entrance, there it said, “Larned State Hospital.” The enormity of it all hit my son. He stared, blinked slowly, and then turned his head to me and said, “Can we get a picture?” Sure, I thought. We parked, and just as he was posing in front of the sign, a policemen’s car came speeding toward us, almost out of nowhere. No sirens, no lights, just driving very fast. A man jumped out of the car and walked quickly to where we stood. The man even scared me. He had bad teeth, bad hair, and bad breath. “No photos allowed here sir. You will have to leave.” I came a long way and was not prepared to give up. After all, I was a lawyer and knew my rights! I spoke. “I’m sorry. I thought this was the entrance and not a secure area. Can’t I get a photo?” “Absolutely not.” My son was petrified. So was I. And as I hit the gas, and circled around to the south end of the complex, we drove by a sign that said, “Walnut Creek.” Twenty miles later, about the Barton County line, the color returned to Robert’s face. And the legend of Larned State Hospital took on an entirely new dimension.

About the Author

Matthew Keenan has practiced with Shook, Hardy & Bacon since 1985. He may be reached at mkeenan@shb.com.
Many, many computers ago I found my first—a Commodore Vic-20—under the Christmas tree. I still recall the thrill of a “real” computer capable of so much more than my Atari 2600 (a mere toy by comparison). My excitement tempered a bit when I turned it on to just a blue screen and flashing cursor. No apps, no start menus, and nothing even resembling an operating system to guide the way.

Though daunting at first, it became a game to guess commands hoping for a response. I transcribed pages of code from computer magazines honing debugging skills because finished programs never worked on the first go. I was learning the linear logic necessary to program, to troubleshoot, and to maintain computer systems in a wide-open universe. That pedagogical approach to teaching computing is the basis of a new computer—the Raspberry Pi.

A $35 Powerhouse

A Raspberry Pi is a capable computer the size of a credit card that costs just $35 from Element14 at newark.com. It arrives in a tiny cardboard box with no case, no cables, no keyboard or mouse, and no operating system (or even a hard drive). It is, however, exceptionally well supported online by a burgeoning user community of tinkerers happy to guide newbies through a variety of projects.

The Test Subject Tests

The test subject, my 16-year-old son, was a bit hesitant to dive in. The first hurdle for Pi users is getting an operating system loaded to an SD memory card. It is barely more complex than copying a file to an SD card but that first step proved too much to combat the easy allure of firing up Halo 4 on the Xbox.

Hardware presented his next challenge. He grabbed the first USB keyboard and mouse available and then scrounged an old phone charger for power. The Pi booted fine but could not see the mouse or keyboard. A few minutes online narrowed the issue down to a power problem. His gaming mouse was drawing more power than the phone charger could deliver. He scrounged a new charger for power and swapped out a new mouse to get up and running again. Success! He had learned to observe, experiment, and solve a persistent computer issue and no worries about damaging anything but a $35 computer.

An operational Raspberry Pi is more user-friendly than the old Vic-20. It runs a lean version of the Linux operating system and even has a graphical interface with pre-installed games and apps. I watched my son fiddle around with some of the games but grinned ear-to-ear when he closed them out and opened a plain old text terminal window. There was that lovely flashing cursor. No instructions and no prompts—just waiting for his command and his humble Pi could become a media streaming device, a game console, or a web server.

Over the next few days, my son periodically returned to the Pi trying new commands. He would share commands like cheat codes though they were simple things. The process was changing him from a passive user able to open Word or code a simple web page into a computer hobbyist. He wanders out onto the web to find some instructions in the Python programming language—the primary coding environment for Pi. He has also started tinkering with Scratch, a graphical coding environment designed to help teach the logic behind computing and software.

Builders, Not Consumers

The concern of the Raspberry Pi creators is that a disturbingly high number of computer science candidates now come to college or employers with very little actual computer experience. They are more appliance users than tinkerers. They can create an Excel spreadsheet but may not know the logic behind a formula. They can plug in a wireless router but are unable to secure or troubleshoot it. Creating new technologies or even maintaining those we have will require more tinkering and experimentation.

Even lawyers testing the waters of electronic filing, e-discovery, etc., are discovering that knowledge of the logic and processes behind applications is key to successful and safe technology use. The aim of the Raspberry Pi makers serves those aims, “We felt that we could try to do something about the situation where computers had become so expensive and arcane that programming experimentation on them had to be forbidden by parents; and to find a platform that, like those old home computers, could boot into a programming environment.”

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.
It was winter break for my three boys as I wrote this column, and we watched a lot of movies. They like action-packed, plot-driven movies with colorful, appealing characters: “Star Wars” is the absolute favorite, along with the “Indiana Jones” and “Men in Black” series.

At the same time, I prepared to teach briefwriting and advocacy in the spring semester of Lawyering Skills. Reviewing class notes, with movies on replay in the background, I began thinking about the stories and characters in these movies. What makes them so compelling? Why are we so confident that the good guys should win? Why do we believe the stories from the filmmaker’s perspective? Are there lessons for lawyers in these movies?

In writing a brief’s facts, of course, lawyers aren’t writing fiction. We have to adhere to the facts of what happened so in one sense, we’re stuck with the story our client brought us or the one developed in the record. In another sense, though, the facts of the case are ours to tell. Lawyers don’t dream up the characters and plot. Instead, we concentrate on thoughtfully portraying the facts we have to tell a persuasive story on our client’s behalf.

Two keys to persuasive storytelling stand out from films like “Star Wars.” (I spent significant time with the “Star Wars” narrative over winter break.) First, develop a character to whom the audience can relate. Second, describe the conflict so that the main character is unmistakably on the right side. (A third important point is to bind the narrative with a cohesive, easily-grasped theme—a subject for another column.)

1. Character

Portray the client as a sympathetic character. “Sympathetic” does not mean “pitiful.” In film, characters are heroes not because of their sob stories, but because of how they approach their circumstances. We admire a character because of her intentions, efforts, and aspirations. Consider that in “Star Wars,” Luke Skywalker is at his most irritating when he complains about life on the farm; he becomes a hero only when striving to defeat the Empire.

In a brief, the client must become the hero of the story. Imagine briefs in a case in which a company fired an employee. The employee claims the firing was discriminatory; the company claims he could not master a crucial job skill. If the plaintiff’s facts emphasize how hard the job was and how demanding his supervisors were, he could seem whiny and unresourceful (possibly proving the employer’s point). If, instead, they emphasize his goal to become a skilled employee and his efforts toward that goal, the plaintiff becomes a more likeable and understandable person.
Whether the client is an organization or an individual, the facts must provide character details that allow the reader to sympathize with the client’s actions. To round out the client’s details sympathetically, consider these questions: In what way does the client contribute to society or serve the public? What are the client’s worthy goals? How is the client good at what he or she does? Has the client overcome adversity in some way? Has the client been victimized or wronged?

Not all of those questions will be applicable in every case or appropriate for every brief. They can, however, help identify facts that show the client deserves to win.

2. Conflict

Of course, lawyers try to frame the conflict so that the client is the good guy. That challenge can be tough. When writing the facts, it may help to think of the legal conflict in terms of a storytelling conflict. We accept it when our favorite movies show us which side is right or wrong. One reason is that in those films, the conflicts aren’t portrayed as between equal people.

In a legal conflict, it might seem natural to think of the dispute as one person against another person. The problem with “person v. person” is that it’s harder to identify the winner. If each side has that kind of human legitimacy, it is easier for the reader to accept that each side may be sympathetic. As illustration, think about the difference between the conflicts in “Star Wars” (people v. evil Empire) and a drama about family dynamics, like “Ordinary People,” meant to show various perspectives without picking a side.

Recharacterizing the conflict can help portray what happened so that the client’s side seems more obviously right. In literature, the various types of conflict are commonly described as person versus self, nature, society, and machine. “Self” means internal forces the hero must overcome; “nature” means external, universal forces; “society” means others’ expectations, rules, and demands; and “machine” suggests a conflict caused by resistance to something impersonal and inexorable.

As a useful exercise in reframing a legal conflict, imagine the case of U.S. v. Software Giant Inc. in an antitrust dispute. If the conflict is person against person, it’s hard to say who should win: a government trying to preserve competition or a corporation trying to succeed at business. Both have legitimate points of view. Reframing the conflict as person against machine, however, allows portrayal of a clear winner. For the government, the brief would portray the conflict as the government protecting people from an empire that crushes all rivals. The corporation’s brief would frame the conflict as a government juggernaut oppressing a company that innovates, employs thousands, and provides beloved products.

Lawyers do not control the characters, plots, or resolutions of the stories we must tell in litigation. We can, however, describe the client’s facts favorably and persuasively. As much as possible, we can portray the client as the good guy on the right side of the narrative: a Luke Skywalker and not a Darth Vader.

About the Author

Joyce Rosenberg teaches Lawyering Skills and directs the Externship Clinic at KU Law School. She can be reached at jorose@ku.edu.
I t was time to seize the moment. The opportunity arose for me to apply my skills acquired from law school to real life. Instead of an elaborate and eloquent fact pattern conjured by a professor with a myriad of answers, reality fashioned an instance for me to venture beyond the realm of classroom hypotheticals.

It occurred when a close friend brought a potential legal problem to my attention. When my friend’s name was typed in on Google, a picture anonymously taken of her at a restaurant during lunch appeared on a website used for anonymous blogging. While the picture is innocent on its face, the dialogue below caused my friend to be concerned that her young professional reputation could be jeopardized. The standard degrading comments were not the problem, as it has become somewhat expected that those types of comments and opinions would appear below a young woman’s picture. Instead, the principal concern was the specific factual allegations made regarding my friend’s identity and prior occupation, which were indisputably false.

Fortunately for my friend, I had just finished my Media Law and the First Amendment final the preceding week. My mind was fresh to apply an arsenal of newly obtained knowledge to the circumstances at hand. After some extra research to cross my t’s and dot my i’s, I sent the website administrator an email detailing that, in my opinion as a non-lawyer, it would be in the website’s best interest to remove the data in issue. One week later, I typed my friend’s name in on Google, and the webpage had vanished. It was a moral victory of the highest caliber.

Which brings me to my point – attorneys everywhere need to be aware of potential Internet pages that cause damage, and know that the damages may be prevented or rectified. The Internet is the Wild West of the new era, and while there are certain regulations, enforcement is difficult. Although it was a few sentences, on a small website, on the immeasurable web, the message truly could have compromised my friend’s reputation. Lawyers may face similar risks.

Keep in mind, I am not an expert in media law, nor am I a lawyer – I have only thoroughly researched the topic. I am personally an advocate of First Amendment rights, and in no way seek to promote the censorship of ideas. However, if somewhere on the Internet there are statements that may harm your professional reputation, the following are factors I have found that may be examined in considering preventative measures to preserve your professional persona.

Defamation is the mechanism to protect yourself as a private plaintiff against damaging Internet statements. Damages from statements over the Internet are not presumed and must be sufficiently established for a successful claim. The posting of offensive comments online about you or your business does not necessarily mean any tangible damages can be proven. If damages can be proven, the statements made must then be closely scrutinized.

One key aspect to determine if the statements are defamatory is the distinction between opinion and fact. Every person is entitled to an opinion and is free (with exceptions) to portray that opinion to the public. Therefore, JohnDoe321@SmearTalk.com is entitled to voice an opinion online that a particular law firm or attorney is, shall we say in the most rated G terms possible, “not satisfactory.” On the other hand, persons are usually entitled to express statements of fact, but may still be subject to liability. Therefore, if JohnDoe321@SmearTalk.com makes a factual allegation that is contrary to the standards of decency and damages an attorney or firm’s reputation, then the statements are more defamatorily suspect.

The next aspect to determine the strength of a defamation claim is the truthfulness or falsity of the statements of fact. Statements of truth are unlikely to be defamatory, because courts want to inform the public and promote the discovery of truth in a marketplace of ideas. It should be noted there is a distinction between truth and provable truth, in that truth that is not provable may not be considered truth. By contrast, false statements of fact are at the crux of defamation claims. To establish defamatory false statements, Kansas uses a negligence standard and examines if the person knew or should have known the statements were false when made. Hence, if a lawyer can show a negligent statement of fact is false and caused damage, the argument the lawyer’s professional reputation was defamed has merit.

The person or entity that created the damaging statements is the party potentially liable. Therefore, websites that have forums for public discussion may not be liable for damaging postings on their webpages unless the website itself has put the damaging information on the webpage. Many times the party liable is a person expressing the damaging information cloaked behind an anonymous pseudonym. Generally, to overcome this barrier, plaintiffs subpoena the organization running the website to disclose the anonymous poster’s identity by showing that the name of the poster is essential, the information cannot be obtained in any other manner, and by specifying the specific information needed.

Lastly, it should be noted that there are ample caveats that apply to defamation law on the Internet. For example, if you
are a public figure, whether voluntarily or involuntarily, different standards apply. Moreover, parody may not be considered defamatory when the expression cannot be interpreted as stating a fact. Many other unique laws and precedents may apply depending on the particular circumstances of the statements. This column is nothing more than an overview of an archaic law that is evolving with new technology and being applied to new factual contexts.

It is important to know that there are ways to use law and savvy to protect yourself from reputation-damaging posts via the Internet. As in my situation, sending an email to request that the information be taken down may prove effective. Counter-speech could be used to combat the damaging comments. There are even web businesses available that specifically search and attempt to remove your damaging information on the Internet. If these options are unavailing, legal routes may be taken when appropriate.

The reputation of the legal profession rests on the shoulders of every lawyer. Lawyers have the unique ability to help deter defamation on the Internet, especially when that defamation threatens someone’s livelihood. I hope this information is useful as an introductory instrument to spark your mind if the opportunity presents itself for you to seize the moment and preserve your professional persona.

About the Author

George Sand is a second-year student at the University of Kansas School of Law and is currently a member of the Kansas Law Review. He has clerked/interned at various firms since 2010 and has assisted in the publishing of multiple law-related academic works. He is interested in media law and business law. You can reach him at GeorgeBSand@gmail.com.

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2013 Oil & Gas Conference
Friday, March 8, 2013

Including the following timely topics in the field of oil and gas law

- Developing Trends in Oil and Gas Litigation in Kansas
- Title Defects Through Litigation
- Wind Farm Easement
- Water Resources & Fracking
- OHSA
- Air Emission Regulations
- Vexatious Kansas Title Problems

Location:
Magouirk Conference Center
4100 West Comanche
Dodge City, Kan.

Room Information:
There is a room block established at the Hampton Inn, 4002 West Comanche, Dodge City at the discounted rate of $124 for a king or double room. This rate includes complimentary high-speed internet and other amenities. To make your reservation, call 620-225-0000 and book under group code KBA. Reservations are accepted until Wednesday, February 20.

Application for CLE approval of this activity in Kansas and Missouri is currently pending: 7.0 hours continuing legal education credit
**Members in the News**

**Changing Positions**

**Walter M. Brown** has joined Seyferth Blumenthal & Harris LLC, Kansas City, Mo.

**Amy B. DeGrave** has joined Kirkland Woods & Martinsen P.C. as an associate, Kansas City, Mo.

**Sean P. Hamer**, **Craig M. Leff**, and **Michael A. Preston** have become shareholders at Yeretsky & Maher LLC, Overland Park.

**Nicholas H. Jefferson** has joined Alderson, Alderson, Weiler, Conklin, Burghart & Crow LLC, Topeka, as an associate.

**Jeffrey W. Jones** has joined Hamilton, Laughlin, Barker, Johnson & Watson, Topeka, as a partner.

**Jarrod C. Kieffer** has joined Stinson Morrison Hecker LLP, Wichita, as a partner.

**Steven J. Koprince** has joined Petefish, Immel, Heeb & Hird LLP, Lawrence.

**Catesby Ann Major** has been promoted to partner at Bryan Cave LLP, Kansas City, Mo.

**Dane C. Martin** has joined Shank & Hamilton P.C., Columbia, Mo., as an associate.

**Greg J. Mermis** has joined Perspective Software, Shawnee, as general counsel.

**Jason E. Oller** and **Melissa M. Plunkett** have joined Shook Hardy & Bacon LLP, Kansas City, Mo., as associates.

**William K. Schmidt** has joined Murray, Tillotson & Burton Chtd., Leavenworth.

**Changing Locations**

**Peggy G. Cobb** has started a practice, Cobb Legal Services LLC, 4646 Broadway, Ste. 7, Kansas City, MO 64112.

**Matthew T. Geiger**, **Daniel J. Langin**, and **Benjamin R. Prell** have started a practice, Geiger, Langin & Prell LLC, 10000 College Blvd., Ste. 100, Overland Park, KS 66210.

**Jeffrey A. Kincaid** and **Terry L. Rees** have started a practice, Rees & Kincaid, 8726 Bourgade Ave., Lenexa, KS 66219.

**Mullins & Baylard LLC** has moved to 2004 NW South Outer Rd., Blue Springs, MO 64105.

**Murray, Tillotson & Burton Chtd.** has moved to 117 Cherokee, Leavenworth, KS 66048.

**Miscellaneous**

**Gregory M. Bentz**, Kansas City, Mo., has been elected president of the Kansas City Metropolitan Bar Foundation.

**Chad E. Chase**, Manhattan, recently graduated from the American Bankers Association Graduate Trust School in Atlanta.

**Editors 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**

**Eldon Sloan**

Eldon Sloan, of Topeka, died December 16 at his home; he was 103. He was born in Hoxie on March 26, 1909, the oldest son of the Hon. Edward R. and Julia Wright Sloan. The family moved to Holton in 1911, and he graduated from high school in 1927.

Sloan graduated from the University of Kansas in 1931 and graduated from Washburn University School of Law in 1933. He entered into private practice in Topeka with the firm of Sloan, Hamilton & Sloan; the firm still bears his name. Sloan retired in 1979 but maintained an office at the firm until 2010, and at the time of his death, was the oldest active member of the Kansas Bar Association.

He served in the U.S. Navy during World War II and was a police judge for the city of Topeka from 1941 to 1944. He was director of valuation for the state of Kansas from 1957 to 1960 and a member of the Kansas Board of Regents from 1964 to 1968. Sloan was also a member of the Topeka Rotary Club, where he was a Paul Harris Fellow; Topeka Country Club; the Judicature Society; a Kansas Bar Foundation Fellow; and a life member in the Topeka Elks Club, and American, Kansas, and Topeka bar associations. Sloan served on the boards of the YMCA, Jayhawk Council of Boy Scouts, and Family Service and Guidance Center, where he was past president.

Sloan is survived by his two sons, John, of Gig Harbor, Wash., and Paul, of San Rafael, Calif.; daughter, Mary Mozingo, of Lawrence; nine grandchildren; 11 great-grandchildren; and numerous nieces, nephews, and cousins. He was preceded in death by his wife, Harriet Burrows Perry; parents; brother, Justice Gordon Sloan, of Salem, Ore.; sister, Clarice Beldon, of Topeka; and grandson, Samuel Mozingo.
SAVE THE DATE!
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Kansas Bar Association
Annual Meeting 2013
The Beam and the Mote:¹ A Review of the Lawyer’s Duty to Report

By J. Nick Badgerow
I. Overview – No Definitive Guidance

The obligation to report misconduct is governed by Rule 8.3 and the professionalism required of attorneys generally as officers of the Court. While reporting of misconduct is a touchy subject and an uncomfortable one within the bar, without adherence to this concept, a self-regulating bar is nearly impossible to achieve.2

When one is upset by the actions of another lawyer, a frequent reaction is to consider reporting the other lawyer to the disciplinary authority. Recalling vaguely that the Rules of Professional Conduct3 include a “duty to report,” one may be emboldened to carry out the first impulse and to report the miscreant to the Disciplinary Administrator to “take his medicine.”

Then, one recalls the duty of zealous advocacy – the duty owed by lawyers to represent their clients with commitment, dedication and zeal.4 Would it not be preferable to use an opposing lawyer’s misconduct to the benefit of one’s client, to press for an advantage for the client in exchange for an agreement not to report? And, if the opponent does not accede, should the zealous advocate not then press home the advantage by bringing the ethical lapse to the attention of the Court, rather than relying on the Board of Discipline to enforce the Rules?

And what about judges? Are they immune both from the duty to report and from the exposure to a possible report being made about them?

This article explores the intent, scope and impact of the duty to report imposed on all lawyers and judges, and considers the application of that duty to conduct by another lawyer, by one’s self and by a judge. Do not look to this article for a definitive answer which may be applied in every case. In the end, as with most matters of ethics, the application of the duty to report comes down to an individual consideration of the particular facts and issues at hand. However, armed with the considerations discussed in this article, one may be better positioned to make that determination.

II. A Self-Policing Profession

A. Kansas Constitution

The Bar is a self-policing profession, one which is authorized to govern itself through professional conduct and judicial oversight.

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.5

The Kansas Constitution vests in the judicial branch the jurisdiction and power to oversee all courts in the state. Article 3, Section 1 provides, in part: “The supreme court shall have general administrative authority over all courts in this state.”6

Under Article 3, Section 1, the judicial power is vested in a supreme court, district courts, probate courts, justice of the peace, and such other courts, inferior to the supreme court, as may be provided by law. Under that provision of the constitution, the supreme court stands at the head of the judicial department (Householder v. Morrill, 55 Kan. 317, 40 P.2d 66 (1895)) and is invested with inherent power arising from its creation, or from the fact that it is a court. Inherent power is essential to its being and dignity, and does not require an express grant to confer it. (Petition of Florida State Bar Ass’n, 40 So.2d 902 (1949))7

The right and power to regulate the practice of law is conferred by Article 3 upon the courts, exclusively.

It is unnecessary here to explore the limits of judicial power conferred by that provision, but suffice it to say the practice of law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to regulate the practice naturally and logically belongs to the judicial department of government. (In re Investigation of Nebraska State Bar Ass’n, 133 Neb. 283, 275 N.W. 265, 114 A.L.R. 151. (1937)). Included in that power is the supreme court’s inherent right to prescribe conditions for admission to the Bar, to define, supervise, regulate and control the practice of law, whether in or out of court, and this is so notwithstanding acts of the legislature in the exercise of its police power to protect the public interest and welfare. (Citations omitted.) It follows that the power of the supreme court to make reasonable rules for these purposes is not open to question. (Citations omitted.)8

Pursuant to that constitutional authority, Kansas statutes confer upon the Supreme Court the power to oversee the admission of lawyers to practice before the state’s courts. K.S.A. 7-103(a) provides:

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

Footnotes
1. “Or how wilt thou say to thy brother, Let me pull out the mote out of thine eye; and, behold, a beam is in thine own eye?” Matthew 7:4 (King James).
3. The Kansas Rules of Professional Conduct (KRPC) are found at Kansas Supreme Court Rule (SCR) 226.
4. KRPC 1.2 [Comment]: “A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon

the client’s behalf.” The Comment continues, “However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued.”
5. SCR 226, KRPC, Preamble, Comment [10].
6. KANSAS CONST., art. 3, § 1.
8. Id. at 478-79.
Given the broad mandate of Article 3, Section 1 of the Constitution and the doctrine of the separation of powers, one wonders whether this statute is necessary or even effective to grant any further or additional power to the Court. However, the statute is at least consistent with the constitutional provision vesting authority in the Court.

B. Kansas Supreme Court Rules

Pursuant to the constitutional power extended by Article 3 (and either pursuant to or in ignorance of K.S.A. 7-103(a)), the Kansas Supreme Court has, indeed, adopted rules for the admission, discipline and disbarment of attorneys. Under Rule 201, any attorney admitted to practice law in this state – whether by license or by special admission pro hac vice – is subject to the jurisdiction of the Supreme Court and the authority established by its Rules.

C. Role of the Supreme Court

Under the established rules, the Kansas Supreme Court sits at the top of the organizational structure. As discussed below, the Supreme Court hears appeals from decisions of the Board of Discipline and actually levies the disciplines of censure, suspension and disbarment.

D. Board of Discipline

The Kansas Board of Discipline for Attorneys is established by Rule 204. The Board is empowered to perform the duties imposed and conferred by the Rules of the Supreme Court.

E. Disciplinary Administrator

Under Rule 205, the Supreme Court appoints a disciplinary administrator, who is empowered to employ staff, investigate complaints, maintain permanent records of discipline, prosecute disciplinary proceedings, appear before the Supreme Court and to investigate and prosecute for the Board of Law Examiners “as needed.”

F. Bar Committees

Under Rule 210, the disciplinary administrator “may call upon any member of the bar of this state or any local or state bar association to investigate or assist in the investigation of any complaint ...” There are, throughout the state, a number of committees established by the Kansas Bar Association and various city and county bar associations whose members are called upon to conduct investigations for the disciplinary administrator and to report those investigations to that office.

Thus, as a self-policing profession, there are avenues available for reporting complaints, which are then investigated and decided through a clearly-defined mechanism designed to provide due process to the participants. And, if the participants do not use the avenues provided, if the bar fails (in the perception of the public) to police itself adequately, others outside the bar may step in and try to force regulation upon it.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession’s independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

These Comments found in the Preamble to the Kansas Rules of Professional Conduct sound the call for self-regulation, including compliance with the duty to report lawyers and judges who fail to comply with the obligations imposed upon them by their profession.

III. History of the Duty to Report

A. The Former Code

Before the modern Rules of Professional Conduct were adopted in 1988, the conduct of lawyers in Kansas was governed by the Model Code of Professional Conduct, with its Canons, Disciplinary Rules (DR) and Ethical Considerations (EC). Canon 1 of the Code mandated that, “A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession.” Under that Canon, DR 1-102 made it “misconduct” to “Violate a Disciplinary Rule.” In turn, DR 1-103(A) stated:

A lawyer possessing unprivileged knowledge of a violation of a DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

Note that the duty to report under the Code was mandatory (“shall”) and was not limited to violations by “another” lawyer.

B. The Former Rule of Professional Conduct

As noted above, the KRPC became effective on March 1, 1988. From that date until July 1, 1999, KRPC 8.3 provided as follows:

A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

Note that the Rule applied only to conduct by “another lawyer,” and the duty to report did not apply to all violations, but only to those which raised “a substantial question” as to that other lawyer’s “honesty, trustworthiness or fitness as a lawyer.” Thus, under the former version of Rule 8.3, a lawyer needed to follow a two-step approach: (1) did the conduct of “an-
other lawyer” represent a violation of the Rules of Professional Conduct, and then (2) did that conduct raise a “substantial question” as to the other lawyer’s “honesty, trustworthiness, or fitness as a lawyer”? In many instances, decisions were made not to report, based on a willingness to overlook the violation as not impugning the lawyer’s “honesty, trustworthiness, or fitness as a lawyer.”

As discussed below, those limitations have been removed from the current KRPC.

C. KRPC 8.3

Effective July 1, 1999, KRPC 8.3 was amended, and that version of the Rule remains in place today. Subsections (a) and (b) of Rule 8.3 now provide as follows:

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

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge’s fitness for office shall inform the appropriate authority.\(^{18}\)

The Comment to Rule 8.3 explains the justification of the duty to report on the basis of the bar as a self-policing profession.

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.\(^{19}\)

D. Supreme Court Rule 207(c)

A further duty to report is found in Rule 207(c) of the Kansas Supreme Court Rules:

It shall be the further duty of each member of the bar of this state to report to the Disciplinary Administrator any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney under these rules.\(^{20}\)

A violation of KRPC 8.3 is often coupled with a violation of Rule 207(c) in discipline decisions.\(^{21}\)

E. Code of Judicial Conduct

The Kansas Code of Judicial Conduct contains general “Canons,” with specific “Rules” under each Canon.\(^{22}\)

The Canons state general principles of judicial ethics that all judges must observe. The Rules of the Kansas Code of Judicial Conduct are rules of reason that should be applied consistent with constitutional requirements, statutes, other court rules, and decisional law, and with due regard for all relevant circumstances.\(^{23}\)

Canon 2 of the Kansas Code of Judicial Conduct states: “A Judge Shall Perform the Duties of Judicial Office Impartially, Competently, and Diligently.”\(^{24}\)

Under Canon 2, Rule 2.15 states:

Responding to Judicial and Lawyer Misconduct

(A) A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question regarding the judge’s honesty, trustworthiness, or fitness as a judge in other respects shall inform the appropriate authority.

(B) A judge having knowledge that a lawyer has committed a violation of the Kansas Rules of Professional Conduct that raises a substantial question regarding the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.

(C) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of this Code shall take appropriate action.

(D) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Kansas Rules of Professional Conduct shall take appropriate action.\(^{25}\)

Note that subparts (A) and (B) limit the duty to report to only that conduct which “raises a substantial question” as to the other lawyer’s or judge’s “honesty, trustworthiness, or fitness.” However, subpart (D) somewhat inconsistently states that if a judge receives information indicating that a lawyer has committed “a violation” of the KRPC – not limited to those raising a substantial question as to the lawyer’s honesty, trustworthiness or fitness – the judge shall take “appropriate action.”

Appropriate action may include, but is not limited to, communicating directly with the judge who may have violated this Code, communicating with a supervising

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18. KRPC 8.3(a) and (b). Under subsection (c), this Rule does not require disclosure of confidential information protected by Rule 1.6 or information concerning any violation which is discovered through participation in a substance abuse committee or comparable committee sponsored by a bar association, or a self-help organization such as Alcoholics Anonymous. See also SCR 206, establishing the Lawyers Assistance Program.

19. KRPC 8.3, Comment [1].

20. SCR 207(c).


judge, or reporting the suspected violation to the appropriate authority. Similarly, actions to be taken in response to information indicating that a lawyer has committed a violation of the Kansas Rules of Professional Conduct may include but are not limited to communicating directly with the lawyer who may have committed the violation, or reporting the suspected violation to the appropriate authority.  

IV. A Review of Rule 8.3(a)

A. Duty to Report Yourself

While the 1988 version of the KRCP limited the duty to report to conduct by “another lawyer,” the change made effective in 1999 makes it clear that the duty applies to one’s self. This duty to report applies when a lawyer has knowledge of any action, inaction or conduct which in his or her opinion constitutes misconduct of “an attorney,” not “another attorney.”

In In re Cline, the Kansas Supreme Court affirmed a panel’s finding that a lawyer violated Rule 8.3 by failing to report his own violation of the Rules.

KRCP 8.3(a) provides that "[a] lawyer having knowledge of any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney under these rules shall inform the appropriate professional authority." In this case, the Respondent knew that he had repeatedly violated the Kansas Rules of Professional Conduct in his representation of Mr. Stephens. Because the Respondent failed to self-report his conduct, the Hearing Panel concludes that the Respondent violated KRCP 8.3(a).

In In re Patterson, a complaint was filed against the respondent in another state, and the respondent failed to self-report in Kansas. That was found to be a violation of Rule 8.3 and, combined with other violations, resulted in an indefinite suspension. The respondent in In re McGraw, was disciplined in another state and was found to have violated Rule 8.3 and Supreme Court Rule 207(b) for failing to report that discipline to the Kansas Disciplinary Administrator.

The Court appears consistently to find violations by lawyers who fail to self-report complaints or discipline in other states.

In this case, the Respondent entered into a stipulation regarding the facts, the law, and the disposition of Ms. Kindred’s complaint and Ms. O’Bryant’s complaint in Texas. Despite the Respondent’s stipulation, the Respondent failed to notify the other states where he held licenses. Because the Respondent failed to properly notify the Kansas and Missouri disciplinary authorities, the Hearing Panel concludes that the Respondent violated KRCP 8.3(a). Similarly, in In re Minneman, the respondent was charged and convicted of criminal offenses in another state and was disbarred by that state’s bar. The respondent’s failure to report the information to the disciplinary administrator’s office was found to be a violation of Rule 8.3(a) and Supreme Court Rule 207(c).

B. Duty to Report a Judge

While the limitations of “honesty, trustworthiness or fitness” have been removed from the duty to report lawyers, the duty to report a judge is still limited to conduct which “raises a substantial question as to the judge’s fitness for office.” However, under those circumstances, the Rule does impose a duty to report.

This issue was addressed in Kansas Ethics Opinion 99-8, where a lawyer inquired whether his knowledge of a judge’s ex parte communication with a party during a proceeding invoked his duty to report the judge under Rule 8.3(b). The KBA Ethics Advisory Committee reviewed the requirements that the lawyer have “knowledge” of conduct which represents a “violation” of the applicable canons of judicial conduct and which raises “substantial question” as to the judge’s fitness. Under those circumstances, the committee found that the lawyer indeed had a duty to report.

We believe based on the facts stated, it appears the attorney has actual knowledge of a substantial question of conduct that bears on the judge’s fitness for the position. Reporting under Rule 8.3(b) is based on the verb “shall.” Unless Rule 1.6 is implicated, there appears to be no discretion from reporting.

There is no guidance in the Comments to Rule 8.3(b) to assist a lawyer considering the reporting of a judge, and there is little guidance in the case law. The one Kansas case which was found to cite this rule provides a warning not to be intemperate or unprofessional.

KRCP 8.3(b) requires that an attorney report the misconduct of a judge when the attorney has “knowledge that a judge has committed a violation ... that raises a substantial question to the judge’s fitness.” In this case, the Respondent made serious allegations against Ms. Schultz both personally and in her capacity as a municipal court judge. However, the allegations made regarding Ms. Schultz were general in nature. The Respondent provided no specific evidence that would lead one to conclude that Ms. Schultz violated the judicial canons. Thus, when reviewing the Respondent’s letter

27. The DR under the old Code did not limit “knowledge of a violation” to conduct by “another lawyer.” Thus, that rule also applied to one’s own conduct. Matter of Linn, 245 Kan. 570, 575, 781 P.2d 738 (1989) (probation).
29. Id. at 842.
31. Id. at 135.
33. Id. at 817-18.
as a whole, a majority of the Hearing Panel concludes that the Respondent was merely lashing out against Ms. Schultz because she filed a complaint against him. The Respondent’s letter was unprofessional and ill advised, however, it does not create an obligation for the Respondent to file a complaint against Ms. Schultz pursuant to KRPC 8.3(b).

Understandably, cases involving subsection (b) of Rule 8.3 are rare.

C. Duty of a Judge to Report a Lawyer

As quoted above, the Kansas Code of Judicial Conduct requires a judge to inform the appropriate authority when he or she has knowledge that a lawyer or another judge has committed a violation of the rules of conduct that raises a substantial question regarding the lawyer or judge’s honesty, trustworthiness or fitness as a lawyer or judge. As the Comment observes, it is not “every” violation which must be reported. “This Rule limits the reporting obligation to those offenses that an independent judiciary must vigorously endeavor to prevent.”

The Comment to Rule 2.15 of the Code of Judicial Conduct makes it clear that “[t]aking action to address known misconduct is a judge’s obligation.”

Paragraphs (A) and (B) impose an obligation on the judge to report to the appropriate disciplinary authority the known misconduct of another judge or a lawyer that raises a substantial question regarding the honesty, trustworthiness, or fitness of that judge or lawyer. Ignoring or denying known misconduct among one’s judicial colleagues or members of the legal profession undermines a judge’s responsibility to participate in efforts to ensure public respect for the justice system.

D. Duty to Report a Partner, Subordinate or Supervising Attorney

On the subject of making difficult decisions, consider the ethical dilemma faced by one who knows that a partner, subordinate or supervisor has committed an ethical violation.

1. Partner’s or Supervisor’s Duty to Report

KRPC 5.1 requires a law firm partner or supervisory attorney to make sure the firm has taken steps to assure that all lawyers (and all non-lawyer assistants) in the firm conform to the rules of professional conduct. Further, a lawyer is responsible for another lawyer’s violations of the KRPC if the lawyer orders the conduct or, with knowledge of it, ratifies the conduct. Additionally, a lawyer is responsible if that lawyer is a partner or has direct supervisory responsibility and, learning of the conduct after the fact, “fails to take reasonable remedial action” when the consequences of the action can be avoided or mitigated.

Of course, the failure to train associates or to instruct non-lawyer assistants can result in discipline to the supervisory attorney. For example, in Matter of Farmer, the Kansas Supreme Court approved, inter alia, the following findings of the hearing panel:

... The Panel also finds that Respondent violated MRPC 5.3(a) and (b) regarding his responsibility for the conduct of non-lawyer assistants. Regardless of whether Respondent explicitly instructed his employees to render legal advice or to lie to clients, the evidence is clear and convincing to the Panel that Respondent did not take the necessary and reasonable steps to supervise his employees. He needed to be pro-active to insure that they were not giving legal advice to clients and other callers.

Thus, when a lawyer knows of conduct by a partner, the lawyer has a duty to report that conduct, even if it implicates the lawyer’s own conduct which violated the professional responsibility rules.

2. Subordinate’s Duty to Report

Compounding the conundrum, imagine the subordinate or associate lawyer who knows of a supervisor’s violation of the rules—a supervisor upon whose patronage the associate depends for employment. Even under those circumstances, the lawyer’s duties under Rule 8.3(a) require the lawyer to report.

An extreme example is Jacobson v Knepper & Moga P.C., an Illinois case where an associate learned that his firm was regularly filing collection suits in the wrong venue in order to prejudice debtors—a violation of federal law. The associate complained to the firm and was fired. When the associate filed a wrongful termination case, the court held that, because the lawyer had a duty to report the partners’ violations to the disciplinary authority, he was not a suitable candidate for whistleblower protection.

Thus, we hold that plaintiff, as a licensed attorney employed as such by the defendant law firm, cannot maintain a cause of action for retaliatory discharge because the ethical obligations imposed by the Rules of Professional Conduct provide adequate safeguards to the public policy implicated in this case.
Despite the employment relationship, lawyers have an ethical duty to report known violations by others in the firm, including partner supervisors.52

E. Must the Violation Be “Substantial”?
As discussed above, the duty to report is no longer limited to misconduct which raises a “substantial question” as to the lawyer’s honesty, trustworthiness or fitness to practice. Any comments to that effect have also been removed. However, even before that change in the comments, there was no comfort to be found there.

[Respondent] argues that the word “substantial” found in the comments to the rule should be read into KRPC 8.3(a), requiring there to be knowledge of “substantial misconduct” before a duty to report arises. He also claims that reporting Conderman’s alleged misconduct would have required publicizing confidential information, protected by KRPC 1.6 (2003 Kan. Ct. R. Annot. 368), and that he did eventually report the matter in a timely fashion.

Pyle’s argument that the word “substantial” should be read into the rule is without merit. The language of the rule requires a lawyer to report “any ... conduct” which the lawyer thinks is misconduct. The language of the rule is clear. Further, in Pyle’s brief he stated that at the time he wrote the first letter to Conderman, he believed Conderman’s conduct to be substantial misconduct.

F. “Knowledge” of a Violation
The duty to report a lawyer requires “knowledge” of action which in the reporter’s opinion constitutes misconduct under the KRPC. The duty to report a judge requires the lawyer to “know” the judge has committed a violation of the code of judicial conduct which raises a substantial question as to the judge’s fitness for office. “Knowledge” is a defined term under the KRPC:

“Knowingly,” “Known,” or “Knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.54

Thus, if one does not believe that a violation has occurred, or only suspects the misconduct to have occurred, the duty to report does not apply. The Court considered this issue in In re Jensen:55

The Hearing Panel unanimously concludes that the Respondent did not violate KRPC 8.3(a) for failing to report himself. KRPC 8.3(a) requires that an attorney report misconduct when he has ‘knowledge of any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney.’ In this case, the Respondent believed, and continues to believe, that he did not engage in misconduct. As a result, no obligation to report flows from KRPC 8.3(a).56

If the lawyer does not know of the misconduct, but only suspects it, there is no duty to report. Further, even if the conduct is known, but the lawyer does not know that the conduct constitutes a violation of the KRPC, there should be no duty to report.

G. No Obligation to Report Violations Based on Confidential Information
Rule 8.3(c) provides that, “This rule does not require disclosure of information otherwise protected by Rule 1.6.” A consistent theme in the KRPC is the preservation of confidential client information protected by Rule 1.6(a), which provides:

A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).57

Paragraph (b) of Rule 1.6 then provides certain limited exceptions, such as prevention of future crimes, compliance with court orders or defense of claims asserted against the lawyer. Otherwise, the client’s confidential information is to be kept confidential.58

The confidentiality of client information is so important that it trumps the duty to report.

A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where it would not substantially prejudice the client’s interests.59

This issue was addressed in a Kansas Ethics Opinion issued in 1994.60 In that instance, the attorney inquired whether his knowledge of a sexual affair by another in his law firm with a client of the firm gave rise to a duty to report. The committee concluded that the obligation to report is trumped by the duty of confidentiality to the client.

If verified, MRPC 8.3 obligates the incident be reported to the Disciplinary Administrator only if the former client releases the firm from its MRPC 1.6 requirements to keep the confidences and secrets of the client inviolate. This generally means a written release. Rule 207 of the Kansas Supreme Court does not override MRPC 8.3’s clear deference to 1.6 confidentiality requirements.61

Similarly, when the lawyer has been retained to represent the respondent in a disciplinary proceeding, the same rule of
confidentiality protects the lawyer from the duty to report the client.

The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.62

H. Impaired Lawyers and Judges

Another social policy is the encouragement of aid and assistance to impaired lawyers and judges who seek out and participate in programs which provide that aid and assistance. Rule 8.3(c) therefore provides that:

[A] lawyer is not required to disclose information concerning any such violation which is discovered through participation in a Substance Abuse Committee, Service to the Bar Committee or similar committee sponsored by a state or local bar association, or by participation in a self-help organization such as Alcoholics Anonymous, through which aid is rendered to another lawyer who may be impaired in the practice of law.63

Providing this exception “encourages lawyers and judges to seek treatment through such a program,” while if the exception were not granted, “lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public.”64 Further, lawyers should be encouraged to serve on, and avail themselves of the services provided by, committees, such as the Kansas Lawyer Assistance Committee [KALAP].65 If this exception were not provided, the rule “might inhibit free and open communication by the incapacitated lawyer and result in neglected matters remaining so.”66

V. When to File a Complaint

Rule 8.3 provides no guidance or instruction as to when the duty to report must be carried out. Likely, this means the report must be made within a “reasonable” time after the reporting lawyer becomes aware of it.67 In In re Comfort,68 the Kansas Supreme Court considered a case where the respondent filed an ethics complaint (after an ethics complaint had been filed against him) a few weeks after he had published a letter threatening the other lawyer with an ethics complaint. In that case, the Court said:

We are unwilling to use this case as a vehicle to impose a time limit for reporting lawyer misconduct to the Disciplinary Administrator. Unlike the Respondent in In re Pyle, 278 Kan. 230, 91 P.3d 1222 (Pyle I), this Respondent ultimately complied with KRPC 8.3.

On this basis, the “ultimate” filing of the ethics complaint resulted in the Court affirming the dismissal of the complaint that respondent violated Rule 8.3.

The disciplinary administrator argues respondent violated KRPC 8.3 when he published the February 18 [2004] letter – alleging Swenson had engaged in an ethical violation – without simultaneously reporting Swenson to the disciplinary administrator. Respondent insists his eventual reporting of Swenson [on March 9, 2004] was sufficient compliance with KRPC 8.3, which sets out no time limit. The hearing panel agreed with Respondent’s reading of the rule.69

VI. Duty to Cooperate in Investigations

Once a complaint has been filed, it is the duty of every lawyer – including the respondent – to cooperate with the investigation of the complaint. Numerous are the cases where the Court has found a separate violation of Rule 8.3 and Supreme Court Rule 207 based upon the respondent’s failure to cooperate.

We agree with the hearing panel’s conclusions in its final hearing report that the failure to file a response to the Kansas disciplinary complaint and failure to appear before this court are in themselves violations of our rules. See KRPC 8.1(b); KRPC 8.3(a); Supreme Court Rule 207(b); Supreme Court Rule 211(b).70

VII. Do Not Use a Violation as a Lever in Litigation

If a lawyer knows of a violation of the Kansas Rules of Professional Conduct under the terms outlined above, that violation should be reported to the disciplinary administrator. It should not be used as a lever in litigation. Indeed, it can be a misuse of the Rules to try to use them in that manner.

Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. ... The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are involved by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer’s self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.71

62. KRPC 8.3, Comment [3].
63. KRPC 8.3(c).
64. Id. Comment [4].
65. www.kalap.com
66. KRPC 8.3, Kansas Comment.
69. Id. at 206.
71. SCR 226, KRPC, Scope, Comment [20].
So, for example, in *Shamberg, Johnson & Bergman Chtd v. Oliver*, the Court considered a defendant’s assertion that his former law firm (a co-defendant) had violated the KRCP in agreeing to an improper referral fee in the face of an (alleged) conflict of interest.

Accordingly, when Oliver discovered what he perceived to be a rule violation by Wallace Saunders, his duty as an attorney was to “inform the appropriate professional authority,” i.e., the Office of the Disciplinary Administrator. KRCP 8.3(a) (2008 Kan. Ct. R. Annot. 585). He should not have sought standing to enforce the disciplinary rules as a procedural weapon to prevail in a civil action.

**VIII. Do Not Threaten an Ethics Complaint**

Because an agreement to violate the Rules is a violation of Rule 8.4(a), it would be improper to make an offer not to report a violation in exchange for settlement. A lawyer has a duty to report under Rule 8.3. That duty cannot be traded for an advantage in civil litigation. Further, an agreement to violate the KRCP is a violation of Rule 8.4(a). As the ABA Ethics Committee has reasoned, “[b]ecause an agreement not to file a[n ethics] complaint if a satisfactory settlement is made is the logical corollary of a threat to file a complaint in the absence of such a settlement, we conclude that a threat to file disciplinary charges is unethical in most circumstances."

**IX. Discipline for Failing to Report**

Because the Respondent had knowledge of what he perceived to be a violation of the Kansas Rules of Professional Conduct, the Respondent had an obligation to report the opposing lawyer to the Disciplinary Administrator. The Respondent did not report the other lawyer’s conduct, rather, he made a threat to report. The Hearing Panel concludes that the Respondent violated KRCP 8.3(a). Similarly, in *In re Comfort*, the Court reiterated that “[a] lawyer may not employ such a threat to obtain a legal advantage for his or her client; we have specifically disapproved of such extortion attempts.”

As the Florida Bar Association has opined, disciplinary threats are “ethically impermissible in most circumstances.”

This issue has been addressed in a number of Kansas cases. For example, in *In re Kenny*, the respondent – in the course of a civil proceeding – threatened to file an ethics complaint against the opposing lawyer. The Supreme Court affirmed the panel’s finding that this was inappropriate and constituted a violation of Rule 4.4.

Because the Respondent had knowledge of what he perceived to be a violation of the Kansas Rules of Professional Conduct, the Respondent had an obligation to report the opposing lawyer to the Disciplinary Administrator. The Respondent did not report the other lawyer’s conduct, rather, he made a threat to report. The Hearing Panel concludes that the Respondent violated KRCP 8.3(a).

Similarly, in *In re Comfort*, the Court reiterated that “[a] lawyer may not employ such a threat to obtain a legal advantage for his or her client; we have specifically disapproved of such extortion attempts.”

**IX. Discipline for Failing to Report**

Because the Rules impose a duty to report most ethics violations, one may then conclude that failure to report a violation is itself a violation. However, there are surprisingly few cases where a lawyer has actually been disciplined for failing to report misconduct.

The landmark case on this point is *In re Himmel*, where the respondent attorney successfully pursued his clients’ former lawyer (who had converted the clients’ funds) and then was brought before the bar for his failure to report the other lawyer’s conversion (violation of Rules 1.15 and 8.4(b)). To compound matters, the respondent had been instructed by his clients not to report the other lawyer, in the belief that a successful resolution of the civil claim would be more likely if there were no pending ethics complaint.

As to respondent’s argument that he did not report Casey’s misconduct because his client directed him not to do so, we again note respondent’s failure to suggest any legal support for such a defense. A lawyer, as an officer of the court, is duty-bound to uphold the rules in the Code.

And to compound matters even further, the respondent took no fee from his clients for restoring their purloined funds, which follows a more expansive reporting requirement than that of the ABA Model Rules. Thus, using the logic of the ABA opinion, any threat of disciplinary action is a violation of Rule 8.4(a) because it implies that the threatening attorney is willing to keep quiet about an ethics violation in exchange for a settlement.

Even if an attorney were not required to report the violation under Rule 8.3(a), the threat still is ill-advised. Disciplinary threats raise special concerns because they introduce the attorney’s fate into the negotiation process – potentially creating a conflict of interest (in violation of Rule 1.7(b)), burdening a third person (in violation of Rule 4.4) and/or hindering the administration of justice (in violation of Rule 8.4(d)). Such a threat burdens the opposing lawyer and his client by introducing extraneous factors into their assessment of whether to settle or proceed to trial. It also creates a conflict of interest between them.

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funds. In suspending respondent Himmel for one year, the Illinois Supreme Court held:

Though respondent repeatedly asserts that his failure to report was motivated not by financial gain but by the request of his client, we do not deem such an argument relevant in this case. This court has stated that discipline may be appropriate even if no dishonest motive for the misconduct exists. (In re Weinberg, 119 Ill. 2d 309, 315, 116 Ill. Dec. 216, 518 N.E.2d 1037 (1988); In re Clayer, 78 Ill. 2d 276, 283, 35 Ill. Dec. 790, 399 N.E.2d 1318 (1980)). In addition, we have held that client approval of an attorney’s action does not immunize an attorney from disciplinary action. (In re Thompson, 30 Ill. 2d 560, 569, 198 N.E.2d 337 (1963); People ex rel. Scholes v. Keithley, 225 Ill. 30, 41, 80 N.E. 50 (1906)).

Thus, it should be clear that lawyers can be, and are, disciplined for failing to comply with their ethical obligations under Rule 8.3.

X. Conclusion

In appropriate circumstances, lawyers and judges clearly have a “duty to report” violations of the KRPC and the Code of Judicial Conduct, by lawyers and judges, respectively (including reporting themselves). Reporting violations of the rules should not be used as a threat, negotiating tool or weapon.

Returning to the theme with which the article began, the bar is fortunate to be granted the franchise of self-regulation.

The legal profession’s relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Rules, authorities and penalties imposed by governmental agencies comprised of non-lawyers would bring about unintended and negative consequences to the administration of justice and the independence of the practicing bar. Thus, it is incumbent upon all lawyers, including judges, to preserve this privilege of self-government accorded to the profession. One way to accomplish this laudable goal is to be aware of the duty to report found in KRPC 8.3 and Rule 2.15 of the Kansas Code of Judicial Conduct and to act in accordance with that duty.

About the Author

J. Nick Badgerow is the partner-in-charge of the Overland Park office of Spencer Fane Britt & Browne LLP. He is a trial lawyer practicing in the areas of construction, employment and professional responsibility. Badgerow is a member of the Kansas Board for Discipline of Attorneys, member of the Kansas Judicial Council, chair of the Judicial Council Civil Code Committee, co-chair of the Judicial Council Antitrust Committee, chair of the KBA Ethics Advisory Committee, and chair of the Johnson County Ethics and Grievance Committee. He is also a member of the Kansas Commission on Professionalism in the Bar, which wrote the Pillars of Professionalism. Badgerow is co-author and co-editor of the Kansas Ethics Handbook, and is a co-author of the Kansas Employment Law Handbook.
The Collateral Source Rule After Martinez v. Milburn

By Hon. Kevin P. Moriarty and Katie Beye
The collateral source rule is a long-standing mandate that requires the tortfeasor to compensate an injured party for the harm they have caused. The Restatement of Torts states that “[p]ayments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor’s liability, although they cover all or a part of the harm for which the tortfeasor is liable.”1 Further, a tortfeasor should be responsible for compensating the injured party for all harms, not just the “net loss” to the injured party. The Kansas Supreme Court has ruled that “benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer.”2 The rule is both a “substantive rule of damages and a procedural rule of evidence.”3 This prevents both the reduction of awards based on payments made by third parties and the introduction of evidence as to how much, if anything, a third party has paid to the benefit of the plaintiff.4

I. Establishment of the Collateral Source Rule

The collateral source rule has long been a part of the common law of the United States and the state of Kansas. Scholars trace the advent of this rule to the U.S. Supreme Court’s ruling in *The Propeller Monticello v. Mollison.*6 In that case, the Court allowed a boat owner to sue for damage done to his boat, even though the losses were covered by insurance.7 The Court reasoned that the defendant’s financial responsibility did not depend on the amount paid by insurance as it was a third-party business deal unrelated to the injury at hand.8 Over time, the collateral source rule was adopted in some form by all fifty states except Alabama.9

In Kansas, the foundation for the rule can be seen in the 1906 decision of *Lewark v. Parkinson.*10 The Kansas Supreme Court ruled that a tortfeasor is liable for all damages caused by negligent behavior, even if the care was provided by family members at no cost to the injured party.11 The 1918 case of *Berry v. Dewey* is generally regarded as the first case in Kansas to specifically recognize the collateral source theory.12 In that case, a mother received benefits after the death of her son. The Kansas Supreme Court ruled that those benefits could not be deducted from the damages awarded to her in a suit for the wrongful death of her son based on the principles of equity and fairness.13

The Kansas Supreme Court has traditionally been strict in applying the collateral source rule. In *Martinez v. Milburn Enterprises,* the dissent writes, “As the 100-year-old history of this court’s treatment of [this rule] illustrates, we have traditionally viewed the introduction of collateral source evidence with disdain.”14 For example, in *Rexroad v. Kansas Power and Light Co.,* the fact that the injured plaintiff had insurance was of “no concern” to the wrongdoer.15 In 1988, the Court stated, in *Harrier v. Gendel,* that the introduction of collateral source benefits was “inherently prejudicial and requires reversal.”16 However, changing circumstances, largely in modern medical billing practices, is causing complications in the administration of this traditionally straightforward rule.

II. Erosion of the Collateral Source Rule

In recent years, several states have reviewed and modified the common law and statutory authority prohibiting the introduction of evidence of collateral source payments. The action has generally been in response to concerns about the rising costs of medical malpractice suits.17 Variation in these efforts has created a “jurisdiction-specific legal patchwork” nationwide.18 As of late 2008, 17 states retain the common-law collateral source rule.19 The remainder of the states allow varying admission of collateral source evidence in all personal injury cases, while others allow it only in medical malpractice suits.20 There are some jurisdictions that allow collateral source evidence to be presented at trial while others allow it only for post-verdict reductions in damages.21 Some states will not allow the introduction of collateral source evidence if the insurer has a subrogation right to collect part of any damages awarded to the injured party.22 The national increase in individuals who are covered by health insurance or Medicaid/Medicare has contributed greatly to the complicated application of the rule, making inconsistency prevalent.23

In Kansas, there have been several attempts to legislatively modify the collateral source rule. The first attempt in 1976 applied only to medical malpractice cases where the collateral source benefit was insurance that neither the plaintiff nor his or her employer had secured.24 That attempt was ruled

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**Footnotes**

1. Restatement (Second) of Torts § 920A(2) (1979).
2. Id. at cmt. 2.
5. Id.
8. Id.
10. 73 Kan. 553, 85 P. 601 (1906).
11. Id. at 555-56.
19. Id. at 352, n.49.
20. Id. at 351.
21. Id.
22. Id. at 352.
unconstitutional in *Wentling v. Medical Anesthesia Services* on the grounds that it unconstitutionally discriminated against those not injured by a health care provider and those who received insurance gratuitously.25 Two more statutes passed in 1985 and 1988 that attempted to limit the use of the collateral source rule were also subsequently struck down on equal protection grounds.26 The most recent attempt to modify the collateral source rule was a bill that passed the Senate in 2006, but did not pass the House of Representatives.27 The bill attempted to abrogate the rule in all personal injury cases and require the court to reduce the damages by the plaintiff's collateral source benefits.28

The failure of those legislative efforts to modify the collateral source rule does not mean that Kansas courts have not done what the legislature was unable to accomplish. Since 1996, judicial decisions regarding “write-offs,” meaning the reduction in charges actually billed to the injured party due to a previous deal between some third party and private insurance or a government program like Medicaid or Medicare, have chipped away at the traditional notion of the collateral source rule.

**A. Bates**

The first case to review the collateral source rule as applied to write-offs was *Bates v. Hogg*.29 Following an injury accident in which the defendant's truck struck the plaintiff's car from behind, the defendant filed a motion in limine to limit the introduction of evidence to the cost of treatment billed to Medicaid, excluding the hospital's write-off.30 The trial court granted that motion.31 On appeal, the Kansas Court of Appeals first stated that the purpose of damages is to return the injured party to the position he or she was in before the injury.32 Under that reasoning, the court found that the collateral source rule did not apply, as the purpose of the rule was not served by allowing evidence of damages greater than that charged to Medicaid.33 The court reasoned that the charge billed to Medicaid became the “customary charge,” and by agreement, any costs in excess of that charge cannot be billed to the individual.34 The court further justified the result, stating that “[i]t would be unconscionable to permit the taxpayers to bear the expense of providing free medical care to a person and then allow that person to recover damages for medical services from a tortfeasor and pocket the windfall.”35 *Bates* essentially limited the collateral source rule so that the injured party could only seek damages up to the amount paid by the collateral source, not those costs which were written off and “paid by no one.”36

30. Id. at 703.
31. Id.
32. Id. at 704.
33. Id. at 705.
34. Id.
38. Id.
39. Id. at 543-44.
40. Id. at 544.
41. Id. at 546.
42. Id. at 545.
43. Id. at 551.
44. Id.

**B. Rose I**

The first case to reach the Kansas Supreme Court on the issue of the collateral source rule as applied to medical write-offs was *Rose v. Via Christi Health Systems*, known as *Rose I*. Plaintiff’s executor sued the hospital where Rose was injured and asked for damages. The trial court denied defendant's pre-trial motion to limit the damages to those actually paid by Medicare, stating that the collateral source rule prevented the introduction of such evidence.37 However, after damages were awarded to the plaintiff, the trial court granted the defendant's motion and reduced the damages by allowing the hospital to offset the award by the amount that they had already written off and not billed to Medicare.38 On appeal, the Supreme Court first found that the offset violated federal Medicare statutes.39 On the defendant's cross-appeal, the Court found that the trial court should have limited the evidence of medical costs to those paid by Medicare, excluding the amount the hospital wrote off. The Court began with the rationale for the rule, writing that “[a] benefit secured by the injured party either through insurance contracts, advantageous employment arrangements, or gratuity from family or friends should not benefit the tortfeasor by reducing his or her liability for damages.”40 Characterizing Medicare like private insurance where benefits are bargained for by payroll deductions, the Court then limited the holding in *Bates* to only those cases involving Medicaid.41 Unlike Medicare, Medicaid is a state-run program that generally provides free health care to those individuals in need of assistance, and therefore the collateral source rule does not apply.42 Because any write-off with Medicare is the result of a voluntary contract between the health care provider and Medicare, the individual should get the benefit, not the provider.43 The majority asserted that this result is supported by public policy. The tortfeasor should bear full responsibility for the damages caused, and any windfall should go to the injured party, not to the wrongdoer, in reducing his or her costs.44

**C. Fischer and Liberty**

The ruling in *Rose I* was further complicated by the Supreme Court's grant of a rehearing. During the almost two year period before the second ruling, the Kansas Court of Appeals released two unpublished opinions related to the collateral source rule and medical write-offs. In *Fischer v. Farmers Insurance Co.*, the court of appeals extended the *Bates* theory to write-offs by all health care providers.45 That ruling extended *Bates* to all write-offs by health care providers, stating...
that the rule was not applicable since the write-off amount is not collateral source benefit.56 The court articulated that the amount paid by the insurer to cover the medical expenses is the reasonable value of the services.47 The presumption that the injured party should receive a windfall in order to hold the tortfeasor fully liable was also discounted.48

Similarly, in Liberty v. Westwood United Super, the court of appeals considered write-offs pursuant to Medicare.49 Following the Bates precedent once again, the court found that the true issue before them was the reasonable amount of plaintiff’s medical expenses.50 The court reasoned that payments to Medicare were not really a voluntary choice made by the individual.51 Medicare is unlike private health insurance because deductions for the federally funded program are withheld from the employee’s paycheck involuntarily, much like the funding supporting Medicaid.52 Additionally, the court characterizes Medicare write-offs as a volume discount, not as a payment at a reduced rate for services.53 Like in Fischer, the court also rejected the argument that a plaintiff should receive a windfall in order to hold the tortfeasor fully liable; the defendant’s insurance is likely to pay any such windfall, thus forcing society to pay the cost in increased insurance premiums while the actual wrongdoer bears little financial hardship.

D. Rose II

Soon after these court of appeals decisions, the Kansas Supreme Court released Rose II.55 Following the logic of the dissent in Rose I, the Court narrowly limited their holding, finding that because the tortfeasor was the health care provider, the collateral source rule did not apply, and the setoff allowed by the trial court was upheld.56 Because they upheld the setoff, the Supreme Court did not touch the issue of whether allowing evidence of the write-off violated the collateral source rule.57 Thus, practitioners were left with a maze of precedent stating that Medicaid and private insurance write-offs were admissible according to Bates and Fischer while the issue of Medicare write-offs was still fluid pursuant to Rose I, Liberty, and Rose II. Generally, the Kansas Court of Appeals characterized the issue as the reasonable value of medical services and not as a collateral source rule issue.58 That interpretation essentially allowed evidence of the write-offs.

E. Martinez

Most recently, the Supreme Court considered the issue of write-offs and the collateral source rule in Martinez v. Milburn

47. Id. at *25-26.
48. Id. at *24.
51. Id. at *26-27.
52. Id.
53. Id.
54. Id. at *27.
56. Id. at 533.
57. Id. at 533-34.
Enterprises. The plaintiff was injured at the defendant’s business, and sought damages. The trial court limited evidence of the amount of medical expenses to that which the insurance provider actually paid, excluding evidence of write-offs by the health care provider.\textsuperscript{69} The plaintiff appealed, urging that the defendant should not benefit by her decision to contract for insurance for which she had paid consideration.\textsuperscript{60} The Court rejected that approach, stating that Medicare patients do not truly bargain for benefits\textsuperscript{61} and that creating differences between patients with Medicaid, Medicare, and private insurance may violate equal protection provisions of both the federal and state constitutions.\textsuperscript{62}

Instead, the Court framed the issue as determining the reasonable value of medical services. The Court specifically held that the reasonable value of medical services is an issue to be determined by the fact finder. The amount paid by an insurer is not conclusively the value of these services.\textsuperscript{63} The Court strikes a balance, upholding the inadmissibility of collateral source benefits, but found that “the rule does not address, much less bar, the admission of evidence indicating that something less than the charged amount has satisfied, or will satisfy, the amount billed.”\textsuperscript{64} In other words, the fact-finder may hear evidence of both the write-off made by the health care provider as well as the amount paid by a collateral source, as long as the collateral source is not identified as the source of such payments.

The dissenting justices pointed out three reasons that they disagreed with the majority’s allowance of the admission of this evidence. First, they believe that, even with limiting instructions, a normal jury is unlikely to hear evidence of collateral payments and fail to come to the realization that much of the plaintiff’s bills were paid by insurance.\textsuperscript{65} They fear the juries will improperly use this information or will simply “split the difference” between the full value of the services before the write-off and that which the insurance provider paid.\textsuperscript{66} The dissent believes that the solution presented by the majority is simply too high-risk and that defendants should take advantage of other alternatives to dispute the reasonableness of medical services bills without involving a collateral source.\textsuperscript{67} The majority responds that these concerns can be solved by a “vigilant trial court.”\textsuperscript{68} They compare this to the admission of prior offenses in a criminal trial where the judge must instruct the plaintiff.\textsuperscript{69} With that approach, the dissent believes that a jury is more likely to award higher damages to an uninsured plaintiff, which is not only illogical in providing incentives for obtaining insurance, but which also may create unfair differences between two plaintiffs with similar injuries.\textsuperscript{71} The majority dismisses the concern, contending that an uninsured plaintiff may negotiate a write-off similar to an insured.\textsuperscript{72} The concurrence also disagrees with the dissent’s conclusion, stating that even though an uninsured plaintiff may get a large award, the health insurance provider is likely to collect its bill out of the judgment.\textsuperscript{73} That still leaves the insured plaintiff in a better position since his or her insurance will have covered at least some portion of their bills.

Finally, the dissent contends that the compromise by the majority undermines the “bright clarity” of the collateral source rule to the point that the usefulness of the rule is all but gone.\textsuperscript{74} They fear that the majority’s approach of allowing the evidence without specific mention of the source as collateral essentially eradicates the rule.\textsuperscript{75} Without the collateral source rule, the dissent fears that the underlying principles of “equity, fairness, and inherent prejudice to the plaintiff if such evidence was presented to a jury,” along with public policy interest in deterring and punishing tortfeasors, will disintegrate as well.\textsuperscript{76}

III. What’s Next?

The Court’s 4-3 ruling in Martinez leaves the collateral source rule on life support. The majority tried to provide some guidance for allowing the admission of collateral source evidence at trial. The Court suggested that the trial court can alleviate any issues with the evidence of write-offs by informing a jury of the limited purpose of that evidence at the time of admission as well as in limiting jury instructions. This is consistent with Kansas statute that provides that evidence admitted for one purpose shall be restricted to its proper scope by jury instruction upon request,\textsuperscript{77} and the Pattern Instructions of Kansas that recommend the use of the limiting instruction whenever the scope of the evidence was limited at the time of admission.\textsuperscript{78}

Less than six months before ruling on Martinez, the Kansas Supreme Court considered limiting instructions in the context of the collateral source rule in the case of Unruh v. Purina Mills.\textsuperscript{79} The Court held that when the mention of insurance coverage is “purely inadvertent and is not brought into the case by intentional misconduct of plaintiff’s counsel,” the evidence is not prejudicial.\textsuperscript{80} Further, inadvertent mention of insurance coverage may be cured by limiting jury instructions.\textsuperscript{81} Thus, it seems that unless the mention of insurance coverage is an intentional ploy by the defense to reduce the damages award, the introduction of collateral source benefits, even by name,
can be remedied by a judge’s admonition and instruction to a jury to limit the scope of consideration of the evidence.82

Historically in a personal injury suit, it was presumed that a doctor’s charge was reasonable.83 Now, with the Martinez decision, the defendant has the right to challenge that presumption based on evidence of write-offs in medical billing procedures. This addresses the modern reality that insurance coverage is increasingly prevalent in this country.84 However, another issue, briefly mentioned by the majority, is the increase in charge-to-cost ratios, or “mark-ups.” Citing the amicus curiae brief submitted by the Kansas Association of Defense Council, the Court noted that the average mark-up of approximately 4,000 hospitals across the country is 244.37 percent.85 While only noted in passing, this mention of mark-ups seems significant as it immediately follows the Court’s conclusion that charges billed by health care providers are not conclusive of reasonableness and other evidence should be admitted.86 These mark-ups were not at issue in Martinez; however, their brief but significant mention likely foreshadows the next step in determining damages by digging deeper into charges billed to find the true cost of medical services.

The Martinez decision leaves trial courts and practitioners with many unanswered questions. Although the Supreme Court has told us what we are to do, how we are to do it remains a bit unclear. ■

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About the Author

**Hon. Kevin P. Moriarty** has been a district court judge in Johnson County since his appointment in 2004. He graduated from Washburn University with a Bachelor of Arts in 1975 and then Washburn University School of Law in 1978. He also earned a Masters in Public Administration from the University of Kansas in 1984. Moriarty began his career as a prosecutor for the Johnson County District Attorney’s Office and then moved on to private practice prior to becoming a judge.

**Katie Beye**, originally from Stilwell, graduated with her Juris Doctor from the University of Virginia School of Law in 2012 and her Bachelor of Arts from Kansas State University in 2009. She is currently clerking for the Hon Jerralud C. Jones and the Hon Mary Jane Hall at the Norfolk Circuit Court in Norfolk, Va.

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82. Some district judges have issued the following instruction in these cases:

   Instruction No. ___

   The existence of any insurance coverage, or the lack of any insurance coverage, shall not enter into your consideration or deliberation of this case. Kansas law is very clear on this point and your failure to follow the law is a violation of your sworn duty as jurors.


86. *Id.*
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ATTORNEY DISCIPLINE

ONE-YEAR SUSPENSION
IN RE CRAIG E. COLLINS
ORIGINAL PROCEEDING IN DISCIPLINE

FACTS: This is a contested original proceeding in discipline filed by the office of the disciplinary administrator against the respondent, Craig E. Collins, of Topeka, an attorney admitted to the practice of law in Kansas in 1988. A hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on January 25, 2012, when the respondent was personally present. Collins' conduct involved overdrafts on his attorney trust account and the resulting investigation, and also his failure to properly prepare tax returns.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator recommended that the respondent be suspended from the practice of law for one year.

HEARING PANEL: The hearing panel determined that respondent violated KRPC 1.3 (2011 Kan. Ct. R. Annot. 433) (diligence), 1.15(a) and (d)(1) (2011 Kan. Ct. R. Annot. 519) (safekeeping property and preserving client funds), 8.1(b) (2011 Kan. Ct. R. Annot. 609) (failure to respond to lawful demand for information from disciplinary authority), 8.4(g) (2011 Kan. Ct. R. Annot. 618) (engaging in conduct adversely reflecting on lawyer's fitness to practice law), and Supreme Court Rule 207(b) (2011 Kan. Ct. R. Annot. 314) (failure to cooperate in disciplinary investigation). In the first complaint, the panel found violations of the KRPC due to overdrafts on the respondent's attorney trust account and his failure to cooperate during the investigation of the overdrafts. In the second complaint, the panel found that the respondent violated the KRPC by not diligently preparing tax returns. The hearing panel unanimously recommended that the respondent be suspended for a period of one year.

HELD: Court held there was clear and convincing evidence that respondent kept personal funds in his client trust account. He admits that he used personal funds to pay his continuing legal education (CLE) commission fees, his Kansas attorney registration fees, and fees to the Kansas Bar Association for attending a CLE all out of his trust account. Court also held that the panel's finding that Collins failed to cooperate is supported by clear and convincing evidence. Last, Court held that over a period of nine years respondent failed to perform legal services which resulted in his clients suffering an unnecessary and expensive tax seizure. Court concluded that a one-year suspension was the appropriate discipline, given the nature of respondent's offenses, as well as the undisputed findings that respondent failed to perform services for his clients and misused his client trust account.

ORDER OF REINSTATEMENT
IN RE PAUL W. DWIGHT
NO. 67,819 – DECEMBER 12, 2012

FACTS: On July 10, 1992, Court suspended the respondent, Paul W. Dwight, from the practice of law in Kansas for a period of one year. See In re Dwight, 251 Kan. 588, 834 P.2d 382 (1992). Before reinstatement, the respondent was required to pay the costs of the disciplinary action and comply with Supreme Court Rule 218 (2011 Kan. Ct. R. Annot. 379). On November 20, 2012, the respondent filed a renewed petition for reinstatement 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: Court, after carefully considering the record, granted the respondent's petition for reinstatement.

40-MONTH SUSPENSION, STAYED AFTER 12 MONTHS, WITH 28 MONTHS' SUPERVISED PROBATION
IN RE CHRISTOPHER Y. MEEK
ORIGINAL PROCEEDING IN DISCIPLINE

FACTS: This is an original proceeding in discipline filed by the office of the disciplinary administrator against the respondent, Christopher Y. Meek, of Baxter Springs, an attorney admitted to the practice of law in Kansas in 1979. Meek had pled guilty to unlawfully possessing hydrocodone and had obtained the prescription medication from clients. Meek received two years' probation.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator recommended that respondent be disbarred. As justifications for the sanction of disbarment, the disciplinary administrator noted that the criminal offense occurred in the context of an attorney-client relationship; the respondent exploited the attorney-client relationship for his personal reasons; the client was vulnerable; and the conduct was serious and implicated the client in criminal conduct.

HEARING PANEL: A hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on April 18, 2012, when the respondent was personally present and was represented by counsel. The hearing panel determined that respondent violated KRPC 1.7(a)(2) (2011 Kan. Ct. R. Annot. 484) (conflict of interest: current clients) and 8.4(b) (2011 Kan. Ct. R. Annot. 618) (misconduct). The hearing panel recommended that respondent's license be suspended for one year and then based on certain conditions, the hearing panel recommended that respondent be placed on probation.

HELD: Court held the evidence before the hearing panel established the charged misconduct of Meek by clear and convincing evidence and supported the panel's conclusions of law. In considering
the seriousness of the offense, Court commented that it was especially troubled that respondent created a conflict of interest for personal gain and in doing so placed his client at risk. Court was also concerned about the safety of the public when the respondent resumes practicing law given the respondent’s long-term issues with alcohol and drugs. Court concluded that a period of probation is appropriate to allow monitoring. A minority of the court would impose a shorter period of suspension and probation than imposed by the majority.

CIVIL

DRIVER’S LICENSE REVOCATION
SHRADER V. KANSAS DEPARTMENT OF REVENUE
DECATURE DISTRICT COURT – REVERSED
COURT OF APPEALS – AFIRMED
NO. 103,176 – DECEMBER 14, 2012

FACTS: Officers saw Shrader’s vehicle make a left turn without signaling and they also knew Shrader was driving on a suspended license. Officers stopped Shrader as he pulled into his driveway. Officers detected a moderate smell of alcohol on his breath. Shrader produced an expired license and expired proof of insurance. When backup arrived, officers asked Shrader to perform field sobriety tests. Officers told him he was not under arrest, but that driving while suspended in an arrestable offense. Shrader said for officers to take him in but officers tried to persuade him to take a field sobriety test and a preliminary breath test instead. Shrader declined. Officers arrested Shrader and at the station Shrader refused a breath test. KDOR revoked Shrader’s driver’s license. The district court affirmed Shrader’s suspension. The Court of Appeals reversed.

ISSUE: Driver’s license revocation

HELD: Court affirmed the Court of Appeals and held that the plain language of K.S.A. 8-1001(b) requires an arrest for an alcohol-related driving offense rather than simply requiring an arrest for any offense involving operation of a motor vehicle. Court held that under the facts of this case, the offense for which defendant was arrested does not authorize the arresting officer under K.S.A. 8-1001(b) to request an evidentiary breath test. Consequently, the defendant’s refusal to take the test cannot be the basis for suspending his driving privileges under K.S.A. 8-1014(a), and they must be reinstated.

STATUTES: K.S.A. 8-1001(b), (h)(1), -1002(a), -1014(a), -1020(h)(1), -1567; K.S.A. 20-3018(b); and K.S.A. 60-2101(b), -3018(b)

DRIVER’S LICENSE REVOCATION
SLOOP V. KANSAS DEPARTMENT OF REVENUE
SHAWNEE DISTRICT COURT – REVERSED
COURT OF APPEALS – REVERSED
NO. 103,334 – DECEMBER 14, 2012

FACTS: Officers stopped Sloop’s vehicle because his license plate light was out, no other traffic violations. Sloop smelled of alcohol and said he had a beer at his friend’s house. Sloop did not exhibit the normal signs of intoxication. After the preliminary breath test, officers arrested Sloop and took him to the station for further testing because the car camera was not working. Sloop only had one or two clues of intoxication when he performed two field sobriety tests. After two tests, Sloop refused to take a breath test. The district court admitted that the evidence of intoxication was weaker than a majority of the cases, but held that a reasonable officer could have believed that it was more than a possibility that Sloop operated his vehicle while under the influence of alcohol. The Court of Appeals affirmed the district court’s decision and the suspension of Sloop’s license.

ISSUE: Driver’s license revocation

HELD: Court held that an arrest must be lawful before an arresting officer is authorized to request a test to determine the presence of alcohol or drugs. Court held the district court and Court of Appeals applied the wrong standard of probable cause of guilt that “is more than a mere possibility.” Court held that because the evidence was insufficient to establish probable cause for the defendant’s arrest, his arrest was unlawful. The arresting officer therefore had no authority to request the defendant to take an evidentiary breath test. The defendant’s refusal to take an unauthorized test cannot be the basis for suspending his driving privileges, and they were reinstated.

STATUTES: K.S.A. 8-1001(a), (b), -1002(f), -1014(a)(1), -1020(h)(1), (k); K.S.A. 22-2401(c); and K.S.A. 60-2101(b)

Appellate Practice Reminders . . .

Admission Pro Hac Vice of Out-of-State Attorney

Supreme Court Rule 1.10 governs admission pro hac vice of an out-of-state attorney before the Kansas appellate courts. An attorney in good standing, regularly engaged in the practice of law in another state, territory, or the District of Columbia, may be admitted on motion to practice law in a Kansas appellate court – for a particular case only – if the out-of-state attorney associates with an attorney in good standing, regularly engaged in the practice of law in Kansas. The duties of the Kansas attorney are to be actively engaged in the case; sign all pleadings, documents, and briefs; and be present at any prehearing conference or oral argument, if scheduled.

A separate motion for admission pro hac vice must be filed for each case in the appellate court, even if the out-of-state attorney has previously been admitted pro hac vice in the same case in the district court under Supreme Court Rule 116. A non-refundable fee of $100 is payable to the clerk of the appellate courts at the time the motion is filed. An attorney representing the government or an indigent party may move for waiver of the fee for good cause.

Requirements for the motion filed by the Kansas attorney of record are set out in Rule 1.10(d), and the contents of the out-of-state attorney’s verified application are set out in subsection (e). If the out-of-state attorney has been granted permission to appear pro hac vice in any Kansas court within the preceding 12 months, all relevant information must be disclosed under subsection (e)(1)(H). Note that the motion, which includes the verified application, must be served on all parties and on the out-of-state attorney’s client. If the appellate court denies the motion, it must state reasons for the denial.

Under Rule 1.10(e)(2), the out-of-state attorney has a continuing obligation to notify the clerk of the appellate courts if a change occurs in any of the information provided in the verified application.

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.
**TRUST AND STATUTE OF LIMITATION**

**HEMPHILL V. SHORE**

**SEDGWICK DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED**

**COURT OF APPEALS – AFFIRMED IN PART AND REVERSED IN PART**

**NO. 102,938 – DECEMBER 7, 2012**

FACTS: In 1984, grantors Lee Shore and Linna S. Shore created the Shore Family Trust. The principal of the revocable trust consisted of farmland in Stanton County. The trust instrument designated as “principal beneficiaries” the grantors’ children, defendant Jay and plaintiff’s mother, Susan; their spouses; and “any children subsequently born to Jay and Susan.” Jay and Susan were named trustees; on the death of one, the other was designated to continue as sole trustee. Susan died on January 20, 1992, leaving plaintiff Hemphill as her only child. According to plaintiff’s response to the defense motion to dismiss in this case, plaintiff, who was age 7 or younger when his mother died, was unaware of the trust or its provisions until his grandmother’s estate was probated in 2008. Neither he nor his natural guardian had ever received a report on the existence of the trust or the status of its assets. Plaintiff filed this lawsuit on April 8, 2009, based on breach of trust, breach of fiduciary duty, conversion, and constructive fraud. Hemphill appeals the district court’s statute of limitations dismissal of his lawsuit against Jay F. Shore, as trustee of the Shore Family Trust. The Court of Appeals affirmed.

 ISSUES: (1) Trust and (2) statute of limitation

HELD: Court held that three of four of Hemphill’s causes of action were time barred, but his claim based on constructive fraud survived. The controlling trust instrument established a confidential relationship between plaintiff as beneficiary and defendant as trustee, and it limited defendant’s discretion to pay out income and distribute proceeds from the sale of principal to provide only for defendant’s health, education, support, or maintenance. Plaintiff has alleged that defendant did both for merely personal purposes and that plaintiff was unaware of the trust and defendant’s actions until within two years before filing suit. Court affirmed in part and reversed in part the rulings of the district court judge and the Court of Appeals panel and remanded to the district court for further proceedings.

STATUTE: K.S.A. 60-208, -209, -212, -511, -513(a)(3), (b), -515

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**CRIMINAL**

**STATE V. MISHMASH**

**CRAWFORD DISTRICT COURT – AFFIRMED IN PART, SENTENCE IS VACATED IN PART, AND CASE IS REMANDED WITH DIRECTION**

**COURT OF APPEALS – REVERSED IN PART**

**NO. 103,158 – DECEMBER 7, 2012**

FACTS: Mishmash pled no contest to one count of manufacturing methamphetamine and one count of possession of methamphetamine. A witness at sentencing testified that she obtained methamphetamine from Mishmash in return for pseudoephedrine pills that she provided. She informed the court that Mishmash was manufacturing methamphetamine both for his own individual use and for sale to others. The sentencing judge granted the agreed downward departure and sentenced Mishmash as recommended by the State. The judge then made a specific finding that Mishmash was not manufacturing solely for personal use and therefore was required to register pursuant to the Kansas Offender Registration Act. The Court of Appeals affirmed the registration requirement.

ISSUES: (1) Offender registration and (2) manufacturing drugs for personal use

HELD: Court stated that when the district court sentenced Mishmash, the court found that some of the methamphetamine that Mishmash manufactured ended up in the possession of other people. The district court used this finding to deny him the statutory exemption from offender registration. Court held that the district court improperly added language to the statute that the legislature elected to omit. Court vacated that portion of the sentence requiring Mishmash to register as a drug offender. Court noted that because of the 2011 amendments to the statute, this issue is unlikely to come up again.

STATUTE: K.S.A. 22-4901, -4902, -4904

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**STATE V. RODRIGUEZ**

**WYANDOTTE DISTRICT COURT – AFFIRMED**

**NO. 103,467 – DECEMBER 7, 2012**

FACTS: Rodriguez convicted of first-degree felony murder with child abuse of 5-month-old as underlying felony. On appeal he claimed district judge erred in: (1) failing to sua sponte instruct jury on reckless second-degree murder and reckless involuntary manslaughter; (2) instructing jury on child abuse that deprived jury the opportunity to make factual finding that great bodily harm resulted from shaking; (3) admitting gruesome autopsy photographs that were unduly graphic and cumulative; and (4) denying motion for new trial when state witness had expressed improper opinion on credibility of another witness.

ISSUES: (1) Lesser-included offense instructions, (2) instruction on child abuse, (3) admission of gruesome photographs, and (4) motion for new trial

HELD: No error in not instructing jury on reckless homicides. Instructions on those lesser-included offenses would have been legally appropriate, but not factually appropriate in this case where no evidence supported the lesser-included instructions at issue. A jury instruction defining child abuse based on PIK Crim. 3d 58.11 is not erroneous when it does not make shaking and great bodily harm synonymous, and it correctly informs jury to find causal relationship between shaking and great bodily harm in order to convict. State v. Bruce, 276 Kan. 758 (2003), is distinguished.

No abuse of discretion to admit autopsy photographs that showed multiple views of internal physical injuries and assisted pathologist’s explanation of nature of trauma to victim and cause of death. Photographs were gruesome, but not cumulative because there was probative value in each view.

State expert’s rebuttal reference to defense expert’s opinion as “hogwash” was improper comment on credibility of another witness, but considered alone and in context, did not constitute an opinion on guilt or innocence of the defendant. No new trial required when the improper comment was isolated and limited in scope, district judge immediately reacted and ensured no repeat of the problem, and jury was able to make its own credibility determination.

STATUTES: K.S.A. 21-3402, -3404, -3609; and K.S.A. 22-3414(3), -3501

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**STATE V. ROSS**

**POTTAWATOMIE DISTRICT COURT – SENTENCE VACATED IN PART AND REMANDED**

**NO. 103,097 – DECEMBER 7, 2012**

FACTS: Ross convicted on no contest plea to felony murder and kidnapping. Hard 20 life sentence imposed for felony murder conviction, and consecutive 61-month prison term for kidnapping conviction. On appeal Ross raised sentencing issues, first claiming district court lacked jurisdiction to impose lifetime post-release supervision. Ross also claimed district court improperly added language to the statute that the legislature elected to omit. Court vacated that portion of the sentence requiring Mishmash to register as a drug offender. Court noted that because of the 2011 amendments to the statute, this issue is unlikely to come up again.

STATUTE: K.S.A. 22-4902(a)(4)(A); ordering Ross to serve aggravated sen-
tence in the applicable grid block for kidnapping conviction; and ordering sentence for felony murder (off-grid crime) and kidnapping (on-grid crime) to run consecutively.

**ISSUES:** (1) Post-release supervision, (2) KORA registration, (3) aggravated sentence in grid box, and (4) consecutive sentences


Nothing in the record suggests the victim was under 18 years of age, and parties agree that Ross is not required to register under K.S.A. 22-4902(a)(4)(A). Remanded to district court for a nunc pro tunc order deleting KORA registration under K.S.A. 22-4902(A)(4)(A). Because registration under K.S.A. 22-4902(a)(2) is still required, nunc pro tunc order merely corrects mistake arising from an oversight and will not change Ross’ sentence.

Prison sentence for kidnapping conviction is within applicable grid box. No appellate jurisdiction to consider challenge to this presumptive sentence.

When a defendant is convicted of both an off-grid crime and an on-grid crime, and district court orders a presumptive sentence for on-grid crime to run consecutive to life sentence for off-grid crime, the resulting controlling sentence is not entirely a “presumptive sentence” as defined in K.S.A. 21-4703(q). Thus K.S.A. 21-4721(c) does not prevent challenge to a district court ordering sentence for on-grid crime consecutive to a life sentence for off-grid crime in a multiple conviction case involving both off-grid and on-grid crimes.

Contrary holdings in *State v. Ware,* 262 Kan. 180 (1997), and *State v. Flores,* 268 Kan. 657 (2000), are disapproved. Appellate court has jurisdiction to review whether a district court abused its discretion in ordering an on-grid sentence to run consecutive to an off-grid sentence. No abuse of discretion in this case.


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**STATE V. SPAGNOLA**

**SHAWNEE DISTRICT COURT – REVERSED AND REMANDED**

**COURT OF APPEALS – REVISED NO. 101,521 – DECEMBER 7, 2012**

**FACTS:** Spagnola filed motion to suppress evidence found in search of his pockets during traffic stop. District court denied the motion, finding chain of events, starting with traffic stop and suspicion that Spagnola was intoxicated, led to a proper stop, Spagnola’s detention, and officer’s request for consent to search Spagnola’s pockets. Spagnola convicted in bench trial of possession of methamphetamine. He appealed district court’s suppression ruling.

In unpublished opinion, Court of Appeals held that Spagnola failed to preserve the suppression issue for appellate review, and in dicta noted the district court had ample basis for denying the motion. Supreme Court granted review.

**ISSUES:** (1) Preservation of issue and (2) constitutionality of search

**HELD:** Under facts in this case, suppression issue was adequately preserved for appellate review.

Under facts in this case there was legitimate concern that Spagnola might be armed or impaired. It was reasonable for officer to prolong traffic stop and await backup, but unreasonable for detention to continue more out of concern about stolen property in backseat of Spagnola’s car rather than Spagnola’s impairment. Officer safety was only justification for pocket search, and here the expanded pat-down search exceeded Terry exception for purpose of police protection. Pocket search exceeded scope of constitutionally permissible action narrowly tailored to protect law enforcement, and could serve no purpose except to open a hunt for evidence unrelated to traffic stop and detention. Search was not consensual under the circumstances, and violated Fourth Amendment protection against unreasonable searches. Evidence obtained from that search should have been suppressed. Judgment of Court of Appeals was reversed. Judgment of district court was reversed and remanded with directions.

**STATUTES:** K.S.A. 20-3018(b); and K.S.A. 60-460

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**STATE V. STAFFORD**

**SEDGWICK DISTRICT COURT – AFFIRMED NO. 103,521 – DECEMBER 14, 2012**

**FACTS:** Stafford and Wells jointly tried on charges involving Wells’ minor child (S.W.). Jury convicted Stafford of two counts of rape and one count of aggravated criminal sodomy. On appeal Stafford claimed district court erred in: denying motion for separate trials; denying motion for psychological evaluation of S.W.; improperly limiting cross-examination of S.W.; failing to strike a juror for cause; and admitting S.W.’s drawings into evidence. Stafford also claimed insufficient evidence supported alternative means of aggravated criminal sodomy (oral) as presented in jury instruction, insufficient evidence supported the conviction offenses, prosecutor improperly commented in closing argument on Stafford’s lack of a response during custodial interrogation, and cumulative error denied him a fair trial. Regarding sentencing, Stafford claimed district court abused its discretion in denying request for departure sentence, and claimed the three consecutive hard 25 life sentences imposed constituted cruel and unusual punishment. (Wells’ convictions affirmed in separate appeal, opinion digested this same date.)

**ISSUES:** (1) Separate trials, (2) psychological examination, (3) limitation of cross-examination, (4) failure to strike juror for cause, (5) admitting drawings into evidence, (6) alternative means, (7) sufficiency of the evidence, (8) prosecutorial misconduct, (9) cumulative error, (10) motion for departure sentence, and (11) cruel and unusual punishment

**HELD:** Stafford and Wells both presented a defense that the crimes did not take place. Wells did not present an antagonistic defense at trial that prejudiced Stafford. No abuse of discretion in denying motion for separate trial.

Under facts of case, no abuse of discretion in denying request for psychological exam of S.W.

Under facts of case, no abuse of discretion in preventing defense counsel from questioning S.W. about how deeply Stafford had penetrated her.

No abuse of discretion in not striking juror for cause who stated he would not presume truth or falsehood of a witness’ statement on its face, and made no reference to presumption of innocence.

Drawings are hearsay evidence admissible in this case pursuant to K.S.A. 60-460(a). S.W. was available for cross-examination regarding her drawings and acts depicted therein because she testified on direct and on cross-examination about both subjects.

Phrase “oral contact or oral penetration of the female genitalia or oral contact of the male genitalia” does not create alternative means, thus jury instruction did not trigger jury unanimity concern or demand application of super-sufficiency requirement.

Under facts of case, sufficient evidence supports conviction offenses.

Prosecutor’s comment during closing argument – suggesting Stafford was guilty of charged crimes because he failed to respond to officer’s comment at start of interrogation – did not improperly prejudice jury against Stafford or deny him a fair trial. Comment was improper,
as well as gross and flagrant, but was not the result of prosecutor's ill will, and likely had little weight in jurors' determination of guilt.

One error in prosecutor's comment is not sufficient to constitute cumulative error.

Jessica's Law does not require district court to state reasons why it denied a departure motion. Under facts of case, no abuse of discretion in denying Stafford's motion for departure.

Consistent with Kansas case law, court declines to address merits of Stafford's cruel and unusual punishment argument because it cannot be raised for first time on appeal.

STATUTES: K.S.A. 21-3501(2), -3502(a)(2), -3506(a)(1), -4643, -4643(a)(1), -4643(d); K.S.A. 22-3204; and K.S.A. 60-401(b), -417, -455, -460, -460(a)

STATE V. WELLS
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 103,559 – DECEMBER 14, 2012

FACTS: Stafford and Wells jointly tried on charges involving Wells' minor child (S.W.). Jury convicted Wells of two counts of rape, one count of aggravated criminal sodomy (oral), and one count of aggravated endangering a child. On appeal Wells claimed: prosecutor misstated legal meaning of unanimity jury instruction during closing argument; insufficient evidence supported alternative means of aggravated criminal sodomy (oral) as presented in jury instruction; district court improperly limited cross-examination of S.W.; district court answering jury question with written note violated Wells' constitutional right to be present at all critical stages of trial; and cumulative error denied Wells a fair trial. Regarding sentencing, Wells claimed district court erred in denying Wells' motion for departure sentence, and in setting 25 rather than 20 years as minimum prison term before Wells became parole eligible. (Stafford's convictions affirmed in separate appeal; opinion digested this same date.)

ISSUES: (1) Prosecutorial misconduct, (2) alternative means, (3) limitation on cross-examination, (4) district court's answer to jury question, (5) cumulative error, (6) denial of departure sentence, and (7) parole eligibility after 25 years

HELD: Prosecutor's statements misconstrued meaning of unanimity instruction by conveying that jury could find Wells guilty of both rape counts without unanimously agreeing on underlying act constituting each rape count. This misstated the law, and fell outside wide latitude allowed prosecutor during closing argument. Because a prosecutor should be sensitive to court's repeated statements regarding purpose of unanimity instruction in multiple acts case, prosecutor's statement in this case were gross and flagrant. Under facts of case, statements were not the result of ill will by prosecutor, and likely had little weight in jurors' determination of guilt in both rape counts. Comments did not improperly prejudice jury so as to deny Wells a fair trial.

(Same alternative means argument rejected in Stafford.)

No violation of Wells' constitutional and statutory right to be present during all critical stages of her trial. Wells was present during district court's discussion with attorneys and ultimate decision on how to answer, in writing, the jury's question. State v. Coyote, 268 Kan. 726 (2000), is factually distinguished.

One error in prosecutor's comment during closing argument is not sufficient to constitute cumulative error.

Jessica's Law does not require district court to state reasons why it denied a departure motion. Under facts of case, no abuse of discretion by district court in denying Wells' motion for departure sentence.


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**Civil**

**DIVORCE, POST-MARITAL AGREEMENT, AND SEPARATION AGREEMENT**

**IN RE MARRIAGE OF TRASTER**

**SEDGWICK DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS**

**NO. 106,092 – DECEMBER 7, 2012**

FACTS: During their marriage, Debra and David Traster executed a post-marital agreement setting forth the respective legal rights and obligations of each spouse in the event the marriage did not survive. After more than 25 years of marriage, David filed for divorce and – contrary to the terms of the post-marital agreement – requested the court equitably divide the marital property. Debra moved for partial summary judgment, asking the district court to find that the post-marital agreement was valid and enforceable and that it controlled the disposition of any and all of the parties’ real and personal property. The district court ultimately construed the post-marital agreement as a separation agreement and, as required by K.S.A. 60-1610(b)(3), reviewed it to determine whether the agreement was valid, just, and equitable. After an evidentiary hearing, the court held the post-marital agreement (1) was invalid because it ran counter to public policy by encouraging divorce, and (2) was unjust and inequitable in the distribution of property because Debra received virtually all of the personal property acquired during the marriage through gift, inheritance, and joint effort of the parties.

ISSUES: (1) Divorce, (2) post-marital agreement, and (3) separation agreement

HELD: Court concluded the district court erred in finding the post-marital agreement ran counter to public policy and in construing the post-marital agreement as a separation agreement under K.S.A. 60-1610(b)(3) for purposes of determining its enforceability. In the absence of a statute governing the law related to post-marital agreements between spouses who plan to continue their marriage, court concluded the appropriate standard for assessing the enforceability of post-marital agreement is review of the agreement by the court to determine whether (1) each party had an opportunity to obtain separate legal counsel of each party’s own choosing; (2) there was fraud or coercion in obtaining the agreement; (3) all assets were fully disclosed by both parties before the agreement was executed; (4) each spouse knowingly and explicitly agreed in writing to waive the right to a judicial equitable division of assets and all marital rights in the event of a divorce; (5) the terms of the agreement were fair and reasonable at the time of execution; and (6) the terms of the agreement are not unconscionable at the time of dissolution. Applying this standard to the post-marital agreement between David and Debra here, court found it enforceable and, therefore, reversed the decision of the district court and remanded with directions to enforce it as written and agreed to by the parties.

STATUTES: K.S.A. 23-2401, -2402, -2407; and K.S.A. 60-1601, -1610(b)(1), (3)

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**Criminal**

**STATE V. EDWARDS**

**SEDGWICK DISTRICT COURT – AFFIRMED**

**NO. 106,299 – DECEMBER 14, 2012**

FACTS: Edwards was charged with attempted murder, aggravated robbery, and aggravated burglary after he beat a neighbor with a hammer in her apartment. He claimed he was under the influence of Haldol given to him at the hospital to counter his severe intoxication hours before the beating and caused him not to understand the wrongfulness of his conduct. The jury convicted Edwards of attempted murder and aggravated burglary, but could not reach a verdict on the aggravated robbery charge. A second trial on the aggravated robbery charge ended in a mistrial. At a third trial, the state argued Edwards committed aggravated robbery when he used force to take the victim’s phone and the hammer was the dangerous weapon. The jury convicted Edwards of aggravated robbery.

ISSUES: (1) Sufficiency of the evidence, (2) jury instructions, (3) expert testimony, and (4) ineffective assistance of counsel

HELD: Court held there was sufficient evidence that Edwards used force against the victim before and during his act of taking the phone away from her. Court also rejected Edwards’ claim of insufficient evidence based on his assertion that he took the property from the victim for the sole purpose of facilitating another crime; i.e., battery. The evidence presented at trial to establish that he took property from the victim by force while armed with a dangerous weapon was sufficient to support his conviction for aggravated robbery. Court also rejected Edwards’ alternative means argument by holding that the taking of property from the person or presence of another establishes a single means of committing robbery. Court also held that any intentional taking of property from the person or presence of another by threat of bodily harm or by force constitutes a robbery and there is no requirement that he or she must have specifically intended to keep the property taken from the victim. Court stated that the evidence presented at trial established that Edwards used force against the victim before and during his act of taking the phone away from her the second time. Given this evidence presented, Court held there was no real possibility that the jury would have rendered a different verdict if the requested use of force instruction had been provided to the jury. Court found no error in the state’s use of an expert witness in rebuttal who had not been previously disclosed. Court stated it is difficult to list rebuttal witnesses in advance not knowing exactly what evidence will be presented in the defense’s case-in-chief. Court found no error in limiting the testimony of the defense’s expert about whether the hospital should have kept Edwards substantially incapable of knowing or understanding the wrongfulness of his conduct. Court rejected Edwards’ claims of ineffective assistance of counsel for failing to call or investigate witnesses, failing to cross-examine expert properly, and failing to ask victim certain questions. Court found Edwards failed to establish any errors in his trial and thus no cumulative error would result.

STATUTES: K.S.A. 21-3208, -3218, -3426, -3427, -3701(a)(1); K.S.A. 22-3219, -3421; and K.S.A. 60-226, -1507
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ORDER

RULES RELATING TO CONTINUING LEGAL EDUCATION

Supreme Court Rule 807 (c) and (d) are hereby amended to read as follows, effective the date of this order.

RULE 807

REPORTING REQUIREMENTS AND NONCOMPLIANCE

(a) Annual Report. The Commission will issue an annual report in August for the preceding compliance period for each attorney subject to the Commission’s jurisdiction. If the report is accurate, the attorney is not required to respond; the report will be filed automatically as the attorney’s annual report. If the report is not accurate, the attorney must notify the Commission within 30 days of the issuance of the report.

(b) Failure to Comply. If it appears an attorney has not earned the minimum number of CLE credit hours required for a compliance period, the Commission must send notice of the apparent noncompliance to the attorney at the attorney’s last known address by certified mail, return receipt requested. Not later than 30 days after the mailing of the notice, the attorney, to avoid suspension from the practice of law, must cure the failure to comply or show cause for an exemption.

(c) Late Filing of Affidavit Attendance Affidavits. All affidavits of attendance for a compliance period must be postmarked not later than July 31 immediately following the compliance period. If an affidavit is postmarked on or after August 1, the attorney will be assessed one late filing fee of $50.

(d) Noncompliance with Requirement Fee. An attorney who does not complete the required number of hours during a compliance period but completes the hours prior to suspension will be assessed a noncompliance fee of $100. An attorney who must pay a noncompliance fee of $75 if:

(1) an attendance affidavit is postmarked on or after August 1; or

(2) the attorney fails to complete the hours required under Rule 803(a) within the compliance period.

(e) Address Change. An attorney must notify the Commission within 30 days after a change of the attorney’s address.

BY ORDER OF THE COURT, this 6th day of December, 2012.

FOR THE COURT

Lawton R. Nuss
Chief Justice

2012 SC 95
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.

SEARCHING for the attorney who prepared the Will for Mary Alice Hubbart. Please contact Rachael Pirner at Triplett, Woolf & Garretson, (316) 630-8100.

SEARCHING for the attorney who prepared the Will for Edward R. Smejkal. Please contact Rachael Pirner at Triplett, Woolf & Garretson, (316) 630-8100.

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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.

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