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Committing to the Fight Against Human Trafficking

By ABA President Laurel G. Bellows
On February 8, 2013, more than 1,000 Kansas attorneys attended, either live or by webinar, a most remarkable ethics presentation. More than one in 10 registered Kansas attorneys observed John Dean and Jim Robenalt present an inside look at the ethical, legal, and moral conflicts presented to the White House staff during the Watergate investigation of 1973-74. To those of us who were riveted by those proceedings when they occurred, the four-and-a-half-hour presentation elapsed as quickly as a finger snap. I was doubly fascinated, having read Dean’s Watergate memoir, “Blind Ambition” (1976), soon after law school. Because of our similarity in age and experience, Dean’s brutally honest account of his actions left an indelible impression on this young, inexperienced and equally ambitious lawyer.

In early July of 1970, after being interrupted at a Baltimore lunch by a White House staffer, Dean was immediately whisked to San Clemente for his first meeting with Bob Haldeman. There, Haldeman asked whether Dean would be interested in the job as counsel for the Office of the President. Dean was 31 years old and five years out of law school at the time. His professional ascent had been meteoric. He had every reason to think he would continue a remarkable legal career.

Four years later, on August 2, 1974, Judge John Sirica sentenced Dean to one to four years’ imprisonment in a federal minimum security prison for obstruction of justice. Dean and Robenalt’s CLE presentation discussed the facts, issues, and circumstances that took Dean from the peak of his profession, achieved in five short years, to a prison sentence. Each attending Kansas attorney found Dean’s journey to be fascinating, educationally informative and morally uplifting.

The Watergate characters and events, seen through Dean’s eyes, are as riveting on their 40th anniversary as they were at the time of occurrence. G. Gordon Liddy, E. Howard Hunt, Jeb Magruder, Bud Krogh, Chuck Colson, the Watergate Burglars, the “ Plumbers,” “Deep Throat” (Mark Felt), the “Satur- day Night Massacre” with Archibald Cox, Elliott Richardson, William Ruckelshaus, Robert Bork, Judge John Sirica, the “smoking gun” tape – all these history-changing people and events seem as remarkable 40 years later as they were at the time they occurred. How amazing to relive Watergate through Dean in a manner that provided genuine guidance and counsel on the ethical responsibilities of our profession.

The Watergate break-in occurred on June 17, 1972. At the time of the break-in, Dean had not planned, did not know of, and had no culpability for the break-in. Actually, the Watergate investigation never developed a shred of evidence that any person within the inner White House group knew of the Watergate plans or break-in at the time of the occurrence. Despite that lack of initial culpability, nine attorneys within the White House orbit were later charged with obstruction of justice. In a remarkable “back of envelope” document that Dean inked in a conversation with others in the White House – a document later presented as Watergate evidence – Dean accurately listed nine attorneys who would later be indicted for obstruction of justice in the cover-up. This column, however, will address the legal developments that resulted from Watergate.

First, the American Bar Association formed a committee to study the Code of Professional Responsibility as it existed in 1973, to determine why so many lawyers made so many troubling mistakes. The committee formed the “Kutak Rules,” which were later woven into the 1978 Model Rules of Professional Conduct to generate the “Report Up” rule we now have at KRPC 1.13 and the “Report Out” provisions within the professional responsibility codes of other states.

The presentation made points on deeper levels than the Kansas Rules of Professional Conduct. The presentation began with the culture of organizations, whether they present a “do whatever it takes” culture or whether an ethical and moral culture is built into the entity.

The presentation delved into the psychology of cover-ups, drawing on psychological studies built around Prospect Theory. Prospect Theory, a recent study that generated a Nobel prize for its authors, states that people are risk adverse when opting be-
I grew up in Kansas City and lived there almost all my life before heading off to college at Kansas State University in Manhattan. After spending four years in Manhattan, I then relocated to Topeka for three years at Washburn Law School. Throughout that time, other than the occasional stop for gas while heading south on I-35, I never set foot in Wichita.

It was not until spring 2005, as I was approaching graduation from law school, that I realized I should expand my job search to include Wichita. Thankfully, the attorneys at Fleeson Gooing invited me down for an interview, and the rest, as they say, is history. I moved here after graduation and have (happily) been here ever since. Wichita is simply a wonderful place to both live and practice law. So, if you are looking for that first job out of law school or maybe are just looking for a change of scenery, I strongly encourage you to consider Wichita. Here are just a few of my favorite things about living and working in Wichita:

1. Amazing legal community

Wichita has some of the most intelligent and cordial lawyers I have had the opportunity to work with in my short career. You can trust people at their word, and a settlement can be made on a handshake. I attribute a great deal of this to the Wichita Bar Association (WBA). Out of the approximate 1,461 lawyers residing or practicing in Sedgwick County, 1,334 are members of the WBA. The WBA enables local attorneys to get to know each other in both a professional and social setting. In other words, attorneys know each other better and in return have respect for each other. Reputation is everything, you know.

The WBA also has numerous committees and programs to encourage lawyer involvement. One of the best groups for young attorneys to become involved in is the Wichita Young Lawyers. They host monthly meetings at a local dining establishment where they put on a program and offer complimentary drinks and appetizers. You can also count on multiple social events taking place throughout the year – most notable being the Trolley Trek each fall.

Not to mention that year is BAR SHOW YEAR! If you aren’t already aware, Wichita attorneys take the bar show very, very seriously. Dancers, singers, and performers start preparing months in advance. Then, about a week or two before the performance is scheduled to start, everyone, including the crew, start meeting on a nightly basis. I’ve participated in the bar show the past two times it was here, and it was a wonderful way to meet many attorneys I never likely would have met and to see others (including judges) outside of the professional environment.

2. Amenities of a large city with a small town feel

When I was looking for that first job out of law school, I really did not have a desire to practice law in the Kansas City metropolitan area. I was, however, enticed by many of the “big city” opportunities that Kansas City had to offer to a young, single professional, and I was afraid Wichita might not have them. It did not take me long to realize that could not be further from the truth. Wichita has almost all the amenities of a big city, however, it comes with the added benefit of a small town feel. I can be anywhere in town in 15 minutes, including driving to and from work, and very rarely do I encounter a traffic jam. Housing is also very affordable here, especially when you are new to the work force and just starting out. An additional bonus is that you pretty much find identical restaurants, shopping, etc., on both sides of town, so you never have to travel too far to get to a desired location.

3. Lots of things to do

Wichita is really working hard to attract (and keep) young talent. One organization aimed at that is the Young Professionals of Wichita (YPW). The YPW is an organization comprised of, you guessed it, young professionals. They host social events and outings on a regular basis and also provide many networking opportunities for young professionals.

Wichita also has a large number of family entertainment options. There is a brand new IMAX theater, which is purportedly one of the best in the nation. The Sedgwick County Zoo is one of the better zoos I have visited, and the Exploration Place museum always has new and interesting exhibits coming to town. You can also always count on kid friendly events/performances at the new Intrust Arena, such as hockey games, concerts, the circus, etc. Last but not least, there is the annual River Festival, and while all of its activities may not necessarily be kid friendly, it never fails to provide excellent people watching opportunities.

Wichita also has a fantastic local restaurant scene with many unique options and family-owned alternatives. Personally, I am not the type to go out and spend money at a typical “chain” restaurant, but if it is a local restaurant where I can get things that I can’t elsewhere, you bet I’ll go. We have awesome Mediterranean restaurants, authentic Mexican restaurants, and some pretty fabulous breweries if I do say so myself.

4. Now that we’ve talked about food, we should talk about fitness

Some of my hobbies include running, cycling, and the occasional triathlon or other road race. I’m not speedy, and I do not compete to win, but I love the camaraderie that comes along with training for the events. I have made wonderful friends that I regularly meet for runs and bike rides. Over time, these people have morphed from just training buddies to wonderful friends. There are several different groups within Wichita alone that are dedicated to running or other forms of fitness.

(Con’t. on Page 10)
Laurel G. Bellows

Committing to the Fight Against Human Trafficking

Like many other domestic workers, Zipora left her home with a diplomat who brought her to the United States. But when she arrived in the U.S., he confiscated her passport and forced her to do unpaid work 12 to 14 hours a day. She cleaned his home, cooked for his catering company and cared for his children. For four years, her life was a nightmare of imprisonment by her fellow countryman – someone she had trusted.

Fortunately, lawyers came to Zipora’s rescue. Her pro bono lawyer Martina Vandenberg, with the assistance of two associates, helped her sue the African diplomat. Thanks to their efforts, Zipora won a $1 million judgment.

Human trafficking is one of the fastest-growing and most lucrative crimes in the world. According to the U.S. State Department, 27 million people are held involuntarily as modern-day slaves across the globe. Eighty percent are women and children.

Thousands of those human trafficking victims, like Zipora, are in the United States. Many victims are compelled to perform labor in homes and sweatshops. More than 100,000 U.S. citizens are forced to provide sex and labor services for their captors’ profit.

And human trafficking takes place in Kansas. From 2007 to 2008, Karen Countryman-Roswurm of Wichita State University interviewed 250 youths coming through the Wichita Children’s Home. Of the children she spoke with, 100 – 40 percent – reported being “forced, prodded, or coerced into trading sex for what they needed to survive.”

The inspiring story of lawyers who represent human trafficking victims motivated me to choose the battle against human trafficking as one of the American Bar Association’s priorities this year. My own experience also guided me.

As a young lawyer, I handled prostitution cases and helped women who were victimized by traffickers, prosecuted in the courts, and denied their freedom. They were also left without services – such as job training or housing placement – that would have provided opportunities for their recovery and self-sufficiency.

Fortunately, awareness of human trafficking in our own country is growing, as are the programs to combat this crisis. As lawyers, we must commit ourselves to the fight for trafficking victims’ fundamental human rights.

The ABA combats trafficking by urging courts and police to screen for victim abuse and exploitation. We also seek to protect victims by encouraging lawyers to provide pro bono legal assistance. But our work is far from complete.

The ABA’s Task Force on Human Trafficking has begun several initiatives to strengthen pro bono networks to address the civil legal needs of trafficking victims. The task force recently conducted one of three national training sessions for individuals in the legal system to learn how to treat victims as victims and not as criminals.

The programs are attended by medical personnel, social service agency employees, prosecutors, and judges, nonprofit representatives, volunteer lawyers interested in helping trafficking victims, and policymakers. The goal of the training programs is to help those likely to come into contact with trafficking victims understand the reality and impact of this growing problem – from showing how trauma affects victims, to illustrating the barriers they encounter in accessing help and resources. I encourage Kansas to develop a similar program to properly educate all stakeholders.

According to the Polaris Project, one of the leading organizations in the global fight against human trafficking and modern-day slavery, 28 states have passed new laws to fight human trafficking in the past year. Kansas has passed numerous laws to combat sex and labor trafficking, but 21 states have passed more comprehensive laws. We urge lawmakers in Kansas to authorize funding to protect and assist victims of trafficking as well as bolster prevention efforts. We encourage local bar associations to engage members of the legal profession in raising awareness of trafficking in their communities and work to provide pro bono legal services to victims of trafficking.

The battle for justice in Zipora’s case is not over. Her lawyers are still working to collect the $1 million judgment.

I hope Zipora’s story, and the initiatives I outlined to combat human trafficking, motivate you to join our effort. Together, we can end the exploitation and abuse that defines human trafficking and shatters the lives of hundreds of thousands of people and their families in our own country and millions throughout our world.

This year marks 150 years since the Emancipation Proclamation went into effect. President Lincoln promised a nation free of slavery – a nation where all are bestowed with the equal rights and opportunities that every person deserves. Lincoln’s promise, however, is yet to be fulfilled.

In the Emancipation Proclamation, President Lincoln made a promise, a promise for the freedom of the slaves of his time. But he also made a promise for the future. “I do order,” his proclamation read, “that all persons held as slaves ... are, and henceforward shall be free.”

Let us unite now to abolish slavery in the United States!

Laurel Bellows is president of the American Bar Association. Contact her at abapresident@americanbar.org.
Thinking Ethics

When an Opponent’s Documents Arrive from Anonymous Sources

By Mark M. Iba, Stinson Morrison Hecker LLP, Kansas City, Mo., miba@stinson.com

Much has been written of the lawyer’s duty under Rule 4.4(b) of the Rules of Professional Conduct to notify the sender of a document that the lawyer knows or reasonably should know was inadvertently sent. But what are a lawyer’s duties when she receives an opponent’s documents from an anonymous third party or from her client? Does she need to disclose them to her adversary? Can she read them? Can she use them? Although the ethics rules do not specifically address this scenario, several recent cases offer guidance.

The Master Plan to Capture Superman

A Hollywood producer and lawyer teamed up with the heirs of Superman’s creators to arrange for a new movie and also to manage preexisting litigation they had against D.C. Comics over the intellectual property rights to the Man of Steel. Problems arose when one of the producer’s attorneys left his employment and absconded with copies of allegedly privileged documents. The lawyer sent a copy of the documents anonymously to D.C. Comics along with a cover letter detailing the producer’s “alleged master plan to capture Superman for himself.” Claims over the documents were ultimately decided in In re Pacific Pictures Corp., 679 F.3d 1121 (9th Cir. 2012), in which the court held that the producer’s voluntary disclosure of the documents to the U.S. Attorney to conduct an investigation over his former employee’s actions permanently waived the privilege, even though the disclosure was made pursuant to a confidentiality agreement with the government.

With respect to the conduct of D.C. Comics, the court observed that the company did not “exploit the documents.” Instead, it entrusted them to outside counsel, which requested copies of the documents through ordinary discovery in the pre-existing litigation over Superman. When the producer resisted, the discovery dispute was taken to a magistrate judge, who ordered him to turn over the documents. While the producer’s voluntary disclosure to the U.S. attorney was kryptonite to any further invocation of the privilege, the key for our purposes is that D.C. Comics and its lawyers refrained from using the purloined copies and, instead, sought and obtained production of the items on the disk, though the opponent objected to producing them. The lawyer later used some of the documents in depositions, but opposing counsel made no objections at that time. Eight months later, the opposition moved to prohibit use of the misappropriated documents and disqualify the lawyer.

Denying the motion, the court observed that the lawyer had acted properly.1 Because neither the lawyer nor client had played any role in acquiring the documents, the court found inapplicable Rule 4.4(a), which prohibits using methods to obtain evidence that violate a third person’s legal rights, and Rule 8.4(d), which prohibits conduct prejudicial to the administration of justice. With respect to the question of disqualification, the court adopted six nonexclusive factors from the Texas case of In re Meador, 968 S.W.2d 346 (Tex. 1998):

- whether the attorney knew or should have known the material was privileged;
- the promptness with which the attorney notified the opposing side;
- the extent to which the attorney reviewed and digested the privileged information;
- the significance of the privileged information;
- the extent to which the movant may be at fault for the unauthorized disclosure; and
- the extent to which the nonmovant will suffer prejudice from the disqualification.

When the Client Violates A Non-Disclosure Agreement

By contrast, counsel was disqualified in Clark v. Superior Court of San Diego County, 196 Cal. App. 4th 37, 125 Cal. Rptr. 3d 361 (2011), when the law firm retained, reviewed, and used privileged documents that its client had taken from his former employer, in violation of a nondisclosure agreement, when his position was eliminated. The court refused the firm’s request for an in camera inspection of the documents to determine privilege. It was enough that all of the documents involved company personnel communicating with the company’s counsel. Further, even though the firm had made no effort to hide its possession of the documents and sequestered them pending the dispute, the court found it had reviewed the documents more than necessary to determine that they were privileged and failed to notify the defendant immediately that it possessed the documents. Concerned about protecting the integrity of the proceedings and that the firm’s review of privileged materials could affect the

Footnote

1. Notably, the court excluded use of the privileged draft affidavit.

(Con’t. on Page 11)
Membership in the KBA can be Fun

By Bob Hiller, Topeka, lawkansas@gmail.com

Q. Bob, why did you join the KBA?
A. Well, when I graduated from KU Law School in 1972, it was a no brainer for me. Law school and membership in the KBA seemed to go hand in hand ... along with being licensed and actually practicing law. These are the things lawyers do, I told myself, and I was not disappointed.

Q. Did you read the KBA Journal?
A. Yes, I read it and really enjoyed it ... still do. It has helped me keep up with the doings of my law school classmates and current issues. I have always particularly enjoyed reading articles by the KBA presidents. In the beginning, those lawyers were names I always seemed to remember, for some reason. Their names and cities just kind of stuck in my mind all these years. And now, as a Baby Boomer, virtually all of the incoming KBA presidents ... men and women ... are younger than me. And I have really enjoyed having individual contact with them through committees and other bar activities. Many of these people are some of my best friends to this day.

Q. Have you gone to any KBA annual meetings?
A. Yes, I have. Quite a few, in fact. And because my wife likes to attend social events, we always go to the meetings together. Usually the social hours, keynote speakers, bar shows, and great CLEs are the highlights of the meetings. When I was chair of the KBA Membership Committee, I always promoted annual meetings by mentioning them to just about every lawyer I came in contact with on my job.

Q. How can you have fun in the KBA?
A. Well, if you like to mingle, schmooze, meet new people, drink a beer with colleagues, and even “adversaries,” the KBA is for you. Let your guard down in a social setting and your opposing counsel may turn out to be a great guy or gal and maybe even a future good friend. You meet people from all over the state, not just your own city and county. If you have nothing else to talk about, sports (or some other passion) are always a good starting point. You don't even have to talk about legal issues to have fun in the KBA.

Q. What other opportunities are there in the KBA?
A. Well, you can write an article for the KBA Journal like this one. Most lawyers like to write, and you can put those skills to good use in the Journal. You can also pick a scholarly topic, write about a historic figure, or write a humorous column. Be sure to include your email address so people can send you some comments ... both good and bad.

Q. What about committees and sections of the KBA?
A. This is where you can roll up your sleeves and dive in to particular topics and kinds of practice. You will meet an endless number of colleagues who can benefit each other's practices and create all sorts of opportunities for referrals, mentoring, and even more social events in the future.

Q. How do you like the KBA employees in Topeka?
A. Getting to know the KBA staff has been a lot of fun for me. They are always very enthusiastic and will bend over backwards to be friendly and helpful. No need to be shy around these folks. They like to have fun and that alone is a great reason to join the KBA!

About the Author

Bob Hiller has a private practice and does consulting in Topeka. He has previously worked for the Kansas Health Policy Authority, Kansas Department of Social and Rehabilitation Services, the Federal Deposit Insurance Corp, Legal Aid and Defender Society of Greater Kansas City, and Kansas Legal Services. Bob has written previous articles for the KBA Journal, and he has served on the Access to Justice, Membership and Diversity Committees. He was given a KBA Outstanding Service Award in 2011. He can be reached by email at LawKansas@gmail.com. He likes to blog on his website which is LawKansas.webs.com.

Reasons to Make Wichita Your Home (for Law and Life)

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.
When an Opponent’s Documents Arrive from Anonymous Sources

outcome of the case, the court ruled that “disqualification is proper as a prophylactic measure to prevent future prejudice to the opposing party from information the attorney should not have possessed.”

Conclusion

In summary, the ethics rules do not require notification upon receipt of an opponent’s documents when they did not arrive in the lawyer’s hands through inadvertence. Nor do they prohibit the receiving lawyer from reviewing privileged material. However, as can be seen in these and other cases, it often will be in the lawyer’s and client’s best interests to give notice of their receipt and, if litigation is pending, request the same documents in discovery. Because of the public interest in protecting the attorney-client privilege, lawyers should recognize the risks of reviewing privileged materials and may want to seek a court ruling on the privilege issue before doing so. Of course, lawyers should fully explain the issues and the various alternatives available so the client may make informed decisions about how the opponent’s documents should be handled.

About the Author

Mark M. Iba is a partner with Stinson Morrison Hecker LLP and practices in the firm’s business litigation division, focusing on complex civil litigation and arbitration. He also currently serves as assistant general counsel for the firm. He received his juris doctorate from the University of Chicago and is a member of the Kansas and Missouri bars.
A Nostalgic Touch

Bear Bryant, Ara Parseghian, and the Good Ole Days

By Matthew Keenan, Shook, Hardy & Bacon LLP, Kansas City, Mo., mkeenan@shb.com

Since March 2005 I’ve filled this space with maybe 60 columns. The topics have ranged from the frivolous to the preposterous, with the only common attribute that none have offered the bar any educational value whatsoever. Devoid of citations, precedent, often even spell checking, there was no chance anyone would read this content and go win a case, gain a client, change a life.

From time to time, I have struck gold retelling the stories of fellow Kansans like Charley Herd, Bob Lewis, John Carpenter, Howard Engleman, Jim Logan, Glen Opie, and even fictional ones, like Perry Mason and Hamilton Burger. Once I wrote about Uncle Denny’s tee shot at the Bar Convention in 1987. If you read that column you learned why your golf foursome shouldn’t include anyone named Keenan. At the other end of the spectrum I re-told the stories of our greatest generation; those who made modesty cool.

But the inventory of column ideas is not without limitation. And panic ensues when my inbox includes this communication from Beth Warrington at the KBA: “I need your column in a week.” Her most recent directive arrived January 18.

I am acutely aware of the need for new material; something fresh, inspirational, even funny. I had none of that, of course, save for one tidbit with its roots in a New York Times article I read just before Christmas. Bill Pennington wrote about a college football game played many years ago. But was it a column? Didn’t seem like one.

In 1973, Alabama played Notre Dame, a game that college football buffs rank as one of the top five games ever played in college football, and one that bears zero relationship to their most recent game. It was more than just Bear Bryant meeting Ara Parseghian—it was two undefeated teams that had never played in all their years. But what I took away from Pennington’s narrative didn’t happen on the turf at Tulane Stadium.

Parseghian’s quarterback was a kid named Tom Clements, whose years were sandwiched between the two Joe’s—Theismann and Montana. In the fourth quarter, Notre Dame had a 24-23 lead but had the ball deep in its own territory—the 3. Pennington’s story picks it up here—“Parseghian told Clements to run Power I Right, Tackle Trap, Pass Left. ‘Are you sure?’ said Clements, who had thrown only 11 passes in the game and would now be flinging one from his own end zone. Parseghian nodded, and then, to make the play look more like a run, he replaced Demmerle, the split end, with Robin Weber, a 6-foot-5, 260-pound backup sophomore who wore No. 91 and was used almost exclusively in blocking situations. Weber had caught one pass for 11 yards in the 1973 season during late-game mop-up time,” Pennington wrote.

The play had all the markers of a running play—seven players on the line and three backs in the backfield. After a play-

 fake, future NFL all-star Dave Casper was the primary receiver, moving behind the Alabama linemen. “Clearing space for Casper was Weber, who lined up on the left end and took off downfield with a late break toward the sideline. ‘I had tackle shoulder pads, a lineman’s cage face mask, and I had never caught a pass from Tom Clements—not even warm-ups,” Weber said last week from his home in the Dallas area. “I had never run the play in practice. I had never run any pass play in practice.”

When Weber left the line, he was all alone. Tom Clements sent the ball over the Alabama defense: Weber could not believe his eyes. “I saw the ball and realized this was for real—I had to catch it now,” Weber said, chuckling. “And then the ball hit me in the hands.”

Weber’s catch was a 35-yard reception, earned Notre Dame a first down, and they were able to run out the clock. The sports writer for the Chicago Tribune described it as a “suicide pass” that earned the victory.

The team celebrated and the fans rushed the field. But when the players returned to the locker room, Bryant had unfinished business. Pennington’s story described it: “Bryant later visited the loud, raucous Notre Dame locker room. He congratulated Parseghian and asked for Clements, shaking his hand. ‘I played a lot of football,” said Clements, now the offensive coordinator for the Green Bay Packers, “but I never had another coach do that.”

Imagine Nick Saban visiting the opponent’s locker room after any game, but particularly one of the biggest games of its time, congratulating his opposing coach and then seeking out the quarterback for a handshake. Bear Bryant is known for his contribution to college football but he was also a veteran of World War II, enlisting in the Navy following Pearl Harbor and serving off the coast of Africa. Perhaps that shaped his perspective, his priorities.

The old school way that adversaries treated each other is a lost art these days. Certainly it is in sports; but what about the law profession? Someday I will write a column about it. Until then, I have a deadline to meet.

About the Author

Matthew Keenan has practiced with Shook, Hardy & Bacon since 1985. He may be reached at mkeenan@shb.com.
E-Filing: Alive and Well

By Larry N. Zimmerman, Valentine, Zimmerman & Zimmerman P.A., Topeka, ks/lpm@larryzimmerman.com

The first live tests of the proposed statewide electronic filing rolled out to beta testers in Leavenworth County District Court near the end of January. I write this in January but assuming roll-out continues as predicted, Douglas County goes live for testing this month (March) and then the toughest live test yet – Sedgwick County – in April. Development and implementation of electronic filing beyond that point is still murky from my January vantage point but the Supreme Court remains committed to seeing this valuable project to complete fruition.

Toward that aim, the “road shows” have started in earnest with participants in the process fanning out to bar associations for updates and information on electronic filing. I attended one at the Wichita Bar Association and noted several relevant questions popped up there that have been asked throughout review, design, and implementation of the Kansas system, the federal ECF system, and even Shawnee County’s early experiments. They appear mundane but are bedrock discussions about how practice works with a shift from paper to electrons.

Mandatory?

Will I be required to file electronically when the system is live? In a word, “Yes.” The primary purpose of the system is not convenience to attorneys so much as efficiency for the courts. Arguably, the full value of that efficiency is not realized unless attorneys use it and it is assumed that many attorneys will opt out if given the choice. There is also the issue of money. In many jurisdictions, electronic filing systems bear a surcharge or electronic filing costs more than paper (i.e., electronic payment service fees) so making them work financially requires an order of the court.

Few jurisdictions have actually experimented with an optional system, however. At least one Singapore court made electronic filing optional but cheaper; a filer delivering paper pleadings paid a surcharge for the added labor they caused the courts. A small handful of courts statewide also made electronic filing optional and relied on the convenience factor for lawyers as incentive alone. Those systems seem to convert a few who file most but many paper filings remain. Of course, until a viable electronic system for self-represented parties is found, there will always be paper in the courts.

Attorney Only?

Can non-attorney staff use electronic filing? Yes, they can. Initially, the only user types recognized by electronic filing will be “attorney” and the user name assigned new filers will be the attorney’s bar number. Anything filed under that user name will be attributed to that attorney and that attorney will be responsible for all filings made under his or her login. This leads some to assume that an attorney cannot delegate the data input, uploading documents, and pressing “submit” to staff.

In fact, electronic filing is merely a delivery system. The attorney must still review, draft a pleading, and still express intent to sign pursuant to KSA 60-211. The electronic filing system only comes into play when moving that completed pleading from attorney to court. Attorneys can use runners, the Post Office, or local counsel for delivery now and electronic filing simply replaces those delivery methods. There is, however, a design feature which appears to allow staff to queue up pleadings as drafts; the attorney could then review a final time and press “submit” providing more comfort to some.

Redundant Checks?

If a pleading requires a pre-requisite action not in the court system, will the system reject my pleading and let me know immediately? A great question but one for which the current answer is probably, “Not quite yet.” Many of us are accustomed to case management systems that help strengthen our practice through redundant checks. Immediate feedback from those systems back up our manual review and catches simple errors humans often overlook despite our best efforts.

Some electronic filing systems duplicate that business logic for filers and for the courts. For example, if a pleading requires a certificate of service but none is noted, the filer is stopped and prompted to correct the issue. The filer benefits because he or she does not have a mistaken idea that a filing is completed – there is immediate feedback saying otherwise. Clerks benefit because manual review is eliminated in mundane matters and more time available for items requiring specific review. These tools will come to the system but are complex to sort and require constant development in reaction to statutory, legal, or pragmatic concerns. Some simpler rules will be likely be implemented as the system develops.

Statewide?

Will every county get electronic filing? Only the legislature knows. A comparatively modest investment is required to implement the system, which is needed for each county regardless of the county’s volume – maybe even in spite of its volume. If you have access to time travel, please send a message back to me in January.

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.
Please Pause for a Moment of Shelf-Reflection

By Emily Grant, Washburn University School of Law, Topeka, emily.grant@washburn.edu

K, shelf-check time, folks! Let’s see what reference books you keep close at hand for those moments when you can’t remember how to parallel cite in the District Court of Trafalgar or when you forget the distinction between nauseous and nauseating. Would your legal writing professor be proud?

Whether you’re a first-year associate, a solo practitioner, or a partner charged with overseeing the briefs of dozens of junior attorneys, a well-stocked reference shelf is almost as critical to maintaining your legal sanity as a well-stocked liquor cabinet. To aid in your never-ending quest for the perfect collection of handy tools of the writing trade, this month’s column presents a rundown of some of the most useful and user-friendly guides to grammar, usage, style, organization, and citation.

First, every attorney, and I would go so far as to suggest every sentient organism, needs a grammar guide—a book containing rules for basic sentence structure and punctuation, so you have a reference for how to properly abbreviate units of measurement or when a modifier may be misplaced or whether you should use a semi-colon to join two clauses. The Chicago Manual of Style is an excellent comprehensive grammar guide, providing 900 pages of rules you never even knew existed. The Redbook and the Apsen Handbook for Writers are some less intimidating options, both with user-friendly layouts and indexes.

Second, a usage dictionary can help when you know that a particular sentence is grammatically correct, but it just doesn’t sound right. A usage dictionary, as opposed to a standard dictionary, not only defines words but also provides examples about how to use words and whether a particular usage is widely accepted. It’s a great resource for learning how to better use words to improve the flow and feel of your writing. Garner’s Modern American Usage is an excellent general usage dictionary, and Garner’s Dictionary of Modern Legal Usage is particularly useful for attorneys because it’s tailored to legal writers specifically.

Next, a style manual is invaluable in alerting you to your writing to the next level. Style is concerned with the clarity and conciseness and effectiveness of your writing. For nearly 100 years, The Elements of Style has been the gold standard in style guides, and while it is a classic, I’m not convinced it’s the most effective or user-friendly style manual for lawyers today. The Elements of Legal Style, modeled after Strunk and White’s classic, is targeted specifically at legal writing and is more thorough than the original. If you’re not as big a fan of Bryan Garner as I am, I can also recommend Plain English for Lawyers, Writing with Style, and Legal Writing in Plain English. Those books can help you avoid cluttering your writing with nominalizations, passive voice, or unnecessary adverbs, and can strengthen your prose with strong paragraph structure, effective thesis sentences, and clean subject clauses.

For more general coverage of writing mechanics and fundamentals, it’s not a bad idea to have a basic legal writing textbook on hand. If you no longer have a copy from your law school days, Just Writing is a solid universal choice while Legal Method and Writing remains an accessible guidepost for legal advocates.

Every barrister should also have (and use) at least one citation manual. For those who retained their law school copy of The Bluebook, consider updating to the 19th edition. New wire spiral spines and handy color coated pages make the manual more usable than ever before. The ALWD Citation Manual is also worthwhile; many new grads will show up with one, preferring its user-friendly examples. It’s OK to be scared, but I promise ALWD won’t bite you.

Footnotes
2. For example, “free” words like toll-free call or tax-free exchange should always be hyphenated. The Chicago Manual of Style, 7.85.
5. I just looked up, for example, the appropriate plural form of “index” for the final sentence in the previous paragraph. “For ordinary purposes, indexes is the preferable plural, not indices ... . Indices, though less pretentious than fora or dogmatia, is pretentious nevertheless.” Bryan A. Garner, Garner’s American Usage 445 (2003). So there.
16. Preferably multiple copies – for home, the office, the car, church, houses of close relatives, etc.
17. The Bluebook: A Uniform System of Citation (Columbia Law Review Ass’n et al. eds., 19th ed. 2010).
18. Darby Dickerson et al., ALWD Citation Manual: A Professional System of Citation (3d ed., 2010).
Finally, have a local rule book on hand. For a splash of local flavor and to keep yourself current on Kansas-specific rules and deadlines, grab a copy of Report of Rules Adopted by the Supreme Court of the State of Kansas. Published each year, it contains general rules for the district courts in the state as well as rules for the appellate and Supreme Court. It also contains rules on attorney discipline, judicial conduct, and mediation, and even includes annotations and comments.

I’m sure many of you are now kicking yourselves for not including several of these titles on your Christmas lists. That said, I hear the Easter Bunny has access to a warehouse of Bluebooks and ALWD manuals, which fit nicely in most standard-issue baskets.

In all seriousness, most practicing attorneys begin neglecting their reference shelves about the same time their law degree comes back from the frame shop. Maintaining, using, and regularly reviewing even a small reference collection will improve the effectiveness of your advocacy. Judges and their clerks notice carefully crafted briefs. Clients appreciate well-written letters. Opposing counsel will take heed when the term “antipode” is casually inserted in a demand letter. Set yourself apart by ensuring that a well-used reference bookshelf is an integral part of your office. Plus, you never know when your legal writing professor might drop by for a surprise inspection.

About the Author

Emily Grant is currently scheduling shelf inspection visits to offices of her former students. Disappointingly, she gets no commission on the sale of any of the books mentioned in this article. If you think she’s missing some indispensable legal writing references books, please email her at emily.grant@washburn.edu.
A Civic Responsibility

By Angel Romero Jr., Washburn University School of Law, Topeka, angel.romero@washburn.edu

Former Supreme Court Justice Sandra Day O’Connor once said:

“Knowledge of our system of government is not handed down through the gene pool … . The habits of citizenship must be learned … . But we have neglected civic education for the past several decades, and the results are predictably dismal.”

The 2010 National Assessment of Educational Progress (NAEP) found that only 24 percent, out of a representative sample of 9,000 high school seniors, performed at a proficient level when quizzed on civic knowledge and responsibility. All hope is not lost, however. My law school and volunteer experience has taught me that lawyers stand in a unique position to aid in a better understanding of civic knowledge and responsibility. Members of the bar can take advantage of their unique position in society to broaden the public’s civic awareness, both through participating in organizations and through their practice of law. A law school education cultivates an appreciation and understanding of civic responsibility that few get the chance to experience. Lawyers have the opportunity to gain a unique perspective on the workings of the justice system and the federal government.

Social media has also added another dimension to citizens’ civic knowledge. Within minutes of the announcement of the verdict in the Casey Anthony case, social media exploded with the vitriolic cries of citizens claiming the jury “got it wrong.” On Twitter, average Americans could render their own arm-chair verdict of a complex case in fewer than 140 characters. Anyone can post an inflammatory article about healthcare reform on their Facebook page, and then proceed to make all kinds of claims about what the law does or does not do.

In the midst of all this chaos, there is a tremendous void that lawyers can fill. Lawyers are trained to analyze the facts of a situation and to see things from multiple points of view. In addition, lawyers understand not only the structure and substance of the law, but also the values underpinning our system of government. Furthermore, lawyers are trained to communicate clearly and effectively. Finally, lawyers are often trusted and respected members of their communities. Utilizing those traits, lawyers are uniquely situated to cut through the noise and offer a clearer, more in-depth civic education.

Thankfully, there are organizations that are working to address the gap in civic education, particularly among young people. Those organizations would love to have the help and support of us in the legal profession. One such organization is Kids Voting Kansas (KVK). Founded in 1992 as an affiliate of Kids Voting USA, KVK is a non-partisan, non-profit organization that teaches students the importance of voting and civic engagement. I have had the pleasure of serving as the interim executive director, and as a current board member, of KVK.

KVK has two components. The first component is a free K-12 civics curriculum that is offered to any participating school district. The lessons are designed to supplement the traditional curriculum offered in schools, and they focus on building a practical civic education. Students learn not only how government works, but why their vote is important and how they can participate in government. The second, and most dynamic, component of the program is a voting simulation that is held on Election Day. KVK prepares ballots for students, and communities coordinate to have KVK voting booths set up alongside adult polling stations. Therefore, students get the experience of going to a polling station and casting their vote. KVK is in more than 60 Kansas communities and would love to involve lawyers as a part of their efforts. You can find contact information for a KVK community near you by heading to KVK’s website: www.kidsvotingkansas.org.

I also recognize that lawyers are busy individuals. Even if you do not have the time to be involved in an organization, you can incorporate civics education into your practice. Particularly in criminal defense cases, clients may come to you very uncertain of what they are facing. It is important for lawyers to be able to meet clients where they are in terms of their understanding of government and the legal system. That begins with acknowledging and confronting any anxieties or misconceptions clients may have about the legal system. Lawyers must maintain open and candid lines of communication with their clients about the status of their litigation or criminal proceeding. Furthermore, as a lawyer, you can explain not only what is going to happen to your client, but why it is happening. It is important for clients to understand that the law does not exist in a vacuum; it is the result of careful policy choices.

While the facts concerning the status of civic education in our country are troubling, the legal profession is uniquely poised to address this problem. Lawyers should never forget the comprehensive set of skills they gain in law school. By acknowledging the important role of lawyers in society, lawyers can leverage their skills and talents to build a better and more comprehensive system of civics education.

About the Author

Angel Romero Jr. is a third-year law student at Washburn University School of Law. He is looking forward to being a “Double-Bod,” as he also earned his Bachelor of Arts in political science from Washburn University in 2010. Romero looks forward to someday working in the field of education law.

Footnotes

2. Id.
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Chief Justice Lawton R. Nuss has suggested legislators create and fund 22 new judicial positions as an alternative to repealing a statute that mandates at least one judge be located in each of the state's 105 counties.

The proposal was contained in the chief justice's 2013 State of the Judiciary Report, which was delivered to legislators in writing January 31.

“For fiscal year 2014, the Supreme Court proposes that rather than eliminating these statutory restrictions on judge transfers, the Legislature instead can create and fund the 22 judicial positions and accompanying staff needed to meet judicial needs in the underserved areas identified by the weighted caseload study,” (an historic exhaustive analysis of the state’s judicial caseload by the National Center for State Courts.) “If the Legislature chooses not to do so, however, then these statutory restrictions should be removed,” Chief Justice Nuss wrote in the annual report.

He noted that the extensive weighted caseload study revealed that “while Kansas has enough judges, some are not placed where they are most needed. That is partially due to a 30-year-old statute that absolutely requires at least one judge to reside in, and have principal office in, each county—regardless of the existing demands of the legal market there," Chief Justice Nuss wrote in the report.

The weighted caseload study was part of a statewide review of Judicial Branch operations that include a 24-member Blue Ribbon Commission, composed of citizens “from a variety of backgrounds and leadership positions from across the state.”

The State of the Judiciary message outlined progress made in implementing the Commission’s recommendations in 11 main categories, which include the development of statewide electronic filing of court cases. He said current funding through the end of this fiscal year, including legislative appropriations and federal grants, will cover pilot projects in the appellate courts, Douglas, Leavenworth, Sedgwick, and Shawnee counties.

“Additional legislative funding [from the State General Fund] is being sought for fiscal year 2014 to allow full statewide implementation of EFS (e-filing system) by the end of fiscal year 2015,” Chief Justice Nuss wrote.

He said the Supreme Court ultimately intends to develop and implement a complete centralized statewide e-courts environment—EFS plus electronic case management systems (CMS) and document management systems (DMS).

“Upon completion, such a combination of statewide systems could allow court personnel in any location to work virtually on court business in any other location, once again allowing the Supreme Court to more effectively and efficiently manage the state’s court system. Properly used, such statewide systems could help us to keep a functioning ‘open for business’ court clerk’s office in all 105 counties.”

“It might be suggested that these electronic systems are absolutely critical to keeping some of these offices open, and further suggested that keeping these offices open is absolutely critical to providing access to justice for our fellow Kansans living in those areas,” Chief Justice Nuss wrote.

In the report’s conclusion, Chief Justice Nuss, said “it is clear that administering justice to all Kansans has been an original function of government performed by the Judicial Branch since 1861. Indeed, since 1861 the Kansas Constitution Bill of Rights has provided that Kansans are entitled to ‘remedy by due course of law’ and [civil] ‘justice administered without delay.’”

“Adequate court funding is critical to providing these essential services—while inadequate funding undermines not only access to justice, but also the people’s belief in the justice system itself,” the Chief Justice wrote.

Members in the News

Changing Positions
Christopher C. Barnds has joined Bryan D. Lykins, Hejtmanek & Fincher, Topeka.
Marc Bennett has been named Sedgwick County district attorney.
Kevin R. Davis has joined Security Benefit Corp., Topeka, as director of governmental affairs and counsel.
Joshua A. Decker has joined Coffman DeFries & Nothern P.C., Topeka.
Tara Sue Eberline has joined Foulston Siefkin LLP, Overland Park, as a partner.
Jack M. Epps has also joined the firm’s Overland Park office.
Nola T. Foulston has joined the Hutton & Hutton Law Firm LLC, Wichita.
Jarrod R. Guthrie has joined Kiewit Corp., Lenexa.
Jacqueline H. Hartis has joined McRoberts & Associates P.C., Kansas City, Mo.
Garth Herrmann has been named a shareholder in the Wichita office of Gilmore & Bell P.C., Wichita.
Gina M. Rickhof has been named a director in the firm’s Kansas City, Mo., office.
Shannon S. Krysl has joined Wichita Public Schools as chief human resource officer.
Kelly Ann Navinsky-Wenz has joined Bolton and McNish LLC, Marysville.
Jennifer R. O’Hare has been sworn in as the Lincoln County attorney, Lincoln.
Hon. Anthony J. Powell and Hon. Kim R. Schroeder have been appointed to the Kansas Court of Appeals, Topeka.
Madeline J. Rogers has joined Woner Glenn Reeder & Girard P.A., Topeka.

Mary S. Shafer has joined Lathrop & Gage LLP, Kansas City, Mo.
Sam H. Sheldon has been appointed as chief judge for the Court of Tax Appeals, Topeka.
Madeline M. Simpson has joined Peter Fiessel Immel Heeb & Hird LLP, Lawrence, as an associate.
Rebecca F. Sisk has joined Joseph Holland & Craft LLC, Wichita.
Jesse D. Tanksley has joined Stinson Morrison Hecker LLP, Wichita.
Spencer L. Throssell has joined Yeretsky & Malher Law Offices, Overland Park.
Nicholas J. Walker has been named Sedgwick County district attorney.

Changing Locations
Lillian G. Apodaca has moved to 2420 Comanche Rd. NE, Ste. H6, Albuquerque, NM 87107.
Beall & Mitchell has moved to 210 N. Saint Francis St., Wichita, KS 67202.
Gerald N. Capps has moved to 301 N. Main, Ste. 1700, Wichita, KS 67202.

Enzt & Enzt P.A. has moved to 1414 SW Ashworth Place #201, Topeka, KS 66604.
Edmund S. Gross has moved to 10 E. Cambridge Cir. Dr., Ste. 250, Kansas City, KS 66103.
Matthew T. Kincaid has moved to 64114 Ward Pkwy, Ste. 370, Kansas City, MO 64114.

Gyllenborg & Brown, P.A.
is pleased to announce that
Kathryn Jermann Marsh
a former
Jackson County Assistant Prosecuting Attorney, Johnson County Assistant District Attorney, Douglas County Assistant District Attorney, and City of Lenexa Assistant City Prosecutor,
joined the firm on February 4, 2013.

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Obituaries

Myron Rene Hausheer

Myron Rene Hausheer, 78, of Topeka, died January 4 at Stormont-Vail in Topeka. He was born June 10, 1934, in Lamoni, Iowa, the son of Herman and Bertha Christine (Roberts) Hausheer. He graduated from the University of Iowa College of Medicine in 1959, and in 1974, he graduated from Washburn University School of Law. Hausheer had a general practice in western Kansas for several years before moving to Topeka, where he worked at Disability Determination Services for the state of Kansas. He was an active member of the community and a member of the American Medical Association, Kansas Bar Association, American Academy of Family Physicians fellow, and American College of Legal Medicine fellow.

Hausheer is survived by his wife, Angelina Zimmerman, of the home; children, Michael Hausheer, Michelle Hausheer, Mark Hausheer, Kevin Hausheer, and Cherise Hausheer; brother, Maurice Hausheer; and six grandchildren. Hausheer was preceded in death by his brother, Herman Hausheer.


Robert I. Nicholson Jr., 65, of Paola, died January 1. He was born August 14, 1947, in Paola, the son of Robert and June Shinkle (Powell) Nicholson. After attending Westminster College in Fulton, Mo., he graduated from the University of Kansas with a bachelor's degree. In 1972, Nicholson earned a juris doctorate from the University of Kansas School of Law, where he was a member of the Phi Gamma Delta and Phi Alpha Delta legal fraternities. Nicholson's legal career spanned more than 40 years. He served as Miami County attorney, in addition to having a solo practice and being a partner in the firm of Nicholson, Dasebrock & Hartley L.C. He was a member of the American Bar Association, Kansas Bar Association, Kansas Municipal Judges Association, and was a Kansas Bar Foundation fellow. He served as past president of the Kingman Recreation Commission, Kingman County Draft Board attorney, Kingman Chamber of Commerce, and Kingman Zoning board. Williams was a U.S. Army veteran who served in World War II as a member of the 20th Armored Division that participated in the Battle of the Bulge and in the liberation of the Dachau Concentration Camp.

Williams is survived by two sons, Brad and Chad; daughter, Debbie; four grandchildren; two stepgrandchildren; three great-grandchildren; and five step-great-grandchildren. He was preceded in death by his wife, Merritta Lewis, brother, Frank, and sisters, Eunice, Lucille, and Martha.

Glen L. Tongier

Glen L. Tongier, 88, of Coffeyville, died December 24 at his home. He was born December 17, 1924, in Coffeyville, the son of Russell M. and Effie Johnson Tongier. Tongier graduated from Field Kindley Memorial High School in Coffeyville and Coffeyville Junior College. He served in the U.S. Navy from 1943 to 1946. Tongier received both his bachelor's and law degrees from the University of Kansas. Tongier practiced law in Coffeyville from 1951 until his retirement in 1996. He served as Montgomery County attorney from 1958 to 1962. He was a member of the American Bar Association, Kansas Bar Association, and past president of the Montgomery County Bar Association. Tongier was also active in political and civic affairs, serving as Montgomery County Republican chair from 1964 to 1966. He was a member and past president of the board of U.S.D. No. 445 and served as attorney for the school district for member years.

Tongier is survived by his wife, Sharon, of the home; daughter, Cheryl Luecke, of Kansas City, Mo.; son John Tongier, of Overland Park; and four grandchildren.

Roy E. Williams

Roy E. Williams, 88, of Kingman, died at Wheatlands Healthcare Center in Kingman. He was born March 6, 1924, in Selman, Okla., the son of Garret Franklin and Martha Eunice Scovel Williams.

A longtime Kingman resident, Williams was a retired attorney with the firm of Williams and Williams Law Offices. He was a member of the American Legion and VFW, was the former Kingman County attorney, a past board member of the Kingman Recreation Commission, Kingman County Draft Board attorney, Kingman Chamber of Commerce, and Kingman Zoning board. Williams was a U.S. Army veteran who served in World War II as a member of the 20th Armored Division that participated in the Battle of the Bulge and in the liberation of the Dachau Concentration Camp.

Williams is survived by two sons, Brad and Chad; daughter, Debbie; four grandchildren; two stepgrandchildren; three great-grandchildren; and five step-great-grandchildren. He was preceded in death by his wife, Merritta Lewis, brother, Frank, and sisters, Eunice, Lucille, and Martha.
Lawyer, Know Your Safety Net: A Malpractice Insurance Primer for New and Experienced Lawyers

By Lauren Schulz and Professor Michael Hunter Schwartz
I. Introduction

Any reasonably competent lawyer knows how to file claims, construct arguments, and represent clients, but few lawyers have been trained to or have even thought extensively about how to protect themselves from client claims against them. As detailed below, claims against lawyers for malpractice happen all the time and are steadily increasing. Even a single claim can cause the loss of one’s savings or job, a suspension from practice, or a disbarment. Years of education and a carefully-constructed professional reputation can disappear faster than kibble served to a hungry dog. In fact, clients (and even non-clients) may bring malpractice claims whether the lawyer made a mistake or not. Consequently, while careful practice habits may decrease the likelihood of malpractice claims, it is not wise to rely on care alone. Nearly all, if not all, large firms and the majority of small firms and solo practitioners, choose to purchase malpractice insurance.1

While Oregon is the only state that requires lawyers to purchase malpractice insurance, many states require lawyers to disclose, either to their clients or to the state bar, whether they carry malpractice insurance.2

Given all those factors, it is surprising how little most lawyers know about the coverage a malpractice insurance policy provides. Most lawyers just assume that their firms or insurance agents will choose the right policies for them. Because the stakes are so high, the logical choice is for lawyers to be proactive and well-informed on insurance policies.

This article offers a short manual on malpractice insurance. It provides a brief description of what constitutes legal malpractice and describes the lawyer errors that most frequently result in malpractice claims; explains the common terms, exclusions, and conditions in malpractice policies; summarizes the process by which insurers set premium rates; and concludes by suggesting some ideas to help lawyers reduce their malpractice premiums, avoid malpractice, and minimize claims if they are sued by clients.

II. What Constitutes Legal Malpractice

When an individual asserts that her lawyer has caused harm by committing professional misconduct, the claim is known as legal malpractice.3 Clients file a variety of causes of action for malpractice, including claims for intentional misconduct or breach of contract, but the most common claims allege breach of fiduciary duty or negligence.4

A fiduciary, as lawyers know, is an individual in a position of trust; lawyers owe their clients a number of professional duties, including a duty to place clients’ interests above their own.5 The fiduciary duties that a lawyer owes to her client include: avoiding conflicts of interest, representing the client in good faith, informing the client adequately, safeguarding the client’s confidential information and property, and abiding by the client’s instructions.6 If a lawyer violates one of those duties, the client may successfully bring a claim of malpractice based on a breach of fiduciary duty.

A lawyer is negligent when she fails to exercise the proper professional knowledge, care, or skill that is sufficient and appropriate for the particular matter at hand.7 Failure to exercise proper professional care is different from a lawyer making a mere error in judgment; mere errors in judgment alone will not suffice to sustain a successful malpractice claim.8 The Kansas Supreme Court has held that it is a lawyer’s duty to provide his client with an informed judgment.9 Thus, a lawyer is not negligent if he makes an error that he believed in good faith was informed and in the best interest of the client.10 However, the Court found that if the error could have been avoided through ordinary research, the lawyer cannot “avoid legal malpractice liability by claiming the error was one of judgment.”11

Other examples of a lawyer’s professional malpractice include: failing to prepare or file the proper legal documents, failing to act diligently, stating the law or facts incorrectly, missing deadlines, failing to inform a client of the statute of limitations, or failing to properly advise the client.12 The conduct must have caused the client some type of harm in the matter for which the client originally hired the lawyer.13 Additionally, the client must show that the harm would not have occurred but for the lawyer’s professional misconduct.14 Possible remedies for the plaintiff in a malpractice suit include damages, an injunction, altering or canceling legal documents, and returning the plaintiff’s property.15

Occasionally, clients will bring a malpractice claim under breach of contract rather than a tort action. Usually, this choice stems from the fact that, in many states, the statute of limitations for breach of contract claims is three years whereas the statute of limitations for tort actions is only two.16 Although some jurisdictions are divided on whether a malpractice claim falls under tort or contract, Kansas is not. In Kansas, unless a claim involves a specific contractual provision, malpractice claims are tort actions.17

4. See id.

Footnotes

2. See id. (stating that seven states require a lawyer to disclose liability insurance status to their clients, and 18 states require disclosure of insurance on the annual bar registration). But cf. K.S.A. 40-3402 (2012) (requiring physicians to obtain medical malpractice insurance); see also AMERICAN MEDICAL ASSOCIATION ADVOCACY RESOURCE CENTER, STATE LAWS MANDATING MINIMUM LEVELS OF PROFESSIONAL LIABILITY INSURANCE 1 (2012) (stating Kansas as one of seven states that requires a minimum level of liability insurance for physicians).
3. See Lisa G. Lerman & Philip G. Schrag, Ethical Problems in the Practice of the Law 36 (Erwin Chemerinsky et al. eds., Aspen Publ’g 2005).
4. See id.
5. See Ronald E. Mallen & Jeffrey M. Smith, 5 Legal Malpractice $15:2 (2012 ed.).
6. See id.
7. See 7 AM. JUR. 2D Attorneys at Law § 168 (2012).
8. See 14 AM. JUR. Trials Actions Against Attorneys for Professional Negligence § 2 (updated in 2011).
10. See id. at 555-56.
11. Id.
12. See 14 AM. JUR., supra note 8.
13. See Lerman & Schrag, supra note 3, at 36-37.
14. See id.
15. See id. at 37.
17. Id. at 578.
Thus, state bars assert that malpractice law increases the quality of the legal profession by forcing lawyers to be precise and meticulous. On average, 6 percent of all practicing lawyers will have a malpractice claim brought against them. For the past several decades, there has been increasing growth in the number of legal malpractice claims and lawsuits. During the 1980s, the reported number of legal malpractice lawsuits tripled from the previous decade, and the 1990s saw a 155 percent increase from the 1980s figures. The majority of malpractice claims arise out of lawyers’ handling of personal injury or real estate matters. Other areas of law that are high risk for malpractice claims include intellectual property, patent, and securities law.

Explanations for the growth in malpractice claims include an increase in litigation, lawyers becoming more willing to bring claims against other lawyers, an increase in third party claims, clients wanting cheaper legal fees, and the current economic malaise. Many insurance carriers blame the poor economy for the increase under the theory that, when there are fewer jobs and people have less money; clients desperate for money are more likely to sue.

Although the types of claims that are brought in malpractice suits vary, the majority of the claims allege “simple, straightforward mistakes.” The most common reasons for malpractice claims include acts such as: missing deadlines, failing to settle, lacking knowledge of law, failing to prepare, failing to manage expectations, and failing to communicate properly.

The Missouri Department of Insurance publishes a Legal Malpractice Insurance Report every ten years that provides statistical data on legal malpractice claims. The 2010 Report showed that 242 legal malpractice claims were closed in 2010, with the average payout being $120,014. The areas of law practiced by the lawyers most often sued for malpractice were bodily injury and property damage, collection and bankruptcy, estates and trusts, family law and real estate. The most common types of lawyer errors included failure to make deadlines, a planning or strategy error, an inadequate investigation, and inadequate knowledge or application of the law. The following two charts show the distribution of claims by area of law and type of lawyer wrongdoing from 2001 to 2010:

### 2001–2010 Percentage of All Closed Claims by Type of Error

![Diagram showing the percentage of all closed claims by type of error during 2001–2010.](image)

### 2001–2010 Percentage of Closed Claims by Area of Law

![Diagram showing the percentage of closed claims by area of law from 2001 to 2010.](image)

III. Malpractice Insurance Basics

To protect themselves from costly claims, solo practitioners and firms buy legal malpractice insurance. Those insurance policies address acts, errors or omissions that a lawyer makes in the scope of the professional services she offers.

Legal malpractice insurance is different from general liability insurance in that it does not cover events such as property damage or physical injuries to clients who are harmed while visiting the lawyer’s place of business. Legal malpractice insurance only covers problems that arise from rendering or failing to render professional legal services.

Even if a lawyer works for a large firm and has a large amount of coverage under the firm’s malpractice insurance policy, that policy does not provide blanket protection. Generally, policies do not cover a wide variety of acts, such as: fraudulent, malicious, dishonest, or criminal acts; do not insure certain types of remedies, such as: orders of restitution of legal fees, fines, penalties, or orders to pay punitive damages; and do not cover particular categories of disputes, such as: disputes involving the conduct of lawyers who both represent and are party owners of businesses or intra-firm disputes.

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19. See id.
21. See id.
22. See id.
24. See Van Laningham, supra note 20 at 327.
27. See Van Lanyingham, supra note 20 at 328-31.
29. Id. at 9.
30. Id. at 41.
31. Id. at 41 (listing the number of claims per area of law).
32. Id. at 41 (listing the number of claims per type of error).
34. See id.
35. See id.
Legal malpractice policies, instead, “provide coverage for claims that arise from ‘wrongful acts’ committed in the rendering of legal services ... in your capacity as a lawyer and generally provide both indemnification coverage and claims expense coverage, subject to specified deductibles and endorsements.”  

Because most policies are drafted by insurers and attorneys have little ability to negotiate terms, malpractice insurance policies are considered adhesion contracts; consequently, in coverage disputes, courts tend to resolve ambiguities in favor of the non-drafting party, the lawyer.

**IV. Terms, Conditions, and Exclusions**

A malpractice insurance policy usually consists of the following sections: Definitions, Coverage Agreements, Defense Provisions, Conditions, Exclusions, and Limits of Liability. The Definitions explain the terms in the policy, the Coverage Agreements explain what services and actions are insured by the policy, Exclusions withdraw coverage for particular types of otherwise covered conduct, Defense Provisions determine the lawyer’s rights in regards to defending and settling claims, Conditions state requirements that must occur for coverage, and Limits of Liability set the outer bounds on what the insurer will pay.

Below, we explain each of these sections in turn.

The Definitions section is significant; most coverage disputes involve questions of policy language interpretation. For example, to understand the Coverage Agreements section, courts look to the Definitions section. To determine whether a policy covers a particular act of misconduct, courts first analyze three basic questions: 1) Was the party insured? 2) Was there an actual claim? and 3) Was the alleged misconduct committed at a time when the lawyer was acting within the legal sphere, the client could then hold the firm responsible for the lawyer’s negligent act.

Another important term in the Definitions section is the insurer’s definition of “damage” or “loss.” In general, a malpractice insurer provides coverage or payment for the damage that a lawyer has caused and is legally obligated to pay. Thus, knowing the definition of “damage” or “loss” lets the lawyer know exactly what the insurance will pay for if he or she loses.

Regardless of which term the policy uses, insurance companies often argue that claims for restitution, disgorgement, penalties, or the return of fees do not qualify as either “damage” or

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37. CNA’s Professional Liability Insurance for Lawyers, supra note 18.
39. Id.
40. Id.
41. See Weston, supra note 33.
42. See id.
43. See CNA’s Professional Liability Insurance for Lawyers, supra note 18; see also Senate Ins. Co. v. Tamanach American, 788 N.Y.S.2d 481 (App. Div. 3d Dept 2005) (holding that a lawyer was not provided malpractice coverage because the misconduct occurred before the lawyer joined the firm, thus he was not acting on behalf of the firm).
44. See Jacobs, supra note 36 at 168; see also Understanding Your Insurance Coverage, supra note 38.
45. See Understanding Your Insurance Coverage, supra note 38.
46. See id.
47. See CNA’s Professional Liability Insurance for Lawyers, supra note 18.
48. See Jacobs, supra note 36 at 168.
49. See id.
51. See Jacobs, supra note 36 at 176-77; see also Weston, supra note 33 at § 10[d] (citing Natl. Union Fire Ins. Co. of Pittsburgh, Pa. v. Shane & Shane Co., L.P.A., 605 N.E.2d 1325 (8th Dist. Cuyahoga County 1992) (holding that a lawyer was not covered under malpractice policy when he retained attorneys fees fraudulently from a settlement)).
52. See Phillips v. Carson, 731 P.2d 820 (Kan. 1987) (Court found attorney negligent for taking out a personal loan from client for a separate business. The Court remanded the case to determine whether the lawyer's law firm was liable).
53. See Jacobs, supra note 36 at 172.
54. See id.
55. See id. at 175 (citing Nutmeg Ins. Co. v. East Lake Mgmt. & Dev. Corp., 2006 WL 3409156 (N.D. Ill. 2006)).
56. See id.
“loss.” Some courts have rejected those arguments, holding that “damage” or “loss” includes at least some forms of restitution, and even disgorgement, depending on the specific language in the policy.58

The Coverage section also establishes the nature of the coverage provided. Legal malpractice insurance policies also are called errors and omissions policies, because they provide coverage for mistakes lawyers make in the scope of their professional services.59 Currently, the majority of legal malpractice insurance policies are, as indicated above, claims-based policies, meaning if a claim is made and reported during the policy period, it is covered.60 Earlier claims-based policies only required reporting during the policy period so long as it was reasonably practicable to provide such notice.61 Now, most policies require reporting during the policy period.62

The failure to make a timely report of a claim affects other insured individuals besides the lawyer who committed the act; a failure to report a claim could also affect the firm or partnership’s coverage for the claim.63 In fact, disputes between firms and their insurers regarding claims made but not reported during the policy period are common.64 This issue often arises when a claim is made at the end of a policy period, and the insured did not have time to report the claim before the policy period ended.65 Courts tend to favor the insurer’s argument in such cases, concluding that, if a policy has a provision requiring the insured to report claims during the policy period, there is no coverage if the lawyer fails to do so.66

Malpractice insurance policies used to be written more similarly to general liability policies, granting coverage on an occurrence basis.67 Under an occurrence-based policy, insurers provide coverage if the action happened during the policy period, regardless of when the claim was made.68 Such policies have disappeared. Occasionally malpractice policies create a hybrid between a claims-based and occurrence-based policy.69 For example, the policy might provide occurrence-based coverage for conduct occurring during the policy period and claims-based coverage as to conduct that occurred prior to the policy period.70

The Exclusions section can seem to contain a series of traps for the uninformed. The most common exclusions include: intentional dishonesty, uninsurable claims by law, and prior acts or knowledge.71 If the claim falls under an exclusion, the lawyer must provide her own defense costs and pay the claim.72 The above three exclusions are described below.

The intentional dishonesty exclusion denies coverage for acts that are dishonest, fraudulent or criminal.73 Insurers typically use one of three common forms of this exclusion. The rarest excludes the most conduct, denying coverage if there is any allegation of fraudulent, dishonest, or criminal conduct.74 The second form denies coverage if fraudulent, dishonest, or criminal conduct actually took place.75 The third form, which is the most commonly used and denies the least amount of coverage, excuses the insurer only if there is a final judgment or settlement of a claim for fraudulent, dishonest, or criminal conduct.76 Because the third form provides the most coverage, lawyers should aim for a policy that uses that particular language and not overlook this exclusion.

The intentional dishonesty exclusion is distinct from the uninsurable claims by law exclusion; the latter bars coverage when providing such coverage would violate state law.77 The exclusion is not based on the lawyer’s act being unlawful; rather, it applies if having an insurer pay for the legal fees would itself be unlawful. The particular circumstances where this exception applies vary depending on the particular state where the insurance policy is provided and the type of claim alleged.78

The clause excluding prior acts and knowledge bars coverage for acts, errors or omissions that occur before the “prior acts date” set in the policy, even if the claim is made and reported during the policy period.79 The exclusion prevents more than one insurer from providing coverage for a single claim, and allows the insurer to avoid providing coverage to a lawyer who did not have insurance when the misconduct occurred. Insurers also rely on this exclusion to deny coverage for claims against newly-added lawyers, such as claims against lawyers added in a law firm merger.80 The policy will either state a retroactive date, exclude prior acts altogether or both.81

“A policy with no prior [acts exclusion] or retroactive date affords “full prior acts” coverage, meaning the time of the act is not relevant if the claim is made during the policy period.”82

The next policy section, the Defense Provisions, is vital because it states how much say the insured will have in defense decisions. Some policies allow the insurer to choose the defense counsel.83 Other policies allow the insured to choose the defense counsel, but only on the approval of the insurer.84 Additionally, the Defense Provisions might include a statement addressing the question of whether the insurer needs approval or consent by the insured to settle a particular claim.85

57. See id. at 172-77.
58. Id. at 174, n.31.
59. See id. at 167.
60. See Weston, supra note 33.
61. See id.
62. See id.
63. See id.
64. See id.
65. Jacobs, supra note 36 at 171.
66. See id.
67. See Weston, supra note 33.
68. See id.
69. See id. at § 4.
71. See Jacobs, supra note 36 at 179-82.
72. See Understanding Your Insurance Coverage, supra note 38.
73. See Jacobs, supra note 36 at 179.
74. See id. (emphasis added).
75. See id. (emphasis added).
76. See id.
77. See id. at 180-81.
78. See id. at 181.
79. See CNA’s Professional Liability Insurance for Lawyers, supra note 18.
80. See id.
81. See Jacobs, supra note 36 at 181.
82. Weston, supra note 33.
83. See Understanding Your Insurance Coverage, supra note 38.
84. See id.
85. See id.
consent is required, policies often place a limit on what the insurer will pay if the insured refuses to settle.86 Unless there is a significant amount of trust between the insurance company and the lawyer or firm, it is in a lawyer’s best interest to have a provision requiring insured consent to settlements.

Policies often place a cap on the amount of money the insurer must provide during a policy period; thus, if the insurer settles a large claim early in the policy period, the insured will have limited protection for the remainder of the policy period. This issue makes examining the Limits of Liability section of the policy also important, because the Limits provision will provide the amount the insurer will pay when there is a settlement or judgment.88 The Limits of Liability section will also address a critical issue, whether the deductible is per claim or in the aggregate.87 Sometimes, policies will state that deductibles are “loss only deductibles,” which means that the insured will only pay when there is a settlement or judgment.88 The Limits of Liability section will also address a critical issue, whether defense costs are included in the policy limit. In most policies, defense costs don’t count towards the policy limit;89 if defense costs do count against the policy limit, the coverage provided by the policy is much more limited than it appears at first glance.90 However, some of the policies that count defense costs against policy limits also include a “claims expense allowance,” which provides a fund for defense costs that, until exhausted, won’t reduce the coverage amount.91 Claims expense provisions, however, are rare.92

V. The Coverage Gap Problem

Gaps in coverage are an insidious problem because they are usually unexpected. The best way to understand the issue is to imagine the following, specific example. A lawyer, who is insured by one malpractice insurer, purchases insurance for the following year from another insurer. The lawyer commits malpractice during the policy period covered by the first insurer, but the lawyer doesn’t realize the error until he is sued in the second year. The lawyer reports the claim to both insurers on the day he learns of it. The first insurer denies coverage because the insured did not report the claim during the policy period. The second insurer denies the claim because of the prior acts exclusion. As indicated earlier, the prior acts exclusion excludes claims that occur during the policy period but which stem from malpractice committed before the period started.93 The insured has a coverage gap.

This problem can be solved by purchasing an extended reporting option.94 An extended reporting option “extends coverage for a delineated period of time after the claims-made policy’s expiration date.”95 The extension can be anywhere from 30 to 60 days.96 Insurers base the cost of this option on the previous year’s premium and the number of years the lawyer or firm has had coverage.97 If the firm or company does not purchase the extended reporting option, a lawyer can purchase it individually.98 It is important to remember that claims can be brought against a lawyer for past conduct even if he or she no longer practices law and has switched careers.99 Thus, lawyers who anticipate leaving their current employers in the upcoming year should strongly consider purchasing an extended reporting option.100

VI. How Insurers Set Their Premium Rates

The factors that determine lawyers’ premium payments include: the size of the firm or employer, the number of employees, the number of years the lawyer has been practicing, the area of practice, and the jurisdiction in which the firm or employer practices.101 The most important factor that insurers take into consideration is the area of practice.102 It is normal for an insurer to charge firms in high-risk practice areas twice the normal rate.103 Geographic location is also important. Normally, insurers start with a general rate that is state influenced depending on state malpractice law and the risk pool.104 The risk pool is defined by other lawyers in surrounding areas and how many claims or acts of misconduct have occurred.105 Sometimes, an insurer will require a lawyer to pay a higher rate if, for example, the lawyer practices in or even near a large city if the city risk pool is very high. Thus, a lawyer practicing in the suburbs may be lumped under the same rate as her city colleagues. Furthermore, the amount of time that the lawyer has been covered affects a lawyer’s rate. When lawyers first begin practicing, they have a higher risk of claims and thus are subject to higher rates.106 After a lawyer practices for several years, the risk flattens out and the rates are lowered.107 Additional factors that affect insurance rates are: personal claims history, amount of years of coverage, internal firm procedures, limits of liability selected, the amount of the deductible, and risk management.108

86. Id.
87. See id.
88. See id.
89. See id.
90. See id.
91. See id.
92. See id.
94. See id.
95. Understanding Your Insurance Coverage, supra note 38 (also referred to as “Tail Coverage”).
96. See Jacobs, supra note 36 at 171.
97. See id.
98. See How to Prevent Gaps in Your Insurance Coverage, supra note 93.
99. See id.
100. See id.
101. See Chineson, supra note 23.
102. See id.
103. See id.
104. See CNA’s Professional Liability Insurance for Lawyers, supra note 18.
106. See CNA’s Professional Liability Insurance for Lawyers, supra note 18.
107. See id.
VII. Strategies for Lowering Insurance Rates, Avoiding Claims and Successfully Defending Malpractice Allegations

A. Strategies for lowering insurance rates

Of course, having the lowest possible malpractice rates, at all costs, should not be any lawyer’s goal. Choosing malpractice insurance is a lot like choosing other forms of insurance in that it is important to consider factors such as the lawyer’s risk tolerance, the breadth of coverage provided, the dollar amount of the policy limits, and the size of the deductible. Factors such as the limits of liability and the amount of the deductible require lawyers to make trade-offs between long-term risk and current cost. Because, as we have explained above, policies can include provisions that greatly restrict the scope and amount of coverage, the specific language of any proposed policy requires careful scrutiny.

Once a lawyer has weighed these considerations and shopped for the right insurance carrier and policy, a few key strategies can help reduce rates. The insurer’s application represents a one-time opportunity. The lawyer must truthfully fill out the application and inform the insurer of any prior acts that might lead to a claim.110 This duty of candor does not mean the lawyer must write down every possible mistake he or she might have made, but it is important to identify the act(s) that he or she thinks might lead to a claim. Additionally, the lawyer should identify any past claims and “explain any extenuating circumstances, mitigating factors, and remedies taken.”111 If the lawyer gives the insurer complete information, the lawyer has a chance to explain situations to the insurer and steps he or she has taken to fix them.111

After the application is complete, the insurer will evaluate the amount of risk the lawyer presents, also known as “underwriting.”112 The insurer will look for items on the application that are red flags or indicate high-risk activities so the insurer can tailor a rate to the lawyer’s particular practice behaviors.113 Some of the high-risk activities that insurers notice and that lawyers can take steps to avoid or minimize include: missed deductible payments, gaps in malpractice insurance, bar disciplinary problems, prior malpractice claims, additional professional licenses, and business relationships with clients.114

Because, as explained above, insurers set rates based on risk pools, questioning the risk pool into which the insurer placed the lawyer can yield reductions in rates. For example, the American Bar Association’s Standing Committee on Lawyers’ Professional Liability recommends that lawyers “[t]ry to find out into which risk pool [they] fall [in] and, if [they] fall within a higher risk group than [they] should, do what [they] can to be placed in a lower risk group.”115 Other rate reduction strategies address some of the factors insurers use in setting rates. Having and adhering to a careful set of internal firm procedures for managing client matters and for risk management are rating factors that are completely within a lawyer’s or a firm’s control.

B. Strategies for avoiding malpractice claims

Even a lawyer who has purchased the best imaginable malpractice insurance at the lowest possible rate must consciously work to avoid malpractice claims. Some strategies are worth adopting right now. First, lawyers should select clients and cases carefully and thoughtfully. A client who is a problem before the lawyer has taken the case will be a problem later. A client who wants to sue over every minor insult may someday turn on his lawyer. New matters often require learning some new law and learning something new about the world, such as the client’s business. However, some areas of law, such as securities law, ERISA, and tax law, are so complex that a lawyer who is new to the field is taking a malpractice gamble.

Because so many malpractice claims stem from missing deadlines, it is critical to create and use efficient case management techniques. Missing a deadline because one’s secretary made an error is no excuse; some calendaring redundancy is a good idea. Insurers agree: they recommend that sole practitioners, employers and firms use a computerized filing and docketing system to help them keep track of clients and deadlines.116

As you might expect, using care in managing case facts, in researching the law, and in crafting arguments isn’t merely good lawyering; it’s also a risk management strategy. For similar reasons, participating in more than the minimal CLE trainings and working under or associating with experienced attorneys can minimize malpractice claims.

Good client relations may be the key to avoiding malpractice claims. Clients who feel good about their lawyers as people are much less likely to sue them. Lawyers who treat each client with respect and therefore attend to relational aspects of the attorney-client interaction have happier clients, and happier clients are less likely to sue. Keeping the client informed, managing the client’s expectations, and clearly identifying the attorney-client relationship all help avoid or at least minimize claims.117

C. Dealing with malpractice claims

If you are sued for malpractice, there are things you can do to minimize the claim and your expenses. Immediately inform your insurer. Maintain all relevant files, email messages, etc. Do not represent yourself; get someone else involved. Regularly communicate with your insurer and counsel and be candid with both. Do not contact the claimant about the claim. In short, be a good client.

VIII. Conclusion

No lawyer is immune to the risk of malpractice claims. Malpractice insurance can be a safety net so that an irrational client or a single mistake does not jeopardize the future. The
malpractice safety net, however, can have holes. Malpractice policies have important variations, and it is therefore critical for lawyers to know how terms, conditions, exclusions and other policy provisions affect their coverage, as well as how to avoid gaps in coverage. By avoiding high risk activities and engaging in a few practice management behaviors, lawyers can lower their policy rates and the likelihood of a claim without sacrificing coverage. Lawyers who are knowledgeable about malpractice policies and risks therefore are more likely to end up with the most impenetrable safety nets.

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Separation of Powers: Is There Cause for Concern?
By Natalie Haag
Most KBA members have heard about the budgetary restraints and the resulting limitations facing the judicial branch. Our organization has lobbied the legislature for more money for the judiciary and as proponents of an independent judiciary. As lawyers, we also focus on legislative proposals that impact our law practices, our clients or the courts. It is now time we look at the growing role of the legislative branch in executive branch functions with a view toward how changes may impact our tripartite form of government and ultimately how it might encroach on the judicial branch. The issue is one of separation of powers.

I. What is Separation of Powers?

Although it is not specifically mentioned in the Kansas Constitution, the Kansas Supreme Court has recognized the doctrine of separation of powers. The concept of separation of powers is founded on the premise that there are three separate branches of government: the executive, the legislative, and the judicial, and that each of the three branches shall have powers distinct from the others. The general concept is:

- The legislative power includes the power to make laws that establish the public policies of the state. In short, the legislative power is to make, amend, or repeal laws.
- The executive branch has the power to execute the laws, that is, to carry them into effect.
- The judiciary has the power to interpret the laws and apply the law to actual controversies.

It is “checks and balances” at its best. While an absolute separation of powers is impossible, we must remain vigilant to protect this system of checks and balances.

II. Are the Executive Branch Powers Eroding?

It has long been recognized that the legislative branch had the propensity for overreaching its powers.

Thomas Jefferson in his Notes on the State of Virginia, Constitution (1758), stated: “All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government.”

James Madison in The Federalist Papers No. 48, stated: “The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex. ... The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments.”

Shelby Smith, former lieutenant governor and secretary of administration, in the Scandal Time Bomb Ticking, by Lew Ferguson, stated: “Blurring the lines of separate and equal branches of government is the breeding ground for scandal.”

In 2001, Smith testified before the legislative Special Committee on the Judiciary identifying 70 assignments of legislators to state boards and commissions involving 31 different state bodies. He noted that 110 such appointments actually occurred that year but only 88 were by legislative mandate and 22 by gubernatorial discretionary appointment.

By January 29, 2008, 25 statutory committees existed to conduct interim studies or oversight activities and whose membership was principally legislative. At the same time, 59 agencies and groups created through legislation after 1985 included legislators, appointments made by legislators, or both.

Despite strong warnings from Smith, as of August 14, 2012, there were still 25 statutory committees and 42 agencies and groups with legislative appointments, including at least two new such committees/governing bodies that were established during the 2012 session. The membership of the 42 state agencies and groups includes 160 representatives of the legislature, including 88 legislators and 72 members appointed by legislators. The statutory committees include 242 legislator members out of 280 total committee members.

Additionally, during the 2012 session, one committee alone considered four additional oversight committees, including a Joint Committee on KanCare Oversight (HB 2789 and SB 459), Kansas Employment First Oversight Committee (SB 205), Joint Committee on State Authorities Oversight (SB 243), and Joint Committee on Oversight of the Closure of the Kansas Neurological Institute (HB 2296).

Legislative involvement in executive branch functions has been challenged in the past. The separation of powers doctrine does not prevent individual members of the legislature from serving on administrative boards or commissions when such service falls in the realm of cooperation on the part of the legislature and there is no attempt to usurp functions of the executive department of the government. For example, the appointment of a majority of the members of the Governmental Ethics Commission did not constitute an unconstitutional usurpation of executive power by the legislative branch nor did it violate the doctrine of separation of powers. In
contrast, the statute creating the State Office Building Commission to manage state office buildings, review leases and approve construction, which limited the governor’s commissioner appointments to legislators, was deemed an unconstitutional encroachment on the executive powers. The legislature also unconstitutionally violated the separation of powers doctrine when it adopted a statute allowing the legislature to adopt, modify or revoke administrative rules and regulations by concurrent resolution without presentment to the governor. The Supreme Court upheld that ruling even though legislators contended their approval of rules and regulations was simply an extension of the legislative function of creating the laws.

Legislative involvement with the governing bodies or oversight committees by itself may not constitute a violation of the separation of powers doctrine; however, at what point does the role of the legislature in joint committees, oversight commissions, and memberships on executive branch governing boards become so pervasive that it begins to usurp the authority of the executive branch? The current scope of issues and governing boards with mandatory legislative roles or appointments is broad. Here are just a few of the governing bodies, joint committees and oversight committees with legislative members or appointments and some of the issues they handle:

A. Social Services

1. Coordinating Council on Early Childhood Development Service (K.S.A. 74-7801 et seq.)
   - Membership: Not less than 16 to not more than 25 members, including two legislators
   - Duties: To develop and implement a plan for the delivery of health, education and social services for young children with or at risk for disabling conditions, appoint a staff person and determine the work activities of said staff person, and propose policies and recommendations for delivery of services.

2. Kansas Commission on Disability Concerns (K.S.A. 74-6701 et seq.)
   - Membership: 30 members, including 4 legislators
   - Duties: To develop and implement a plan for the delivery of health, education and social services for young children with disabilities and assist other agencies with this mission.

3. Joint Committee on Children’s Issues (K.S.A. 46-3001 et seq.)
   - Membership: 10 legislators
   - Duties: To oversee the implementation and operation of children’s health insurance plans, including assessment of the performance based outcomes set forth in law and “other children’s issues as the Committee deems necessary.”

4. Joint Committee on Home and Community Based Services (K.S.A. 39-7,160)
   - Membership: 9 legislators
   - Duties: To review the number of individuals transferred from institutional settings to home and community based settings and the cost savings; review community capacity and ensure that adequate progress is being made for the transfers to occur; study and determine the effectiveness of the program and perform a cost analysis; review the salaries, benefits, and training of direct care staff and ensure that any proceeds resulting from the successful transfer be applied to the system of long-term care and home and community-based services.

B. Public Safety

   - Membership: 17 members, including 4 legislators
   - Duties: To study the data-driven, fiscally responsible policies and practices that can increase public safety and reduce recidivism and spending on corrections in Kansas.

2. Emergency Medical Services Board (K.S.A. 65-6102 et seq.)
   - Membership: 13 members, of which 4 members are appointed by legislators
   - Duties: To select the administrator/CEO of the agency, adopt rules and regulations, conduct hearings on regulatory matters, enter contracts, develop a state plan for delivery of emergency medical services, review and approve training programs and funding requests, approve methods for examination for certification, set standards for providers, and appointment of a medical advisory council.

3. Joint Committee on Corrections and Juvenile Justice Oversight (K.S.A. 46-2801 et seq., as amended)
   - Membership: 14 legislators
   - Duties: To monitor the adult inmate population and study the program, activities, plans, and operations of the Kansas Department of Corrections and the adult correctional institutions; monitor the establishment of the Juvenile Justice Authority and study its programs, activities, plans, and operations and the juvenile correctional facilities; review and study the adult correctional and juvenile offender local programs and related entities; and report annually to the Legislative Coordinating Council.

4. Joint Committee on Kansas Security (K.S.A. 46-3301)
   - Membership: 10 legislators
   - Duties: To study, monitor, review and make recommendations on matters relating to the security of state officers or employees, state buildings and information systems and to create measures for improvement of security for the state.

C. Gaming

1. Lottery Gaming Facility Review Board (K.S.A. 74-8735)
   - Membership: 3 appointees of the governor and 4 appointees of legislators
   - Duties: To review the applications forwarded from the Kansas Lottery to determine the “best possible contract” in the four gaming zones.

D. Economic Development

1. Creative Arts Industries Commission (2012 Senate Substitute for House Bill 2454) replaces the abolished Arts Commission and the Film Commission
   Membership: 11 members, including 6 members appointed by legislators
   Duties: To measure, promote, support, and expand the creative industries to drive the Kansas economy, grow jobs, and enhance the quality of life for all Kansans.

2. Employment First Oversight Commission
   Membership: 5 members, including 4 members appointed by legislators
   Duties: To establish measurable goals and objectives for the state of Kansas and track the measurable progress of public agencies in implementing programs designed to employ persons with disabilities. All state agencies are statutorily required to fully cooperate with and provide data and information to the commission in carrying out its duties and providing annual reports to the legislature and the governor.

3. Joint Committee on Economic Development
   Membership: 13 legislators
   Duties: To promote economic growth, diversification, and expansion of existing state enterprises; maintain and revitalize economically depressed areas; and promote the state's workforce development efforts.

E. Education

1. Kansas Post-Secondary Technical Education Authority (TEA) (K.S.A. 72-4481)
   Membership: 12 appointed members, including 4 members appointed by the state board of regents, 3 appointed by the governor, and 2 appointed by legislators
   Duties: To operate under the auspices of the Kansas Board of Regents and make recommendations to the Regents regarding the coordination, statewide planning and improvements/enhancements to the post-secondary technical education system. TEA’s priority is to review and recommend approval of new and existing post-secondary technical programs; develop a new approach to funding post-secondary technical education; develop accountability indicators; and coordinate the development of a seamless system between secondary and post-secondary technical education levels.

F. Other State and Regulatory Services

1. Kansas Electric Transmission Authority
   Membership: 7 members, including 4 legislators
   Duties: To ensure reliable operation of the electrical transmission system, diversify and expand the Kansas economy and facilitate consumption of Kansas energy through improvements in the state’s electric transmission infrastructure. The authority has all the powers necessary to carry out the purposes and provisions of this act, including the ability to hire employees, enter contracts, amend the bylaws, adopt rules, and regulations, purchase, or lease real and personal property, borrow money, make loans to finance construction or repairs to a transmission facility not owned by the Kansas electric transmission authority, etc.

2. Joint Committee on Information Technology
   Membership: 10 legislators
   Duties: To study and make recommendations regarding computer, telecommunications, and other information technologies used by state agencies.


Let’s pause to look at legislative involvement in Kansas boards and commissions in light of the separation of powers doctrine. In any separation of powers decision a four-step analysis must be applied, specifically:

1. The essential nature of the power being exercised;
2. The degree of control by the legislative department in exercise of the power;
3. The nature of the objectives sought to be obtained by the legislature; and
4. The practical result of the blending of powers as shown by actual experience over a period of time, where such evidence is available.

The essential power exercised by an agency’s board or commission is governance. The board or commission provides the leadership and directs how the agency is to operate. Often the board or commission is also responsible for hiring the executive director or manager of the agency, like the EMS Board described above. The legislature currently has the authority to make appointments to 42 different governing bodies and policy making groups.

Most oversight committees are established to direct the implementation of policies and laws adopted by the legislature. Similarly, joint committees are often established to monitor and study issues facing the state. The legislative justification for oversight committees and legislative appointments to boards/commissions is accountability, i.e., the need to monitor issues and concerns about the agency or issue. Additionally, legislators sometimes note that their input is necessary because they speak for the people.

Legal Article: Separation of Powers ...
Can “monitoring” the executive branch go too far and interfere with executive branch functions? During the 1997 session, the legislature created a Joint Committee on Corrections and Juvenile Justice Oversight with duties to monitor the implementation of the juvenile justice authority. By statute the governor could appoint a Commissioner of Juvenile Justice on January 1, 1997. The governor made the appointment and during the next few years, this committee demanded regular reports from the commissioner about every aspect of the establishment of the agency, including the hiring of staff, the resumes submitted for positions with the agency, interview schedules, grant criteria, community communications, and other details about how the agency was managed. At one point several legislative members of the Joint Oversight Committee demanded that the commissioner be terminated because he wasn’t managing the agency as the legislators directed. That seems to be a clear example of micromanagement of an agency by a legislative committee. Interestingly, even though the agency has been in existence now for more than 15 years, the oversight committee still has a duty to monitor the establishment of the agency. In contrast, the Central Payment Center Oversight Commission, which was established to monitor the implementation of a new consolidated child support payment system after it faced very public criticism for implementation issues, no longer exists.

Recall that the legislature makes the laws and the executive branch implements and enforces the laws. So isn’t overseeing the agency, hiring the people who run the agency and making the policy decisions for the agency the equivalent of implementing and enforcing the law? Doesn’t the executive branch speak for the people, just as well as the legislative branch?

If oversight commissions were truly established to monitor the resolution of a specific issue or concern why are some commissions still in place more than 15 years later? Does that mean the issue or concern that caused the establishment of the oversight committee hasn’t been resolved? And, isn’t it the function of the executive branch to resolve the issues regarding implementation of the laws? It would seem that the true function of legislative involvement in boards and oversight committees is to perform executive duties.

Legislative involvement in the executive branch has also extended to attempts to direct the attorney general to take specific legal action or to enforce laws in specific ways. Fortunately, the Kansas Supreme Court found that the legislature cannot constitutionally direct the attorney general to take an action the attorney general believes is without merit. More specifically, the legislature cannot override the attorney general’s ethical duties not to bring or defend a proceeding, and not to assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

The appropriation process is often used as a means to direct the attorney general from taking enforcement actions. That same power is also used to control the actions of other agencies, in clear violation of the separation of powers doctrine.17 Within the 2012 Appropriations bill the legislators go beyond funding to set forth specific terms for grants, scholarships and loan programs. In one instance, the bill specifies the exact recipients for particular grants, very much like the federal earmark system. The funding for the Behavioral Science Regulatory Board18 included a proviso that prohibited the board from paying more than $14 per square foot for leased office space. Gov. Brownback vetoed those provisions and reminded legislators that: “Oversight of leased office space is the domain of the Department of Administration. To the extent that we can centrally manage leased space, we can manage our operating costs. These provisions would arbitrarily provide an exception not afforded other agencies and superseded the management function properly placed in the executive branch so I find it necessary to veto them both.” In other words, those provisos violate the separation of powers doctrine.

Given the scope of the oversight committees, legislative involvement in governing boards, and use of the appropriations process to make executive decisions, it may be time to take a broader look at the legislative branch’s exercise of authority over the executive branch and consider challenges to this exercise of authority.

III. Are Judiciary Powers Under Attack?

In “Gingrich targets independent judiciary,”19 George Will points out the irony of the attacks by Newt Gingrich on the judiciary, stating: “He (Gingrich) says the Founders considered the judiciary the ‘weakest’ branch. Not exactly. Alexander Hamilton called the judiciary the ‘least dangerous’ branch (Federalist No. 78) because, wielding neither the sword nor the purse, its power resides solely in persuasive ‘judgment.’ That, however, is not weakness but strength based on the public’s respect for public reasoning. Gingrich yearns to shatter that respect and trump such reasoning with raw political power, in the name of majoritarianism.

Judicial deference to majorities can, however, be a dereliction of the judicial duty to oppose actions irreconcilable with constitutional limits on what majorities may do. Gingrich’s campaign against courts repudiates contemporary conservatism’s core commitment to limited government.”

In “Obama Warns Supreme Court,”20 Laura Meckler and Carol E. Lee write: “For years, what we’ve heard is the biggest problem on the bench was judicial activism or the lack of judicial restraint, that an unelected group of people would somehow overturn a duly constituted and passed law,” he [President Obama] said at a news conference. The health care case is a good example of just that, he said. ‘And I’m pretty confident that this court will recognize that and not take that step. ...’ The president’s comments indicate how he might deal with the political fallout should he lose, framing the
court as a potential villain that substitutes its judgment for that of elected legislators, and Americans who lose benefits of the law as victims. ... Sen. Orrin Hatch (R-Utah), among the first to argue that the mandate to buy insurance was unconstitutional, responded, ‘It must be nice living in a fantasy world where every law you like is constitutional and every Supreme Court decision you don’t is ‘activist.’”

In “GOP, Gov now target judges, unions,”21 John Hanna writes: “Kansas Gov. Sam Brownback awoke Wednesday with a majority in the state Senate all but guaranteed for his fellow conservative Republicans to help him pursue new limits on annual government spending, further cuts in income taxes and greater influence over who sits on the state’s appellate courts. ... Sontag’s group [Americans for Prosperity], other conservatives and the anti-abortion group Kansans for Life also want to give the governor the power to appoint the state Court of Appeals judges and Supreme court justices, subject to Senate confirmation. A nominating commission currently screens applicants and gives the governor two or three choices for each vacancy, with no role for legislators. Supporters of such change argue that it will make the selection process more open, and many conservatives worry that the state’s courts are too liberal. Critics contend the independence of the judiciary is at stake if such a change is made. ‘The governor will have control of all three branches of state government,’ [Senate President Steve] Morris said.”

During the recent election year, candidates across the board in federal and state elections have been attacking judges as activists, accusing them of making the law rather than enforcing the law. In Kansas, elected officials and candidates raise this issue and push for “judicial reform,” usually in the context of a different selection process. During the 2012 Kansas primary election, one candidate for the Kansas Senate stated in his candidate questionnaire to a local paper that he would strengthen the abortion laws by changing the selection process for the appellate judges.22 Was he proposing a process designed to select judges who rule on matters exactly like the legislature wants them to rule, even if that isn’t the law? Was he no longer interested in an independent judiciary making fair and impartial decisions?

The legislature doesn’t need to control the decisions of the court; it has the authority to change decisions with new laws. Legislation can be passed to modify or codify judicial opinions. For example, the 2011 changes to the workers compensation act incorporated and modified existing statutes based upon a number of judicial opinions.

Toward the end of the 2012 legislative session, the antitrust case of O’Brien v. Leegin Creative Leather Products Inc. (Leegin II)23 was decided. The legislature immediately began taking steps to reverse the decision. The right and power of the legislature to draft laws and make changes to those laws when they disagree with a judicial decision was recognized in the preamble to 2012 House Bill 2797 that stated: “The purpose of this act is to correct the interpretation of the Kansas restraint of trade act, ... made in O’Brien v. Leegin Creative Leather Products Inc., Kansas Supreme Court No. 101,000 (May 4, 2012), which is contrary to the intent of the Kansas legislature in enacting the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto; to prevent wasteful litigation that would likely result if such interpretation is not corrected; to forestall those potentially affected by such interpretation from ceasing or refusing to do business in Kansas in order to avoid potential liability; and to minimize conflicts between the Kansas restraint of trade act and section 1 of the Sherman act, 15 USC Section 1, and reduce uncertainty as to the law applicable to commerce in Kansas.”

Rulings on controversial subjects like school finance, damage caps, and abortion spark legislative debate about changing the selection process for appellate judges and, sometimes even, changing the authority of the courts. For example, following the Montoy vs. State of Kansas24 decision, many legislators expressed concerns that the court engaged in appropriations by issuing that ruling, a duty they deemed exclusive to the legislative branch. Legislators debated passing legislation to restrict the power of the courts to rule on matters that might involve appropriations, particularly those involving school finance issues.

The Kansas Supreme Court recognizes that “[e]xcept for certain constitutional limitations and restrictions, the control and disbursement of funds belonging to the state are subject to the will of the legislature, unfettered by interference by the executive or the judiciary.”25 However, in Montoy, the Court was applying the Kansas Constitution, which requires that “[t]he legislature shall make suitable provision for finance of the educational interest of the state.”26

Is this one of the constitutional exceptions to the appropriations authority? The school finance debate continues to be whether the funding formula and amount of funding fulfill that constitutional requirement. The legislators have a good point that the judiciary should not decide the amount of money going to the schools within a particular fiscal year. Yet, the judiciary can’t rule on whether the constitutional mandate is fulfilled without discussing the funding of schools. While the legislature has the authority to change public policy based upon a disagreement with a court ruling, like that proposed in 2012 HB 2797 (Leegin II), limiting the judicial scope of review in a constitutional case is a dangerous precedent. Since a challenge to the state funding of schools is again before the court and ongoing budget restrictions are expected, this constitutional issue is a relevant topic for future legislative action.

The attacks on the independence of the judicial branch may also take less direct avenues through budget restraints and provisions. Restricting the ability to hire staff, replace equipment, provide up to date technology for filings, and, ultimately, impacting the ability of the courts to remain open will affect the legal community’s ability to provide timely justice for our clients. Given how the appropriations process is used to influ-

26. Kansas Const., art. 5, § 6(b).
ence the decisions made by the executive branch agencies, this could be a real threat to the judicial branch.

All legislative steps taken to address “judicial activism” should be closely monitored to ensure that the courts will always have the power to function as a separate and independent branch of government. The great leaders of our country realized that necessity as early as 1788 when they wrote in The Federalist Papers No. 51, “The Structure of Government Must Furnish the Proper Checks and Balances Between the Different Departments,” which states, in part: “In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each shall have as little agency as possible in the appointment of the members of the other. ... In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them. It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their office. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal.”

IV. Is the Legislative Branch at Risk?

When state officials and legislators complain about “judicial activism” regarding a particular judicial opinion, they are really contending the judicial branch made law rather than interpreted the law passed by the legislature. If true, that would amount to an encroachment by the judicial branch into the powers of the legislative branch. Debate on this issue is likely to continue with future school finance decisions.

Historically, most of the Kansas case law regarding the improper exercise of legislative powers has occurred when the legislature made an unconstitutional delegation of legislative authority. The Kansas appellate courts recognize that the legislature may enact general provisions and leave to others the discretion to fill in the details. Similarly, the legislature can transfer broad powers to executive or other agencies to set guidelines and to fashion remedies. This division of power was applied in State ex rel. Stephan v. Finney, wherein the Court held the governor had the authority to negotiate a tribal-state casino gaming compact but absent an appropriate delegation of power by the Kansas legislature, or legislative approval of the compact, the governor had no power to bind the state to the terms of said compact. As always, the issue is finding the right balance in the authority of each branch.

Statutory provisions imposing restrictions on appeals and judgments also raise issues regarding the separation of powers doctrine. For example, Miller v. Johnson analyzed whether the statutory caps on noneconomic damages violated the separation of powers doctrine. In that case, Miller argued that K.S.A. 60-19a02 violate the separation of powers doctrine because it abolishes the judiciary’s authority to order new trials if the jury’s award is inadequate, and because it is an inflexible cap that robs judges of their judicial discretion by functioning as a statutory remittitur effectively usurping the court’s inherent, exclusive, and constitutionally protected power to grant remittiturs. Relying on the four step analysis set forth in State ex rel. Morrison v. Sebelius, the Supreme Court noted that for many years the legislature has exercised some control over the judicial power to grant a new trial if a party doesn’t accept the court’s offer of additur or remittitur. As early as 1904, the judiciary recognized that the legislature could “regulate the matter of granting of new trials.” The Kansas Supreme Court found that the statutory cap did not violate the separation of powers doctrine.

From a purely practical standpoint, it is difficult to see how the branch of government responsible for making the laws and appropriating funds to the other branches of government could be at risk of losing power to one of those other branches of government. That is something the defenders of three separate but equal branches of government have recognized from the time this form of government was implemented.

V. Conclusion

Separation of powers is at the core of our American government and each branch has an important role. As lawyers we should defend the need for three separate branches of government and educate our lawmakers on the importance of maintaining an independent judiciary.

About the Author

Natalie Haag currently serves as general counsel and executive vice president of Capitol Federal Savings Bank in Topeka. Prior to joining CapFed, she previously worked at Security Benefit Corp. as second vice president, director of governmental affairs, and assistant general counsel and as general counsel and chief of staff to Gov. Bill Graves. Haag currently serves as secretary-treasurer to the KBA Board of Governors. She is a 1985 graduate of Washburn University School of Law and a 1982 graduate of Kansas State University.

30. Kansas Supreme Court, Case No. 99,818 (October 5, 2012).
31. Id.
34. See Federalist Papers No. 48 and 51; Thomas Jefferson, Letters on the State of Virginia (1787).
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FACTS: This is an original proceeding in discipline filed by the office of the disciplinary administrator against the respondent, Roger Batt, of Wichita, an attorney admitted to the practice of law in Kansas in 1991. Respondent’s disciplinary proceeding involved his representation of an inmate in a probate case, two termination of parental rights cases, a guardianship, a post-divorce child custody matter, a child in need of care matter, and a bankruptcy. Respondent failed to comply with the terms and conditions of a diversion agreement and complaints were filed with the disciplinary administrator.

HEARING PANEL: A hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on May 15, 2012, at which the respondent appeared pro se. The hearing panel determined that respondent violated KRPC 1.3 (2011 Kan. Ct. R. Annot. 433) (diligence); 1.4(a) (2011 Kan. Ct. R. Annot. 452) (communication); 1.16(a)(3) and (d) (2011 Kan. Ct. R. Annot. 535) (termination of representation); 3.2 (2011 Kan. Ct. R. Annot. 552) (expediting litigation); 8.4(d) (2011 Kan. Ct. R. Annot. 618) (engaging in conduct prejudicial to the administration of justice); and Kansas Supreme Court Rule 207(b) (2011 Kan. Ct. R. Annot. 314) (failure to cooperate in disciplinary investigation). Hearing panel stated that respondent knew that he was not performing the services requested by his clients and required for adequate representation. The respondent did nothing to remedy the situation. Hearing panel unanimously recommended that respondent be suspended from the practice of law for an indefinite period of time.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator recommended that respondent be indefinitely suspended from the practice of law. The recommendation changed after respondent failed to appear.

HELD: Court adopted the hearing panel’s conclusions. Court found that respondent received adequate notice of all hearings in this case and did not appear before the Court. Due to that failure, Court disbarred the respondent from the practice of law.

ORDER OF REINSTATEMENT
IN RE MICHAEL E. FOSTER
NO. 105,458 – JANUARY 18, 2013


HELD: Court, after carefully considering the record and the disciplinary administrator’s finding that the respondent met all requirements set forth by Court, granted the respondent’s petition for reinstatement conditioned upon his compliance with the annual continuing legal education requirements and upon his payment of all fees required by the clerk of the appellate courts and the Kansas Continuing Legal Education Commission.

TWO-YEAR SUSPENSION
IN RE MARK A. GALLOWAY
ORIGINAL PROCEEDING IN DISCIPLINE

FACTS: This is an original proceeding in discipline filed by the office of the disciplinary administrator against the respondent, Mark A. Galloway, of Hayesville, an attorney admitted to the practice of law in Kansas in 2003. The respondent’s disciplinary matter involved his estate practice and arrangement with life insurance companies and the creation of trusts using the life insurance with short term financing secured for the premium of the first year of the policies.

HEARING PANEL: A hearing was held on the complaint before a panel
FACTS: This is a contested original proceeding in discipline filed against the respondent Megan Leigh Harrington, an attorney admitted to the practice of law in Kansas in 2004. The respondent’s disciplinary matter involved her entering a guilty plea to battery (misdemeanor), driving under the influence of alcohol (misdemeanor), and obstruction of official duty (misdemeanor) after she struck another vehicle on the highway while under the influence of alcohol and cocaine.

HEARING PANEL: The Kansas Board for Discipline of Attorneys conducted a hearing on February 22, 2012, at which the respondent was present and represented by counsel. The hearing panel determined respondent violated KRPC 8.4(b) (2011 Kan. Ct. R. Annot. 618) (commission of a “criminal act that reflects adversely on the lawyer’s ... fitness as a lawyer”). The hearing panel recommended that the respondent be suspended from the practice of law for a period of three months.

DISCIPLINARY ADMINISTRATOR: The office of the disciplinary administrator filed a formal complaint against respondent on January 6, 2012, alleging violations of the Kansas Rules of Professional Conduct (KRPC), and respondent answered the complaint on January 30, 2012. The disciplinary administrator recommended that the respondent be suspended from the practice of law for a period of two years.

HELD: Court agreed with the panel’s conclusion that respondent failed to fully acknowledge the wrongful nature of her conduct. Court found respondent’s failure to submit and implement a workable probation plan prevented the panel from recommending her for probation. Court agreed with the disciplinary administrator that given the gravity of and potential harm from respondent’s actions, a period of two-year suspension was appropriate. After three months, Court said it would suspend the remaining 21 months if respondent met a list of drug treatment requirements.


HELD: Court examined the files of the office of the disciplinary administrator and found that the surrender of the respondent’s license should be accepted and that the respondent should be disbarred as of December 19, 2012.

ORDER OF REINSTATEMENT 
IN RE DAVID G. SHRIVER
NO. 107,697 – JANUARY 18, 2013

FACTS: On June 22, 2012, Court suspended the respondent, David G. Shriver, from the practice of law in Kansas for a period of six months. See In re David G. Shriver, 294 Kan. 617, 278 P3d 964 (2012). On January 8, 2013, Shriver filed a petition with Court for reinstatement to the practice of law in Kansas.

HELD: Court, after carefully considering the record and the disciplinary administrator’s finding that the respondent met all requirements set forth by Court, granted the respondent’s petition for reinstatement conditioned upon his compliance with the annual continuing legal education requirements and upon his payment of...
all fees required by the clerk of the appellate courts and the Kansas Continuing Legal Education Commission.

**DISBARMENT**

**IN RE ROBERT M. TELTHORST**

**ORIGINAL PROCEEDING IN DISCIPLINE**

**NO. 12,823 – DECEMBER 19, 2012**

FACTS: In a letter received by the clerk of the appellate courts on December 11, 2012, respondent Robert M. Telthorst, an attorney admitted to the practice of law in the state of Kansas, voluntarily surrendered his license to practice law in Kansas. On October 21, 2011, the respondent was temporarily suspended from the practice of law pending the outcome of disciplinary proceedings against him. On November 14, 2012, the respondent pleaded guilty to two felonies in the U.S. District Court for the District of Kansas. The crimes to which the respondent pleaded guilty were 18 U.S.C. § 1343 (2006), wire fraud, and 18 U.S.C. § 1956 (2006), money laundering.

HELD: Court examined the files of the office of the disciplinary administrator and found the surrender of the respondent's license should be accepted and that the respondent should be disbarred as of December 19, 2012.

**CIVIL**

**CLASS ACTION – OIL AND GAS**

**COULTER V. ANADARKO PETROLEUM CORP.**

**STEVENS DISTRICT COURT – AFFIRMED**

**NO. 103,310 – JANUARY 11, 2013**

FACTS: Royalty owners entitled to share of production of natural gas in Hugoton gas field brought class action in 1998 against Anadarko Petroleum Corp., claiming that company and its affiliates had underpaid royalties required by plaintiffs’ respective oil and gas leases. Case tried to bench in 2002, reargued in 2006, and settled in June 2009 with amended class expanded from 4,500 to 6,000 members. One member (Boles) objected to the amended class certification and to the class action settlement agreement, claiming the agreement essentially gave away class members’ potential non-gathering claims without adequate identification or investigation. District court approved the settlement, finding it to be bona fide, fair, just, reasonable, and adequate. Boles appealed. Case was transferred to Supreme Court on its own motion, with issues identified as whether trial court abused its discretion (1) in finding class attorneys were “adequate” to represent the class, and (2) in approving the class action settlement.

ISSUES: (1) Certification of amended class and (2) approval of settlement agreement

HELD: Prior to 2010 amendment, K.S.A. 60-223 contained no specific guidance on how a district court should assess adequacy of class counsel. Statute as amended is not binding authority in this case, but is used as framework for analyzing argument that class counsel was inadequate. Under facts of case, Court agrees with district court’s finding that class counsel adequately represented class members, and affirms district court’s certification of the amended class.

Kansas appellate courts have not adopted a specific test or list of factors which must be considered in evaluating class action settlements, and because 2010 amendment to K.S.A. 60-223 mirroring Fed. R. Civ. P. 23 does not govern this appeal, court does not determine whether federal factors will become mandatory inquiry in class action settlements in Kansas district courts. Under facts of this case, no due process concerns with settlement of non-gathering claims along with gathering claims, because both are based on same underlying facts and theory of liability. No abuse of district court’s discretion in finding settlement agreement was fair, reasonable, and adequate notwithstanding settlement’s release of non-gathering claims. No abuse of district court’s discretion in approving settlement agreement with going-forward provisions that did not violate state and federal constitutional rights, and arbitration provisions.


**EMINENT DOMAIN**

**CITY OF WICHITA V. DENTON AND CLEAR CHANNEL SEDGWICK DISTRICT COURT – AFFIRMED**

**NO. 97,952 – JANUARY 4, 2013**

FACTS: City of Wichita (City) filed action under Kansas Eminent Domain Procedure Act (EDPA) to condemn tract of land for highway purposes. Defendants included Denton as owner of fee title, and Clear Channel as lessee on property for operation of billboard. Appraisers valued tract at $1,075,600, with no compensation given for billboard structure and no consideration as to advertising income produced by Clear Channel’s leasehold. Clear Channel appealed appraiser’s award, and requested jury trial to determine total damages for the condemned property. District court affirmed the award as just compensation for taking the entire tract, ruled the billboard was personal property for which no compensation was required, and granted summary judgment to City. Clear Channel appealed, alleging error in district court’s judgment that billboard structure was noncompensable personal property, and district court’s related order granting City’s motion in limine order to exclude Clear Channel’s expert testimony based on advertising income as irrelevant to issue of just compensation.

ISSUES: (1) Character of billboard structure, (2) evidence of advertising income, and (3) unit rule

HELD: Appeal involves valuation stage of EDPA two-stage (valuation and apportionment) approach to compensation for taking where property consists of fee ownership and leasehold. District court correctly granted City’s motion for partial summary judgment and motion in limine excluding evidence of value of billboard structure because undisputed facts in this case demonstrate that billboard was personal property noncompensable in eminent domain proceeding.

District court did not err in granting City’s motion for partial summary judgment and motion in limine excluding evidence of advertising income generated by billboard structure on condemned real estate because this evidence represented business profits rather than rental income, and was irrelevant for determining value under any authorized valuation method.

No violation of unit rule in this case. District court correctly excluded evidence of value of billboard as personality, correctly excluded evidence of advertising income produced by the billboard, and Clear Channel presented no other admissible evidence regarding value of its leasehold or the tract as a whole.


**MEDICAID REIMBURSEMENT, EQUAL PROTECTION, AND DUE PROCESS**

**VILLAGE VILLA V. KANSAS HEALTH POLICY AUTHORITY SHAWNEE DISTRICT COURT – AFFIRMED**

**NO. 102,324 – JANUARY 11, 2013**

FACTS: This is a Medicaid reimbursement appeal under the Act for Judicial Review and Civil Enforcement of Agency Actions, K.S.A. 77-601 et seq. (now the Kansas Judicial Review Act, K.S.A. 2011 Supp. 77-601 et seq.). Three corporations, each of which owns
MEDICAL MALPRACTICE AND JURY INSTRUCTIONS
BATES V. DODGE CITY HEALTHCARE GROUP
SEDGWICK DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 100,215 – JANUARY 11, 2013

FACTS: This is a case about instructing the jury in a medical malpractice action. Tom Bates and Michelle Entriken, individually and on behalf of their daughter, Hayley Bates, allege obstetrical nurse Linda Unruh breached the standard of care which caused permanent injury to Hayley. For Unruh’s purported negligence, the parents sued her employer, Dodge City Healthcare Group L.P., d/b/a Western Plains Regional Hospital (hospital), under respondeat superior. The jury returned a verdict for the hospital, and the parents appealed a number of issues. After the Court of Appeals affirmed, Kansas Supreme Court granted the parents’ petition for review on one issue of whether it was proper for the jury to receive the stock instruction of PIK Civ. 3d 123.01 that Unruh’s duty as nurse was to use “that degree of learning and skill ordinarily possessed and used by members of that profession in the community in which she practices, or in similar communities.”

ISSUES: (1) Medical malpractice and (2) jury instructions

HELD: Court held that Instruction No. 11 admittedly concerns the hospital standard of care. But Unruh’s standard of care in Instruction No. 9, as repeated in No. 21 for comparative fault purposes, is the actual underlying basis of liability for the hospital – not No. 11. Furthermore, the community language contained in Instruction Nos. 9 and 21, while not identical to that found in Instruction No. 11, is not so different as to be confusing and require reversal and remand. The latter requires that hospitals be held to a standard of reasonable care “used by hospitals generally.” When considering Instruction No. 11 in the context of the other instructions discussed above, Court stated that it must affirm the district court and Court of Appeals.

CONCURRENCE: Justice Biles agreed with the majority’s determination that there was a conflict in the evidence as to whether the local standard of care applied to the parents’ negligence allegation based upon the failure to activate the chain of command and that the PIK Civ. 3d 123.01 instruction containing the “similar communities” language was required to be given as to this single claim. However, Justice Biles would hold that the district court needed to issue the modified instruction requested by the parents, which omitted the community language, because there was an evidentiary dispute over which standard applied.

STATUTES: K.S.A. 20-3018(b); and K.S.A. 60-258a
verdict in favor of Dr. Klaumann. Foster challenged multiple issues on appeal, include the jury instructions. The Court of Appeals held that the best judgment instruction could have improperly focused the jury on Klaumann’s subjective beliefs in determining the appropriate treatment, instead of an objective standard of care and the trial court should also have modified the instructions to inform the jury this claim was governed by the lower standard of care.

ISSUES: (1) Medical malpractice and (2) jury instructions

HELD: Court held that PIK Civ. 4th 123.11 does not misstate the law because the second paragraph directs the jury to the objective standard of care, clarifying any potential confusion caused by referencing a physician’s right to use the doctor’s best judgment. Court concluded the instruction accurately stated the law and was supported by the case facts. Although neither of the challenged instructions was as helpful to the jury in deciding this case as it could have been with some modification, neither required a new trial.

STATUTE: K.S.A. 20-3018(b)

MEDICAL MALPRACTICE, STANDARD OF CARE, AND EXPERT TESTIMONY

SCHLAIKJER V. KAPLAN M.D.

JOHNSON DISTRICT COURT – REVERSED AND REMANDED

COURT OF APPEALS – REVERSED

NO. 98,932 – JANUARY 25, 2013

FACTS: Schlaikjer seeks reversal of the Court of Appeals’ decision affirming summary judgment in favor of defendant Kaplan M.D. Schlaikjer sued Kaplan for medical malpractice arising out of surgeries to treat her tracheal stenosis. Kaplan filed a successful motion in limine to prevent Schlaikjer’s subsequent treating physician and designated expert, Joel Cooper M.D., from testifying about the standard of care. The district court granted the motion in limine because Cooper did not meet the requirements of K.S.A. 60-3412. In the absence of expert testimony on the standard of care, Schlaikjer could not, as a matter of law, carry her burden of proof; and summary judgment in Kaplan’s favor followed. The Court of Appeals affirmed the district court’s summary judgment in favor of Kaplan. Schlaikjer now pursues four claims on petition for review to this court: (1) The 50 percent rule for expert witnesses under K.S.A. 60-3412 is inapplicable to treating physicians; (2) K.S.A. 60-3412 violates both the federal and state constitutions; (3) testimony of physicians on their treatment preferences may be used to prove standard of care in medical malpractice cases; and (4) the district court’s grant of summary judgment was improper.

ISSUES: (1) Medical malpractice, (2) standard of care, and (3) expert testimony

HELD: Court held that Schlaikjer’s arguments on her first and fourth appellate claims require disposition of this appeal in her favor and they did not reach her constitutional challenges to K.S.A. 60-3412. Court first stated that the requirements of K.S.A. 60-3412 apply to any witness who would give expert testimony on the standard of care in a medical malpractice action, regardless of whether the prospective witness is a treating physician. Therefore, the district court did not err on this point of law. As far as the 50 percent rule, the Court failed to find substantial competent evidence to support the district court’s fact finding that Cooper did not spend at least 50 percent of his time in actual clinical practice. His testimony supported at least three and one-half days to four days of each seven-day week on direct patient care. Hands-on resident supervision and consultation and his own clinical research necessary to provide patient care accounted for still more of his professional workweek. In the Court’s view, evaluation of whether he met the 50 percent requirement of K.S.A. 60-3412 required more than adding his imprecise estimates of 30 percent, 20 percent, and 1 percent to 2 percent. It required a holistic reading of his description of his clinical practice in an academic setting, including all of his varied patient care activities. Court held the district court should have ruled Cooper’s testimony admissible and denied the summary judgment motion. Court also held that the district court was correct in its ruling on the inadmissibility of
FINDINGS

FACTS: Burch was committed in 2002 under Kansas Sexually Violent Predator Act (SVPA). In 2005 he filed petition for discharge or transitional release. District court denied the petition without an evidentiary hearing, finding Burch failed to show probable cause that his mental abnormality had changed to extent he is safe to be placed in transitional release. Burch appealed. Court of Appeals affirmed in unpublished opinion. Burch’s petition for review granted.

ISSUES: (1) Review of district court’s probable cause determination, (2) burden of proof, and (3) probable cause showing and evidentiary hearing

HELD: Unique SVPA statutory process is discussed. Court of Appeals panel properly concluded the district court’s probable cause determination is subject to de novo review.

A person committed as a sexually violent predator bears burden to establish probable cause at annual review hearing, thus district court must draw inferences favorable to the committed person from the evidence and resolve all conflicting evidence in that person’s favor.

In this case, Burch failed to establish requisite probable cause that would entitle him to a full evidentiary hearing on his petition for discharge or transitional release. Court of Appeals’ decision affirming district court’s probable cause determination was affirmed.


ISSUE: Actuarial risk assessments and Frye

HELD: As issue of first impression, Frye test applies to actuarial risk assessments used by expert witnesses to help form their opinions of sex offenders’ risk of recidivism. Court notes similarities between actuarial risk assessment and other types of evidence to which Kansas appellate courts have applied Frye. The court’s implicit rejection of application of Daubert is noted. Court observes that Kansas has not adopted Federal Rules of Evidence, that K.S.A. 60-456(b) is not substantially similar to Rule 702 and does not contain the same intent, and that Kansas has not adopted Daubert.

STATUTES: K.S.A. 20-3018(b); K.S.A. 59-29a01 et seq., -29102(a); and K.S.A. 60-456(b)
Statutory definition of “malice” in K.S.A. 21-3831(b), requiring (1) acting with intent to vex, annoy, harm, or injure or (2) acting with intent to thwart or interfere in any manner with the orderly administration of justice, does not create alternative means of committing aggravated intimidation of a victim. Court affirms panel’s conclusion, but rejects panel’s reasoning to the extent it suggests that alternative mental states cannot create alternative means of committing a crime. In this case, sufficient evidence established that Aguilar attempted to prevent or dissuade his victim from reporting his crimes, and that he acted with requisite malice in doing so.

No error in district court denying request for unanimity instruction where statutory definition of malice does not create alternative means of committing the crime.

STATUTES: K.S.A. 21-3301(a), -3831(b), -3832, -3833; K.S.A. 22-3421; K.S.A. 2008 Supp. 8-1567(a); and K.S.A. 2006 Supp. 8-1567(a)

STATE V. AHRENS
KINGMAN DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED IN PART AND REVERSED IN PART
NO. 103,662 – DECEMBER 21, 2012

FACTS: Ahrens was stopped for having a defective taillight and subsequently failed two field sobriety tests. Ahrens was convicted of DUI for operating or attempting to operate a vehicle under the influence of alcohol. Court of Appeals found that the phrase operate or attempt to operate creates alternative means of committing the crime of DUI, but that the state presented sufficient evidence that Ahrens both operated and attempted to operate a vehicle while DUI.

ISSUES: (1) DUI and (2) alternative means

HELD: Court applied the rubric recently developed in State v. Brown, 295 Kan. 181, 284 P.3d 977 (2012), and concluded that operating and attempting to operate a vehicle while under the influence of alcohol are not alternative means of committing the crime of DUI under K.S.A. 2008 Supp. 8-1567(a). Court reversed the Court of Appeals’ decision with respect to that issue. Because operating and attempting to operate are not alternative means and the state presented more than sufficient evidence that Ahrens operated the vehicle under the influence of alcohol to a degree that rendered him incapable of safely driving a vehicle under K.S.A. 2008 Supp. 8-1567(a)(3), Court affirmed Ahrens’ DUI conviction.

STATUTES: K.S.A. 8-285, -530, -1001, -1005, -1567(a); K.S.A. 20-3018; K.S.A. 21-3301; and K.S.A. 22-3421

STATE V. CHEATHAM
SHAWNEE DISTRICT COURT – REVERSED AND REMANDED
NO. 95,800 – JANUARY 25, 2013

FACTS: Cheatham was convicted and sentenced to death in capital murder case involving double homicide and shooting of third victim. In his direct appeal, Kansas Supreme Court remanded for a Van Cleave evidentiary hearing on allegations of ineffective assistance of counsel. State district court found deficiencies in trial counsel’s performance during guilt phase, but upheld convictions because no showing of prejudice. In penalty phase, district court found prejudice resulted from deficiencies consistent with parties’ stipulation of deficient performance, and ordered new penalty determination. Kansas Supreme Court bifurcated ineffective assistance of counsel allegations from all other issues in Cheatham’s appeal, and had parties brief allegations of error in Van Cleave court’s decision regarding deficient performance and conflict of interest in guilt phase.

ISSUES: (1) Deficient performance and (2) conflict of interest

HELD: Noncompliance with ABA standards for death penalty representation does not equate to constitutional error. Specific claims of deficient performance addressed, including lack of preparation, ignorance of capital murder litigation, failure to associate with learned counsel, failure to obtain necessary training, counsel’s investigation of witnesses and evidence, and failure to file statutory notice of alibi defense and have three alibi witnesses available. Deficient performance found on these claims, but no showing of prejudice. However, no justifiable basis for Van Cleave court’s reliance on trial strategy to excuse counsel’s disclosure to jury of Cheatham’s prior voluntary manslaughter conviction. Those errors, coupled with counsel’s inflammatory characterizations of his client to the jury, denied Cheatham a fair trial guaranteed by both federal and state constitutions.

Also, under circumstances of this case, counsel’s fee arrangement created an actual conflict of interest that adversely affected the adequacy of Cheatham’s defense. Standard in Coyler v. Sullivan, 446 U.S. 335 (1980), is applied and distinguished from Strickland standard. Convictions reversed and remanded for new trial.

STATUTES: K.S.A. 21-4624(c), -4624(e), -4625, -4627(d); K.S.A. 22-3211, -3218, -4501 et seq.; and K.S.A. 60-455

STATE V. GALAVIZ
FORD DISTRICT COURT – REVERSED AND REMANDED
COURT OF APPEALS – REversed
NO. 101,084 – DECEMBER 28, 2012

FACTS: On appeal from probation revocation, Galaviz argued for first time that he was entitled to automatic reversal under State v. Jenkins, 257 Kan. 1074 (1995), because his attorney mentioned being guardian ad litem to a victim in one of Galaviz’s crimes, and district court failed to investigate this conflict of interest. In unpublished opinion, Court of Appeals rejected that argument. Citing Mickens v. Taylor, 535 U.S. 162 (2002), panel found Galaviz had to show adverse effect because he did not object to the multiple representation, and found that record was sufficient to show the conflict of interest did not adversely affect the attorney’s performance. Galaviz’s petition for review granted.

ISSUES: (1) Constitutional right to effective assistance of counsel in probation revocation proceeding, (2) Mickens and Jenkins, and (3) showing of adverse effect

HELD: Court decides for first time that a Kansas criminal defendant has a constitutional right to effective assistance of counsel in probation revocation proceeding under Due Process Clause of 14th Amendment of U.S. Constitution. That right includes right to conflict-free counsel.

Mickens and Jenkins compared, finding Mickens effectively overrules portions of Jenkins. A criminal defendant is not entitled to automatic reversal of a district court’s order to revoke probation when defendant’s attorney had served as guardian ad litem for victim of the defendant’s crime if a timely objection to the multiple representations was not made before or during the proceeding. On appeal, the defendant at a minimum must show that the conflict of interest had an adverse effect on the attorney’s representation.

Court of Appeals correctly found active conflict of interest arising from attorney’s multiple representation, and Galaviz was not entitled to automatic reversal under Jenkins. Judgment of Court of Appeals is reversed, however, because record on appeal is insufficient to determine whether that conflict had adverse effect on attorney’s representation. Case remanded to district court with directions to appoint new counsel and either conduct probation revocation proceeding with conflict-free counsel or conduct a hearing regarding the nature of the conflict of interest and whether that conflict requires reversal of the probation revocation.

CONCURRENCE (Johnson, J.): Concurring in the result.

STATUTES: K.S.A. 20-3018(b), -3602(e); K.S.A. 22-3716(b); and K.S.A. 60-1507
STATE V. HABERLEIN
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 102,254 – DECEMBER 28, 2012
FACTS: Haberlein was convicted of first-degree premeditated murder, aggravated kidnapping, and aggravated robbery in the savage beating and death of a manager at a Dollar General Store. Haberlein argues: (1) the district judge erred by failing to instruct the jury on second-degree intentional murder; (2) the state failed to present sufficient evidence to prove what he claims are two sets of alternative means of committing aggravated kidnapping; (3) the district judge erred in issuing an instruction on aggravated robbery that was broader than the language in the information; (4) the district judge erred in certifying him as an adult without having a jury make that determination; (5) cumulative error deprived him of a fair trial; and (6) the Kansas hard 50 sentencing scheme is unconstitutional.
ISSUES: (1) Jury instructions, (2) alternative means, (3) certification as an adult, (4) cumulative error, and (5) sentencing
HELD: Court found Haberlein challenged the failure to give a second-degree intentional murder as a lesser-included offense for the first time on appeal and that the case was peculiarly abundant with evidence of premeditation – including testimony that the armed defendant announced to accomplices before a planned robbery that something more serious was about to happen, as well as physical and testimonial evidence that he and an accomplice recaptured the robbery victim after an attempted escape and beat her for up to 10 minutes with several objects and then shot her for a third time – the district judge’s failure to give a lesser-included offense instruction on second-degree intentional murder was not clearly erroneous.
Court also held neither the phrase “force, threat, or deception” nor the phrase “to facilitate flight or the commission of any crime” in the Kansas kidnapping statute sets forth alternative means of committing the crime of kidnapping or aggravated kidnapping. Court stated that this cases was not an alternative means case on either of the bases asserted by Haberlein.
Court held that because the information on the charged aggravated robbery required the jury to find that Haberlein took money from the presence of Bell, the broader concept, it also permitted the jury to find that Haberlein took money from the person or presence of Bell, the narrower concept. The inclusion of both concepts in the instruction was neither factually nor legally erroneous and thus not clearly erroneous.
Court did not address Haberlein claims of adult certification and unconstitutional sentencing challenged for the first time on appeal. Court found no cumulative error.
CONCURRING IN PART AND DISSENTING IN PART: Justice Rosen wrote separately to reiterate his position in other cases that it was not error for the trial court not to instruct the jury on second-degree murder under the facts presented.
STATUTES: K.S.A. 21-3420, -3421; and K.S.A. 22-3401, -3402, -3414

STATE V. PERKINS
NORTON DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED IN PART AND REVERSED IN PART
NO. 103,735 – DECEMBER 21, 2012
FACTS: Officers came upon Perkins’ vehicle on the side of the road and stopped for a safety check. Perkins was in the driver’s seat and appeared intoxicated. He failed preliminary sobriety tests. Perkins was convicted of DUI for operating or attempting to operate a vehicle under the influence of alcohol and also open container. Court of Appeals found that the phrase operate or attempt to operate creates alternative means of committing the crime of DUI, but that the state presented sufficient evidence that Perkins both operated and attempted to operate a vehicle while DUI.
ISSUES: (1) DUI and (2) alternative means
Held: Court applied its decision the same day in State v. Ahrens and concluded that operating and attempting to operate a vehicle while under the influence of alcohol are not alternative means of committing the crime of DUI under K.S.A. 2008 Supp. 8-1567(a). Court reversed the decision on alternative means, because Perkins’ conviction finding there was sufficient evidence that Perkins operated a vehicle while under the influence and they did not consider whether the Court of Appeals properly concluded the evidence of an attempt to operate the vehicle was also sufficient.

Statutes: K.S.A. 8-262, -1567, -1599; and K.S.A. 20-3018

**State v. Smith**

**Douglas District Court – Affirmed**

**Court of Appeals – Affirmed in Part and Reversed in Part**

**No. 102,573 – December 21, 2012**

Facts: Smith convicted of aggravated burglary and felony murder. On appeal he claimed district court erred in admitting evidence of three other burglaries, and in giving a cautionary accomplice witness instruction over defense objection. Smith also claimed his conviction should be reversed due to prosecutorial misconduct and cumulative error, and claimed aggravated burglary and felony murder based on aggravated burglary as the underlying felony are multiplicitous.

Issues: (1) K.S.A. 60-455 evidence, (2) cautionary accomplice witness instruction, (3) prosecutorial misconduct, (4) cumulative error, and (5) multiplicity

Held: Under facts of case, evidence of the three other burglaries was probative on identity, and no abuse of district judge's discretion in weighing probative value and risk of undue prejudice. No error found in K.S.A. 60-455 limiting instruction given to jury.


Claims of prosecutorial misconduct are specifically addressed, finding no error in claims that prosecutor improperly vouched for a witness's testimony, appealed to jurors' sympathy, told jury which parts of alibi defense to believe, commented on Smith's credibility, and mistrusted state's burden of proof. However, prosecutor's repeated reference to the "truth" during closing argument was error. During closing argument, a prosecutor may not claim sole possession of the "truth." Prosecutor's repeated references to the "truth" during closing argument in this case was error, and prosecutor's behavior was perilously close to gross and flagrant and demonstrative of ill will. But given weight of direct and circumstantial evidence against Smith, error was harmless under K.S.A. 60-261 and Chapman v. California, 386 U.S. 18 (1967).

One nonreversible error does not support cumulative error claim.


**State v. Suter**

**Sedgwick District Court – Affirmed**

**Court of Appeals – Affirmed in Part and Reversed in Part**

**No. 103,164 – December 21, 2012**

Facts: Suter convicted of driving with suspended (DWS) and driving under the influence (DUI). He appealed, claiming district court, in advising defense witness of right against self-incrimination unconstitutionally interfered with that witness's decision to testify. Suter also claimed DWS is an alternative means crime, and the state failed to present sufficient evidence to prove alternative means of committing DWS and DUI. In unpublished opinion, Court of Appeals affirmed the convictions. Suter's petition for review granted.

Issues: (1) Advising potential defense witness of right against self-incrimination, (2) driving while suspended, and (3) driving under the influence

Held: Under facts of case, district judge's comments to potential defense witness may have been excessive but did not exert duress sufficient to prevent witness from testifying, nor did they infringe upon defendant's constitutional right to due process or to present his defense.

DWS, as defined in K.S.A. 2008 Supp. 8-262, is not an alternative means crime. Legislature's use of disjunctive "or" in phrase "canceled, suspended or revoked" in K.S.A. 2008 Supp. 8-262 was not intended to create three means of committing crime of DWS. Actus reus of DWS is driving without a privilege to do so. Phrase "canceled, suspended or revoked" simply describes different factual circumstances that can prove that material element of the crime. Suter's DWS conviction is affirmed.

As decided in State v. Ahrens (this same date and digested herein), K.S.A. 2008 Supp. 8-1567(a) does not contain alternative means of committing DUI. Evidence in this case was more than sufficient to establish that Suter operated vehicle while under the influence. No need to consider panel's conclusion that state presented sufficient evidence of Suter's attempt to operate the vehicle while under the influence.

Statutes: K.S.A. 20-3018(a), 22-3421; and K.S.A. 2008 Supp. 8-262, -262(a)(1), -1567(a)

**State v. Ta**

**Sedgwick District Court – Reversed**

**No. 104,241 – December 28, 2012**

Facts: Ta approached and touched two young girls who were playing outside a Wichita movie theater. The touches were relatively innocuous, but the police were called. Ta told the police he had a problem and needed help because he wanted to have sex with children and was having a difficult time controlling his urges. At trial, Ta did not dispute his intent, but insisted there was no evidence that he had committed a lewd touching. A jury convicted Ta of two counts of aggravated indecent liberties with a child and sentenced him to a mandatory sentence of 25 years.

Issues: (1) Sufficiency of the evidence and (2) lewd touching

Held: Court stated that a defendant's mental state should not be used to define or determine whether a touching is lewd. Court held that whether a touching is lewd should be determined by considering the common meaning of the term "lewd," that is whether a touching is "sexually unchaste or licentious; suggestive of or tending to moral looseness; inciting to sensual desire or imagination; indecent, obscene, or salacious." In considering if a touching meets that definition, a fact finder should consider whether the touching "tends to undermine the morals of a child [and] ... is so clearly offensive as to outrage the moral senses of a reasonable person." Court held that in the present case, viewing the evidence in the light most favorable to the state, the state presented evidence that Ta caressed the children's faces, hair, arms, and legs. This type of touching, when considered without regard to surrounding circumstances, was not lewd. When considered in the surrounding circumstances, as it should be, the fact that Ta was a stranger who approached small children and who was undaunted by the reaction to his touching makes the touching awkward and strange to the point the mothers were understandably uneasy. Nevertheless, the touches were not indecent, obscene, salacious, unhallow, or licentious. Nor did the touches tend to undermine the morals of the children or outrage the moral sense of a reasonable person. Thus, the state failed to establish sufficient evidence to support the element of lewd fondling or touching. Court reversed Ta's convictions.

Statutes: K.S.A. 21-3504; and K.S.A. 22-3419, -3601
COURT OF APPEALS

CIVIL

HABEAS CORPUS
SHUMWAY V. STATE
SHAWNEE DISTRICT COURT – REVERSED AND REMANDED
NO. 107,248 – JANUARY 18, 2012

FACTS: Shumway's conviction for intentional second-degree murder and attempted theft affirmed on direct appeal. 30 Kan. App. 2d 836, rev. denied 247 Kan. 1117 (2002). Shumway filed K.S.A. 60-1507 post-conviction motion alleging ineffective assistance of trial counsel in failing to call two alibi witnesses. He later amended his motion to claim trial counsel also failed to call several witnesses who would have supported Shumway's theory of defense that another person killed the victim. Court of Appeals reversed trial court's summary dismissal of the petition, and remanded for an evidentiary hearing on the first claim, and for determination of whether claim in amended petition should be considered to prevent manifest injustice. Trial court held evidentiary hearing and denied the original and amended motions, finding counsel's failure to call alibi witnesses was reasonable trial strategy. Trial court also found remaining claim was untimely with no showing of manifest injustice if not considered, but also addressed and rejected the remaining claim on its merits. Shumway appealed.

ISSUES: (1) K.S.A. 60-1507 motion and amendment and (2) ineffective assistance of trial counsel

HELD: Original 60-1507 motion was timely filed. Amended motion not filed within the statutory one-year limitation period, but court examined on its own and found the amended claim related back to the original timely filing.

Under extensive facts detailed in the opinion, trial counsel's failure to call one or both alibi witnesses, and failure to either conduct an investigation or call witnesses to challenge or refuse state's key witnesses' testimony, was deficient performance that prejudiced defendant's theory of defense and denied him a fair trial. Reversed and remanded for new trial.

STATUTE: K.S.A. 60-1507, -1507(f)(1), -1507(f)(2)

CRIMINAL

STATE V. CASTLEBERRY
LYON DISTRICT COURT – AFFIRMED
NO. 106,600 – JANUARY 18, 2013

FACTS: Castleberry appealed convictions for obstruction of official duty, distribution of methamphetamine, unlawful use of a communication facility to arrange a drug sale, failure to affix a drug tax stamp, and fleeing or attempting to elude a police officer. Castleberry was the focus of a controlled drug purchase and then a high-speed chase after the sale.

ISSUES: (1) Sufficiency of the evidence, (2) jury instructions, (3) alternative means, and (4) criminal history

HELD: Court stated the record does not indicate whether Castleberry was in Lyon County when he received the phone call from the informant. There is no dispute, however, that the informant made the phone calls from Lyon County. Because an act requisite to Castleberry's commission of the crime of unlawful use of a communication facility was committed in Lyon County, Court held the district court properly exercised subject matter jurisdiction over the offense and the state presented sufficient evidence that Castleberry committed the crime in Lyon County. Court found the district court erred in failing to provide the specific elements of each kind of moving violation in the jury instructions, but held the failure was harmless because all of the moving violations described by the officers at trial constituted moving violations and the instructional error was not clearly erroneous. Court found Castleberry's conduct here – fleeing from law enforcement, stopping his vehicle, being tased, and being taken into custody – amounted to one continuous act in which Castleberry substantially hindered or increased the burden of the law enforcement officers who were trying to effect his arrest. Consequently, Castleberry's actions of fleeing from law enforcement and struggling with law enforcement prior to his arrest do not constitute multiple acts. Court also held within the definition of “distribute,” actual transfer and attempted transfer do not present alternative means of distributing controlled substances and does not trigger concerns of jury unanimity or raise a sufficiency issue that requires the court to examine whether these options are supported by evidence. Court rejected Castleberry's Apprendi argument.

STATUTES: K.S.A. 8-1507, -1560b, -1560c, -1568; K.S.A. 21-36a01(d), -36a07(a); and K.S.A. 22-2602, -2603, -3414, -3421

STATE V. J.D.H.
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 107,916 – JANUARY 11, 2013

FACTS: J.D.H. entered guilty pleas in 2011 to three aggravated offenses. Consistent with the plea agreement, the district court designated the proceedings as an extended juvenile jurisdiction proceeding (EJJP), imposed a controlling juvenile sentence of 36 months intensive supervised probation, and stayed an underlying 126-month adult sentence. Two months after sentencing, state filed motion to revoke J.D.H.’s juvenile sentence. J.D.H. admitted the violation, and district court ordered him to serve the underlying 126-month adult prison sentence. J.D.H. appealed, arguing (1) district court lacked jurisdiction to impose EJJP sentence under K.S.A. 2010 Supp. 38-2347(a)(3) because state did not file motion to request court designation as EJJP; (2) K.S.A. 2010 Supp. 38-2364(b) can be read with K.S.A. 2010 Supp. 22-3716(b) to allow sentencing judge the option to modify an adult sentence upon finding the juvenile violated his juvenile sentence in an EJJP; and (3) K.S.A. 2010 Supp. 38-2364 violates separation of powers doctrine by prohibiting sentencing judge from exercising discretion to modify the adult sentence.

ISSUES: (1) Jurisdiction, (2) modification of previously imposed underlying adult sentence under K.S.A. 2010 Supp. 38-2364(b), and (3) separation of powers

HELD: J.D.H. did not timely appeal his jurisdiction claim. No appellate jurisdiction to consider this claim.

Claim that K.S.A. 2010 Supp. 38-2364(b) and K.S.A. 2010 Supp. 22-3716(b) necessarily allow sentencing judge discretion to modify an EJJP adult sentence after finding a juvenile has violated the terms of an EJJP juvenile sentence has been rejected by other Court of Appeals panels, and J.D.H. made no showing warranting consideration of this claim raised for first time on appeal. Even so, claim has no merit. Dissent in Stare v. I.A., 2011 WL 3250584 (Kan. App. 2011), is distinguished.

Although K.S.A. 2010 Supp. 38-2364 removes district court's discretion to impose lesser adult sentence on juvenile after violation of juvenile sentence, Kansas courts have found this blending of legislative duty to proscribe punishments with judiciary's duty to sentence convicted offenders to be acceptable under separation of powers doctrine, especially in cases involving mandatory sentencing statutes. Because there is a reasonable way to construe K.S.A. 2010...
STATE V. RIVERA
LEAVENWORTH DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 105,834 – DECEMBER 21, 2012

FACTS: Rivera was convicted of involuntary manslaughter and child endangerment in the death of her 4-year-old son (G.R.). Rivera’s boyfriend, Jones, pled guilty to second-degree murder and child abuse involving G.R. Rivera challenges the sufficiency of the evidence supporting her convictions, that one of the prosecutors who handled her criminal case should have been disqualified from prosecuting the criminal case because that same prosecutor represented the state in G.R.’s CINC case or allow the prosecutor as a witness, two instances of prosecutorial misconduct, several improper jury instructions, endangering a child is lesser-included offense of involuntary manslaughter, insufficient complaint, failure of the district court to allow a continuance, and cumulative error.

ISSUES: (1) Sufficiency of the evidence, (2) witnesses, (3) prosecutorial misconduct, (4) jury instructions, (5) lesser-included offenses, (6) sufficiency of complaint, (7) request for continuance, and (8) cumulative error.

HELD: Court held that based on the witness testimony and the photographic evidence admitted at trial, it was not unreasonable for the jury to infer that G.R.’s injuries were the product of physical abuse committed by Jones and that Rivera knew or should have known about the abuse but ignored it. Therefore, there was sufficient evidence to support Rivera’s conviction for involuntary manslaughter.

Court held that Rivera failed to show that there was prosecutorial partiality warranting a disqualification of the prosecutor, and the district court did not abuse its discretion in denying Rivera’s motion. Court also stated that Rivera failed to show that the prosecutor’s deposition or trial testimony was necessary for her defense.

Court rejected Rivera’s arguments that the prosecutor improper commented on a possible hung jury during voir dire or that during closing the prosecutor did not directly comment on Rivera’s credibility but rather pointed out that Rivera’s testimony at the CINC hearing was inconsistent with statements she later made to the police.

Court held that if even if the trial court gave an improperly involuntary manslaughter instruction during preliminary instructions, the jury was given the correct involuntary manslaughter instruction immediately before its deliberations and had a copy of that instruction to consult during those deliberations. Court also held the lack of a separate instruction on proximate cause was not clearly erroneous.

However, Court reversed Rivera’s conviction and remanded for a new trial based on faulty jury instructions. Court held that the district court erred in failing to include the elements of endangering a child in the involuntary manslaughter instructions. Court found the district court did not give a unanimity instruction and the state never elected which act it was relying upon to support each of the charges. Court held there was no way of knowing whether the jury convicted Rivera based solely on the events of October 4, or whether it convicted her of endangering a child based upon the events of October 1 and involuntary manslaughter based upon the events of October 4. Court rejected Rivera’s claim that endangering a child is a lesser-included offense of involuntary manslaughter.

Court found the amended complaint was sufficient because it substantially followed the language of the pertinent statute.

Court held that although there was a quick turnaround from the preliminary hearing to the pretrial hearings and to the jury trial, the case was nearly a year old when the trial occurred. Court found the district court’s rationale for denying Rivera’s request for a continuance was not unreasonable.

ISSUE: Criminal history

HELD: Court held the plain language of the unlawfully tampering with electronic monitoring equipment statute, K.S.A. 21-4232(a), requires only proof that the defendant was on parole, not proof of the conviction that created that status. Therefore, Thacker’s prior conviction was properly included in his criminal history.

STATE V. THACKER
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 107,549 – JANUARY 18, 2013

FACTS: Thacker appeals from the sentence imposed by the district court after he pled no contest to attempted tampering with an electronic monitoring device. Thacker claims his sentence was illegal because the underlying felony conviction for which he was being monitored was included in his criminal history for sentencing on the attempted tampering charge.

ISSUE: Criminal history

HELD: Court held the plain language of the unlawfully tampering with electronic monitoring equipment statute, K.S.A. 21-4232(a), requires only proof that the defendant was on parole, not proof of the conviction that created that status. Therefore, Thacker’s prior conviction was properly included in his criminal history.

STATUTE: K.S.A. 21-3413(a)(2), -3810(a), -4204(a)(3), -4232(a), -4710(d)(11)
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