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Bryan A. Garner to Present Two LawProse Sessions at KBA Annual Meeting

Cover layout & design by Ryan Purcell
rparcell@ksbar.org

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Kansas Bar Association, Topeka, Kan.
On December 7, 2012, the Kansas Bar Association Board of Governors unanimously passed a resolution endorsing merit selection:

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

Thereafter, KBA representatives generated proposals and undertook discussions with legislative leaders which were intended to generate a compromise to preserve merit selection for our Kansas Supreme Court and, hopefully, extend constitutional merit selection to our Court of Appeals.

The KBA effort was intense. In its fourth merit selection meeting, your Board approved, by a vote of 14 to 10, a “4-4-1” Merit Selection Plan for both courts that would provide:

A. Commission:

  4 Attorneys, one elected from each Kansas congressional district;  
  4 Commission members selected by the Kansas Governor; and  
  1 Commission member selected by the Kansas Speaker of the House.

B. The commission would consider all applications, in the current manner, to present five applicants for the selection by our governor.

C. The governor’s selection would be appointed upon a majority Senate vote for confirmation.

The KBA governors approving the proposal understand that Senate confirmation in Kansas has not been difficult or unreasonable. The Senate has confirmed every nominee recommended to it in the last eight years. Thus, while future action may be uncertain, the Kansas Senate has a history of taking its confirmation responsibilities seriously and in a reasonable and appropriate manner.

Unfortunately, the KBA could not achieve agreement for the “4-4-1” proposal. It was not presented for legislative approval. Instead, the Kansas Senate passed (by two-thirds vote) a constitutional amendment for gubernatorial selection of Supreme Court justices subject to Senate confirmation. The House vote (also requiring a two-thirds majority) on the measure failed by just eight votes. However, because the Court of Appeals judge selection is governed by statute, and statutory enactment only requires a majority vote, legislation was passed to provide for gubernatorial selection and appointment of Court of Appeals judges subject to Senate confirmation. Kansas is now one of only three states with one methodology for selecting the Court of Appeals judges and another for selecting Supreme Court justices.

The KBA governors unanimously favor merit selection. However, governors vary in their views on how to achieve that goal because (1) they vary in their perception of the present threat of gubernatorial appointment for selection to our Supreme Court, and (2) they vary in their willingness to sponsor compromises to achieve merit selection. Some governors fear that our legislature will soon achieve the two-thirds vote in the Kansas House of Representatives, which would place a gubernatorial appointment system on a constitutional ballot. Other governors do not favor compromise; they hope that Kansas appellate court judge and justice selection will return to the present merit selection system when today’s conservative political pendulum begins to return toward center.

We are an organization of attorneys. Thus, while we clearly favor merit selection, we have many differences about the most effective means to achieve that goal. The KBA wants and needs the thoughts of our membership on the very important issue of how to preserve merit selection. To obtain your thoughts and views, I have asked each governor to attend as many bar association meetings and conferences as possible, to interview and discuss merit selection with as many of you as possible. To assist the KBA’s effort, please contact your KBA governor to address:

(1) your thoughts and observations on (1) the number of attorneys elected and (2) the total number of members selected to the nominating commission;  
(2) your thoughts on a larger commission structure, so long as four attorneys remain a constituent part;  
(3) your thoughts concerning the minimum and maximum number of applicants that the commission should recommend to the governor; and  
(4) your thoughts on Senate confirmation.


KBA President Lee M. Smithyman may be reached by email at lsmithyman@ksbar.org, by phone at (913) 661-9800.
Many of you may not be aware of this and some may even find it hard to believe, but the KBA annual meeting used to be THE event to attend each year. Lawyers brought their families and joined together in the meeting location for several days of fun activities while trying to squeeze in some CLE. The annual meeting is the reason many attorneys from across the state know each other and their families.

Unfortunately, many are becoming concerned that the annual meeting is gradually becoming a thing of the past. Each year, fewer and fewer people are attending the meeting, and it is no longer the place that lawyers are bringing their families to for a weekend of socialization with other lawyers. This has already been made clear by the fact that we no longer hold a meeting in Colorado, which served as the location for the “western Kansas” meeting location.

The main problem facing the KBA and its governing board is how do we continue to pay for the meeting if there aren’t enough registrations to help offset the cost? Obviously, the KBA works hard to get sponsors and to make deals with vendors/hosts; however, that is not enough to offset the enormous expense of the annual meeting. In fact, the meeting has been operating in the red for years—with the KBA being the one to shoulder the burden and the costs.

The decrease in attendance and, therefore, funding for the annual meeting has, to no one’s surprise I’m sure, resulted in discussions about what should be done with the annual meeting. Should it be eliminated? Only occur every two years? Every three years? Should it continue to occur annually as there are some people who continue to look forward to it? So far, no one has the answer.

I’m on the planning committee for the 2013 annual meeting, and our No. 1 goal is to do whatever we can to increase attendance at the meeting—especially that of the young lawyers. If we can create a trend of increased registration and help offset the costs shouldered by the KBA, maybe this discussion will become one of the past. So, that begs the question—how do we get people interested in the annual meeting again? What will make people sign up and attend?

I don’t know that anyone has a magic answer to this question, but I can assure you the planning committee is working tirelessly to try and make the programming and social events ones that will entice both young and old to make a trip down to Wichita for a few days (remember, Wichita is pretty awesome, and if you’ve forgotten that, go re-read my article from two months ago). However, we also need your help to increase the attendance at the annual meeting—especially those of the young lawyer genre.

As a not far removed associate, I understand the pressure concerning billing hours and not wanting to take off several days to attend an annual meeting—or not feeling like you can take off a few days to attend the meeting. This is where you partners come in. Encourage your young attorneys to attend! Pay for them to attend! You benefit from their attendance. Think of the networking they will get to do with other young lawyers, lawyers from across the state, and judges. Think of the great programming they will have the opportunity to attend and potentially knock out all of their CLE hours in one swoop. Young lawyers will come if it is supported by their mentors. Also, lead by example. If you encourage your young associates to attend, why don’t you attend as well?

The point is, in order keep the annual meeting going, attendance has to increase—plain and simple—and we need to plant the seed young. Who are the people that most commonly attend the annual meeting—it is the people who have been going for years and look forward to seeing old friends, some that they may only see at the annual meeting. In order to have people attending in 20 years, people need to start attending now!

Let’s bring back the annual meeting Kansas lawyers. Wichita, June 19-22. See you there.

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.
Professor Bryan Garner’s path to becoming a premier lexicographer began in high school; in fact, it started as a way to impress a girl but took off in a different direction. Starting with vocabulary, Garner said he then became obsessed with general semantics, English grammar and usage, the history of the English language, rhetorical tropes, pronunciation, and punctuation.

Garner, already armed with a bachelor’s degree in English from the University of Texas at Austin, nearly pursued a Ph.D. even though he had originally planned to follow in his grandfather’s footsteps and become a lawyer.

"In the end, I kept to my original plan — but immediately started work on Modern Legal Usage during my first week of law school," said Garner.

While in law school at the University of Texas and during his clerkship for the Fifth Circuit, he kept thousands of notecards that contained legal terms and their usages. Those notecards would become the basis for A Dictionary of Modern Legal Usage, which was published by Oxford University Press in 1987.

Although Garner was an associate working for a law firm in Dallas, his real love was teaching. He served as an adjunct professor of law at the University of Texas School of Law. Before his two-year appointment at the school concluded, he was faced with a choice: go back to practicing law or stay with academia. Neither option seemed too pleasing, so Garner decided to place his career in the hands of fellow attorneys.

“I believed that my most effective strategy was to take my teaching to the profession as a whole — and not to be confined to one law school,” he said.

LawProse was founded in 1990 with a simple idea: teach lawyers a better, simpler way to communicate through all-day seminars using edited briefs. The company’s writing seminars are organized around five practical tenets: (1) the best legal style is simple and direct; (2) learning that style takes dedication; (3) legal writers need to achieve credibility and then maintain it; (4) writers must reject many old and meaningless conventions; and (5) writers need empathy for the reader.

“It’s for lawyers themselves to say what kind of difference my LawProse seminars have made for them,” Garner said. “I do know that LawProse has made me a much better teacher and writer.”

The success of LawProse has led Garner to publish more than 20 books. What many regard as his opus, Garner’s Modern American Usage has been widely praised, and David Foster Wallace called Garner a genius in his essay (posing as a book review on the usage dictionary) for Harper’s.

“I don’t think about ‘genius,’” he said. “What I have is a ‘focused knack’ — and boundless curiosity.”

Garner’s writing expertise has led him to work with various legal institutions, including the Judicial Conference of the United States, the Supreme Courts of Delaware and Texas, and the U.S. Courts of Appeals for the Tenth and Eleventh Circuits. In addition, he serves as editor-in-chief of Black’s Law Dictionary and has served on editorial advisory boards for The Chicago Manual of Style, The Copy Editor, and The Green Bag.

So what’s next for Garner? His latest book offering, written with Justice Antonin Scalia, is Reading Law: The Interpretation of Legal Texts, which explains the most important principles of constitutional, statutory, and contractual interpretation in an informative style with hundreds of illustrations from actual cases.

In June, Garner will be attending the KBA Annual Meeting in Wichita to train attorneys in two LawProse seminars: Advanced Legal Writing & Editing and Drafting Better Contracts. Be sure to register early as seating will be limited at these sessions. ■
Still Coping with New Technology

By Hon. Steve Leben, Kansas Court of Appeals, Topeka

Lawyers have always had to cope with change. I can recall as a young lawyer having an experienced practitioner recite to me just a few of the statutory compilations and key sets of rules—the Uniform Commercial Code, the Uniform Probate Code, the Federal Rules of Civil Procedure, and the Federal Rules of Evidence among them—that had all been enacted after he had graduated from law school. Keeping up with changes in the law can be a daunting task.

Today’s lawyers not only must stay on top of changes in the law, they must also stay on top of changes in technology. Those changes are important in many ways. Discovery in a lawsuit now entails not only documents but also metadata. Marketing for lawyers and law firms may be more likely to include social media than traditional outreach methods. In addition, lawyers must consider how a lawyer’s ethical duties may play out in new settings that have been changed by technology.

Two years ago, I provided an initial look at some early but well-developed ethics opinions in this area. The good news is that those opinions remain an excellent starting place. New York Ethics Op. 842 (2010) addressed steps lawyers should take when storing electronic but confidential client information in cloud storage sites run by third parties. The overriding principle—which has been reinforced in later ethics opinions from several other states—is that the lawyer must exercise reasonable care to maintain the confidentiality of client information. The opinion recommends several specific steps that a lawyer should undertake, including making sure that the online data storage provider has an enforceable obligation to preserve confidentiality and security; making sure that the provider will notify the lawyer if served with process requiring production of client information; and investigating the provider’s security measures, ability to purify and wipe data, and ability to move data to a different host at the lawyer’s request. A second opinion, California Formal Ethics Op. 2010-179 (2010), also found cloud storage of files acceptable. A lawyer will be well served by maintaining a file showing that the lawyer has done research (such as reviewing the New York and California ethics opinions) about what to do and showing reasonable efforts to comply.

The California opinion is also valuable because it recognized that technological advances will outpace changes in ethics rules, so the opinion discussed concepts, issues, and questions that should be kept in mind for whatever technologies are being considered. In one example, the California opinion explained that an attorney who uses his or her laptop in a local coffee shop, using a public wireless Internet connection to do legal research on a client matter and then to email the client, may not be complying with client-confidentiality rules unless the attorney takes “appropriate precautions, such as using a combination of file encryption, encryption of wireless transmissions and a personal firewall.”

Another emerging area is the virtual law office, in which a lawyer conducts his or her practice largely over the Internet. Such a practice offers potential benefits to both lawyers and clients, but the lawyer must carefully work through ways in which established ethics rules might apply. There are now ethics opinions from several states that have approved the virtual law office model, but one Virginia attorney was found to have violated ethics rules on the communication of fields of practice and certification. St. Louis attorney Michael Downey has written an excellent article summarizing the key ethics rules to consider in starting a virtual law office, and lawyer and author Stephanie Kimbro maintains a website (virtuallawpractice.org) that regularly highlights new developments and ethics opinions.

The American Bar Association’s 20/20 Commission proposed some ethics rule changes specifically related to technological advances—such as adding a specific comment that a lawyer’s duty to provide competent representation included keeping abreast of changes in relevant technology. But even without the adoption of new rules or comments, lawyers must assume that their duty of competence includes the duty to keep up-to-date on technological advances that affect their relationship with their clients, their ability to keep client confidences, and their ability to carry out other duties to clients.

About the Author

Steve Leben has been a member of the Kansas Court of Appeals since 2007. Before that, he was a district judge in Johnson County for nearly 14 years. He has been a co-presenter of Ethics in the Morning—Professional Ethics at the Dawn of Cloud Computing, 38 WM. MITCHELL L. REV. 111 (2011). The American Bar Association’s 20/20 Commission made recommendations, approved by the House of Delegates, for some rules updates that in part reflect the intersection of technological advances with the ethics rules. For a recent summary, there is a California CLE summary of them (available at http://goo.gl/Ao9wF) that includes links to the underlying rules proposals.

Footnotes


2. See Michael Downey, Ethics and the Virtual Law Office, St. Louis Lawyer, Feb. 2013 (available at http://goo.gl/vqJyl); see also Stephanie Kimbro & Courtney Kennaday, Ethics of Virtual Law Practice, South Carolina Lawyer, Mar. 2012, at 40. The Virginia disciplinary case referenced in text is Virginia State Bar v. Sriskantharajah; the June 2012 public-reprimand order can be found at http://goo.gl/7B9oh. For additional sources in this area, the American Bar Association’s Law Practice Management Section keeps an updated chart showing ethics opinions regarding cloud computing generally (available at http://goo.gl/cLWZg); see also Maria Kantzavelos, Taking Your Practice to the Cloud, 100 ILL. B.J. 188 (2012); Roland L. Trope & Sarah Jane Hughes, Red Skies in the Morning—Professional Ethics at the Dawn of Cloud Computing, 38 WM. MITCHELL L. REV. 111 (2011). The American Bar Association’s 20/20 Commission made recommendations, approved by the House of Delegates, for some rules updates that in part reflect the intersection of technological advances with the ethics rules. For a recent summary, there is a California CLE summary of them (available at http://goo.gl/Ao9wF) that includes links to the underlying rules proposals.
Lock Picks and Lawyers

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

“Do I like to make trouble? Of course, I’m a lawyer!” said Marc Tobias in a 2009 Wired magazine interview covering his professional lock picking exploits. The article chronicled Tobias’ stunning defeat of the famed Medeco3 high-security lock – robust locks used to protect the Treasury, the Pentagon, and other high-value targets. Wired even filmed Tobias defeating the “pick-proof” locks in as little as seven seconds. You too can try – Tobias publishes his techniques through his websites Security.org and in.Security.org. Why, however, should a lawyer care?

Tobias contends the problem is not the lock but “it’s about what these locks protect.” His view on security is “if we can do it, so can the bad guys.” Weak locks must be publicized so the public can compensate for their weaknesses. That is a valid discussion worthy of several articles but my interest in locks and lock picking are more metaphorical.

A lock is a system to manage access by checking credentials. If you have proper credentials (the key), then you get access. Practice management systems in firms and courts contain similar “locks.” If, for example, a matter presents a true conflict, then it lacks the necessary key to open a file in my office. If a summons was not served, then the necessary key to “open” a judgment is missing. Understanding the purpose and failures of locks is a helpful metaphor in developing practice and court management systems. Renowned security expert and lock picker, Deviant Ollam, takes up this thread in his presentation, “Here’s to Fail,” at http://bit.ly/2MrQXq.

A lock – or a practice/court management system – should include three key capabilities:

Resist

The primary purpose of your policies, procedures, and systems is to resist error. It is notable that the goal is not elimination of error. In the lock world, a lock is evaluated partially by how long it can resist attack. In other words, eventual failure is assumed!

Error-resistance in case management is obtained by looking for “doors” in the process from which an error can enter. Suppose your client intake includes a secretary running a conflict check. One opening for error would be the secretary being out sick. If the secretary is gone, does a matter walk right on in without that key check? Put up a lock at that point and develop a procedure that can resist a failed conflict check.

Recognize

Because no lock is impenetrable, a good lock will include tricks and traps that make it evident when it has been defeated. Good management processes are the same.

In a rather infamous case, an attorney had an automated email system for linking electronic service returns from the bankruptcy ECF system to her case management system. She had an error-resistant “lock” in that her system would open a return, read its case number, and then import it into case management. Better yet, her system helped resist and recognize error because it was configured to dump returns it could not match to an exception folder for manual review. Sadly, no one reviewed that exception folder and a single case escalated into a nightmare of hearings and sanctions until the court was finally able to hear and digest the root cause.

React

Once the inevitable error has occurred and has been recognized, reaction is important. Many lock makers deny or ignore exposed vulnerabilities in their product. They may even go after lock pick enthusiasts instead of fixing their product. That not a viable solution for lawyers or courts. When our processes fail, that is our opportunity to improve the “lock.” For the attorney with the bankruptcy noticing issue above, improving the lock was simple – assign and verify review of the exception folder. Part of reaction involves auditing. Just like a lock has a time resistance to picking, we ought to thoroughly know our processes’ accuracy rates and watch for deviations.

Failure Improves Odds of Success

Lock picking is a productive hobby because it is a tangible reminder of fallibility that exports well as we design law practice and court management systems. Our systems will always have inherent flaws. Watching a system fail can translate into more robust systems the next time around as we study what went wrong. Grab a set of picks at toool.us or lockpicking101.com and puzzle out a better case management system. Puzzling out a tangible system you can hold in your hands often improves our grasp of intangible systems we lawyers face routinely.

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.
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A Nostalgic Touch of Humor

Going Undercover with the TSA

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

CBS has a reality TV show called “Undercover Boss.” It involves a business owner typically for a large corporation, who surreptitiously works in the trenches with the regular Joes and gains an appreciation for the little guy. If you haven’t seen it, that’s OK; it’s got almost nothing to do with this column. Except I want to go undercover. For the TSA.

TSA has replaced the old TWA gate agents at Lambert Airport as the most disliked people in the travel business. I’m sure that somewhere in the mix there are well-intentioned, hard working men and women doing just what they are told. But they seem to be on break when I’m getting special screening. No one, ever, in my life has called me special. Why does that change when I get picked out at the Nashville airport? In Baltimore I got a pat down that included a discount double check along the upper thigh by some dude who can’t live within a mile of a grade school. TSA: Touching Sensitive Areas.

Airport security needs to meet Dale Carnegie. Sure, beating up on TSA is like criticizing John Calipari or trashing those refs who tried to keep Wichita State from shocking the world. Fruit hanging so low you could trip on it.

It’s a small price to pay, they say, for “keeping the skies safe.” Really? Consider what my favorite legal blogger—loweringthebar.net reported: “The TSA is spending about $2 billion on its “Screening Passengers by Observation Techniques” program, or SPOT (get it?). This involves training certain screeners to look for “behavioral indicators”—like acting stressed out—that terrorists supposedly exhibit. This has actually been implemented at a number of airports since 2004, and here are the results: Out of 2 billion passengers who passed through SPOT airports ..., only 1,100 were arrested, and none were arrested on terrorism charges. Even more disconcerting is the fact that GAO reported that since the SPOT program’s inception, at least 17 known terrorists have flown on 24 different occasions at eight SPOT airports.” Don’t you feel better?

So I want to infiltrate TSA. I would start with the ID check—er. They serve no functional purpose except to keep you from boarding on time. But I would change that. Here is what I would do.

First, anyone in military fatigues would go ahead of everyone else. Same with anyone over the age of 70. Parents with toddlers would receive similar treatment. But everyone else might get these questions upon the ID check:

- Hello ma’am. Are you wearing those Lulu lemon pants they recalled?
- You look familiar to me. Didn’t I see you on television? Were you on “The Walking Dead”?
- You sort of look like Kate Middleton. Has anyone told you that?
- This weight on your license can’t be correct. Exactly how much do you weigh?

For those travelers who cut in line because they have some kind of preferred status, I would make them regular, like the rest of us:

- Is this your ID? I need to compare it to your birth certificate. Please produce it.
- Have you spent time recently in Sudan? Can you prove you weren’t there?
- It looks like your license has expired. Please return to the end of the line.
- Do you have a hairpiece? If so you may need to put in a special tray along with your laptop.
- I’m sorry but this boarding pass was printed from a printer with low ink. You will need to replace your cartridges and come back later. NEXT!
- Your height and weight don’t match your actual dimensions. Is this your weight on the moon?
- Why are you so nervous? What exactly is going on with you?

For bratty high school seniors heading off to a spring break trip, I would elevate my level of scrutiny:

- Yes. You’ve been selected for special screening. I need a urine sample. Please head to the men’s room and find a cup.
- You are going to Mexico? And you are 18? Great. Please recite the alphabet backwards standing on your head. You can practice at the end of the line. Don’t worry—if you miss your flight there are some bus trips to Branson opening up tomorrow.
- Who is the president of the United States? And what is his blood type, shoe size, and eye color?

Later I would be the “Do what I say” guy. That guy in desperate need for a personal trainer who barks out inane directives we have heard a thousand times: “Take your laptop out!” “No gels or liquids!” “Form a single line!” My plan would be to say nothing except, “You know what to do so I’m not going to say anything. Thanks and have a great day.”

There would be other things. I would go on the intercom and declare, repeatedly, “Whoever left a nose hair trimmer at the security checkpoint please return immediately. We don’t know how to turn it off.” Or this one: “Something of value has been left at the security check point.” After a pregnant pause, I would add: “A money clip plus a pair of Polo XXL underwear. Please come back to security.” Other announcements: “We have a bottle of Rogaine left behind. If unclaimed we will come find its owner.” “Anyone with Low T please come back to the desk. You’ve left your roll on prescription.”

I would have a dog at my side—a sniffing dog but she knows nothing about drugs—it would be my BFF—Bernie, our Wheaten. She would be an official greater who would lift everyone’s mood.

So next time you are at KCI and see me patrolling the security line … don’t say a word. I’m filming our next episode.
How Law School Forged a Neurological Truce Between My Right and Left Brain

By Leah Bockover, Washburn University School of Law, Topeka

Until I entered law school, a war raged between my right brain and my left, a feud similar to the Hatfields and McCoys in that its exact origins are uncertain, but distinguishable in the sense that it was probably less violent and certainly less famous. As a child, I was inherently scatterbrained, passionate to a fault, and relished any opportunity to be creative. Consequently, I felt destined to lead the chaotic but torturously romantic life of an artist.

Unfortunately, I learned at a very young age that I am tragically incapable of generating anything aesthetically or euphonically pleasing and was reminded as such on several occasions. For example, when I was 6 years old, I begged my mother to let me enter a local beauty pageant. For my talent, I sang “Tomorrow” from “Annie.” As I left the stage, the pageant host commented that he had never heard it sung in that key. At the time, I interpreted this as a compliment on my impressive vocal range. My mother told me that I took fourth place, although the judges only announced first through third. My willful ignorance permitted me to believe her for years to come.

The only apparent talent that I possessed was an affinity for math, an unwanted gift that I resisted as incompatible with my preordained lifestyle. In fact, I might have abandoned numbers altogether if not for a fated, third-grade encounter with a particularly obnoxious 8-year-old named Daniel who informed me that “boys are better at math than girls.” I gracelessly responded with a protruding tongue and immediately joined the math club. For the next few years, my left brain dominated as I found delight in quadratic equations, logic problems, and graphing calculators. Although relations between Daniel and me remained hostile, I accumulated a number of left-minded friends who built robots on the weekends and could ramble off 89 digits of pi. However, with the dawn of adolescence, my right brain sounded a call to arms.

With what I fancied to be a rebel yell, I exploded into my teenage years with the renewed resolution that somewhere within me lied a secret talent, waiting to be unearthed. I took singing lessons, auditioned for school plays, and even flirted with photography. Despite failing at those and other artistic endeavors, I was determined to act the part. I pretended to like “Citizen Kane,” “Zen and the Art of Motorcycle Maintenance,” and free verse poetry. While not entirely abandoning my robot-building friends, I wandered from clique to clique looking for my niche without success. I graduated from high school with an eclectic group of friends, hair that had been tortured by various dye jobs, and a complete lack of self-identity.

I spent the next seven years enrolling and withdrawing from college courses, changing my major from pre-veterinary medicine to journalism to engineering to French. By the time that I graduated with a bachelor’s in creative writing, both the right and left sides of my brain suffered from Acute Battle Fatigue. Despite student-loan evidence to the contrary, my degree was less than valuable and did not afford me any real advantage or insight in forging a career path. I therefore exercised the only option that remained at my disposal. I went to law school.

On my first official day of law school, my Torts professor began class by writing BAFITTC on the board and asking who had seen the movie “Annie.” A number of students’ hands went up, including mine. “Who is familiar with the song ‘Tomorrow?’” A few hands went down while mine stretched higher. “Who can sing?” Every hand went down but mine. Although years of rejection had stripped me of any confidence in my singing ability, I was eager to impress and gambled that my claim of talent would surely not be put to trial. “OK, sing the chorus but change the word tomorrow to ba-feet-ka.” Terror has suppressed the memory of what happened in the next seven seconds, but I am told that I did it. My memory resumes with the professor smiling at me and saying “Perfect” before proceeding with a lecture on intentional torts.

I entered law school expecting to spend the majority of my time memorizing black letter laws and secretly rehearsing “Objection!” in front of a mirror. As I began my studies, however, I realized that law school would not train me to plug client facts into a legal calculator but to paint persuasive pictures, typically of barren cows or fox hunts, within a legal framework. The world of law seemed to strike a perfect balance between art and science. In law school, my creative flair and affinity for logic were equally valued. Even more importantly, with the exception of my first day of Torts, it did not seem to require any fine artistic ability. As I was essentially rewired to “think like a lawyer,” the tension between my right and left brain began to dissipate, and the neurological battlefield began sprouting buds of friendship.

About the Author

Leah Bockover is a third-year student at Washburn University School of Law. She will graduate in May 2013, thanks to the love and support of her husband, Benjamin Bockover, her daughters, Ava and Delaney, and her parents, Ron and Pam Doyle. She can be contacted at leah.bockover@gmail.com.

Footnote

1. Battery, assault, false imprisonment, intentional infliction of emotional distress, trespass to chattel, trespass to land, and conversion. BAFITTC.
Don’t Act Like an Ostrich:
How to Not Run Aflame of the Duty of Candor

By Joseph P. Mastrosimone, Washburn University School of Law, Topeka, joseph.mastrosimone@washburn.edu

“A lawyer shall not knowingly (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; ….”

–Kansas Rules of Professional Conduct 3.3(a)(1) & (2).

Every practicing lawyer has thought at one time when drafting a brief: “if only that case did not exist.” While the temptation to dream is harmless, acting on that wish by ignoring adverse precedent creates a potential minefield of ethical troubles. Legal ethics can have a significant impact on an advocate’s practice and reputation. Attorneys have been sanctioned in various ways for ethical and professionalism breaches in their advocacy – ranging from embarrassing and career-halting footnotes in published cases to formal bar discipline and assessment of costs.

Attorneys, as officers of the court, have the duty not only to vigorously represent their clients but to temper that representation by the duty of candor codified in Kansas Rule of Professional Conduct 3.3.1 In recent years, courts have taken attorneys to task in so-called “bench slaps” for violating this duty by failing to cite adverse controlling precedent or misstating the law. The cautionary tales that follow should convince all to avoid the dream and return to the hard work of distinguishing or criticizing adverse precedent in their briefs.

Gonzalez-Servin v. Ford Motor Co.,2 is a graphically entertaining example of a breach of the duty of candor. There, plaintiffs appealed the district court’s transfer of the case to Mexico. In a previous case on nearly identical facts, the Seventh Circuit transferred a case to the courts of Argentina under the doctrine of forum non conveniens.3 Despite the parallels between the cases, the Gonzalez-Servin plaintiffs cited the adverse case in neither the opening brief nor reply brief. That was a mistake. “When there is apparently dispositive precedent, an appellant may urge its overruling or distinguishing or reserve a challenge to it for a petition for certiorari but may not simply ignore it.” After labeling such advocacy as “unacceptable,” the court compared counsel to a large flightless bird and photographically criticized their avian advocacy:

The ostrich is a noble animal, but not a proper model for an appellate advocate. (Not that ostriches really bury their heads in the sand when threatened; don’t be fooled by the picture below.) The “ostrich-like” tactic of pretending that potentially dispositive authority against a litigant’s contention does not exist is as unprofessional as it is pointless.4

As if a “bench slap” is not enough, the court in United States v. Collins,5 upheld an attorney’s disqualification and revocation of pro hac vice status based on a violation of Kansas Rule 3.3. There, an out-of-state criminal defense lawyer violated Rule 3.3 by citing legal authority with constructive knowledge that such authority had been superseded. The Tenth Circuit, in upholding the district court’s disqualification order, noted:

Standing alone, the inadvertent citation to superseded authority, while professionally wanting, does not constitute misconduct warranting disqualification. However, prior to his involvement in this case, [the attorney] advanced the same legal argument concerning the third-party summons while defending a similar tax evasion case in the Western District of Kentucky. The government’s response explicitly pointed out that the delegation order on which [he] relied had been superseded by subsequent authority. … [T]he failure to disclose known dispositive contrary authority precluded [him] from providing competent and ethical representation to defendant.5

Misquoting an adverse case is perhaps even worse. In Porter v. Farmers Supply Service Inc.,6 the court awarded attorney fees to the defendant – to be paid by either the client or the attorney – based in part on the appealing attorney’s distorting precedent “by omitting language devastating to its position on appeal.”

Footnotes
1. KRPC 3.3 comment 2 (“Performance of [the duty to present the client’s case with persuasive force], however, is qualified by the advocate’s duty of candor to the tribunal.”).
2. 662 F.3d 931 (7th Cir. 2011).
4. Gonzalez-Servin, 662 F.3d at 934. See also Borowski v. Depuy Inc., 850 F.2d 297 (7th Cir. 1988) (noting that counsel’s “ostrich-like tactic of pretending that potentially dispositive authority against [his] contention does not exist[] is precisely the type of behavior that would justify imposing Rule 11 sanctions”); Jewelpack Corp. v. United States, 297 F.3d 1326, 1333 (Fed. Cir. 2002) (“We note our significant dismay at counsel’s failure to cite Heraeus-Amersil as controlling (or at the very least, persuasive) authority in his opening brief. Although counsel subjectively may have believed that another case was more persuasive, officers of our court have an unfailing duty to bring to our attention the most relevant precedent that bears on the case at hand – both good and bad – of which they are aware.”).
5. 920 F.2d 619 (10th Cir. 1990).
6. Id. at 632. See also Precision Specialty Metals Inc. v. United States, 315 F.3d 1346 (Fed. Cir. 2003) (sanctioning attorney under Rule 11 where attorney cited to dictionary definition of a term but failed to cite to controlling Supreme Court definition).
7. 790 F.2d 882 (Fed. Cir. 1986).
As seen above, there is no substitute for the tried-and-true method of addressing and distinguishing adverse precedent. Advocates build their credibility and insure their professional reputation when they responsibly inform the court of adverse precedent (even if not necessarily required by Rule 3.3) and then advocate why the case is distinguishable on the facts, contains flawed reasoning, or should be overruled. Doing otherwise ensure that your brief will lay an ostrich-sized egg.

About the Author

Joseph P. Mastrosimone is an associate professor of law at Washburn University School of Law and teaches in its nationally ranked Legal Analysis, Research, and Writing program. Before joining Washburn’s faculty, Mastrosimone served as the chief legal counsel for the Kansas Human Rights Commission and as senior legal counsel to the former chairman of the National Labor Relations Board. He also practiced labor and employment law with Stinson Morrison Hecker LLP and Crowell & Moring LLP. He has nothing personal against the noble ostrich.

Wouldn’t you like to deal with someone who speaks your language...

Daryl Craft, JD
Stephen Page, JD
Stephen Funk, JD
Gary Howland, JD
Rudy Wrenick, JD

Pilot Appellate Mediation Project Begins

The Kansas Court of Appeals has begun a pilot project to evaluate the potential use of mediation in select civil cases. The court is committed to keeping the costs as low as possible, and to creating as minimal a disruption as is necessary to the judges and parties involved in each case. This program will provide the parties with a forum and process by which they can:

1. consider the possibility of settling the entire case or specific issues in the case;
2. discuss limiting and simplifying the issues on appeal;
3. take actions that may reduce costs; and
4. aid the speedy and just resolution of any case.

A high priority for the pilot is to collect as much evaluative information as possible. The pilot will mediate twenty cases and use the evaluations of those cases to assess whether to implement a permanent program. Sixty lawyer mediators have volunteered to participate as a way to evaluate the potential of using mediation in Court of Appeals cases.

The timing of the mediation is the key portion of the program. Early scheduling is intended to give the parties the opportunity to settle a case before they incur major appellate expenses such as having the clerk’s record delivered, the reporter’s transcript prepared, and filing briefs.
Members in the News

**CHANGING POSITIONS**

**Brian Carman** has been named a member of Stinson, Laswell & Wilson, Wichita.

**Brian E. Engel, William B. Moore,** and **Kimberley S. Spies** have joined the law firm of White Goss Bowers March Schulte & Weisenfels P.C., Kansas City, Mo.

**Tyler C. Hibler** has joined Sanders Warren & Russell LLP, Overland Park.

**Larry G. Karns** has joined the Kansas Department of Labor, Topeka, as the director of workers compensation.

**Clayton I. Kerbs** has joined the Thompson Law Office, Chapman.

**Tiffany Ann McFarland** has been elected as a shareholder at McDowell, Rice, Smith & Buchanan P.C., Kansas City, Mo.

**Sylvia B. Penner** has become a member of Fleeson, Gooing Coulson & Kitch, Wichita.

**Erik M. Rome** has joined Newbery, Ungerer & Hickert LLP, Topeka, as an associate attorney.

**Hon. Kim R. Schroeder** has been appointed to the Kansas Court of Appeals by Gov. Sam Brownback.

**CHANGING LOCATIONS**

The Law Office of Bruce D. Mayfield Chtd. has moved to Historic Voigts Building, 7944 Sante Fe Dr., Overland Park, KS 66204.

**Tiffany Ann McFarland** has been elected as a shareholder at McDowell, Rice, Smith & Buchanan P.C., Kansas City, Mo.

**Sylvia B. Penner** has become a member of Fleeson, Gooing Coulson & Kitch, Wichita.

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**You take care of your clients, but who takes care of you?**

ALPS is honored to be partnering with the Kansas Bar Association for the inaugural Kansas CLE Tour. Join us for:

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- Thursday, May 23 - Hilton Garden Inn, Manhattan
- Friday, May 24 - Sheraton Overland Park Hotel, Overland Park

Learn more and register at:
www.alpsnet.com/kansascletour2013

**MISCELLANEOUS**

**Jeanie L. Schainost**, Garnett, has been elected as president of the Anderson County Bar Association. **Terry J. Solander** has succeeded Frederick B. Campbell as treasurer.

**Gregory L. Musil**, Overland Park, was selected by the Johnson County Bar Association for the Justinian Award for Professional Excellence.

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

Mark Alan Biberstein

Mark Alan Biberstein, 46, of Wichita, died February 13 in Wichita. He was born June 25, 1966, to Mike and Gail Biberstein in Emporia. Biberstein graduated from Santa Fe Trail High School in Carbondale in 1984 and then attended Emporia State University. While at Emporia State, he was student body president and an active member of the Sigma Tau Gamma fraternity.

After graduating in 1988, magna cum laude, Biberstein worked briefly for Koch Industries before attended law school at the University of Kansas, where he served as editor of the KU Law Review and graduated Order of the Coif in 1992. After graduation, he joined Foulston Siefkin as an associate attorney and was elected partner in 1998.

Within the firm, Biberstein served on a variety of committees, mentored several young lawyers, and established and maintained a successful litigation and trial practice. He was also active outside the firm, serving on committees in both the Wichita and Kansas bar associations. Biberstein also served on the boards of Communities in Schools, Andover Advantage Fund, American Heart Association, and Emporia State University Alumni Association.

Biberstein is survived by his wife, Kim; two children, Devon and Mason; mother, Gail, of Andover; father, Mike, of Las Vegas; two sisters, Sara Gott, of Wichita, and Laura “Lucy” Holmes, of Wilmington, Del.; mother- and father-in-law, Alice and James Riley, of Durant, Okla.; sister-in-law, Melody Thomas, of Elkhart; and many nieces and nephews.

Don. O. Concannon

Don O. Concannon, 85, of Hugoton, died March 9, in Beloit. He was born October 28, 1927, near Garden City, to Hugh Christopher Concannon and Margaret McKinley Concannon. Concannon grew up on a farm 20 miles northeast of Garden City and attended Essex Country School until it closed and then moved into Garden City. He graduated from Garden City High School in 1945 and then served in the U.S. Navy in the South Pacific during World War II.

After the Navy, Concannon attended Garden City Junior College, where he was instrumental in starting the football program. He graduated from Washburn University School of Law in 1958 and moved to Hugoton to begin his law practice, where he was elected Stevens County attorney one month after arriving.

Concannon was a member of Kappa Sigma and Delta Theta Phi fraternities; chair of the Kansas Young Republican Federation, Kansas Presidential Electors, Kansas State Republican Committee, Kansas Reagan for President, Hardage for Governor, and Governor’s Taskforce on Future Rural Communities; Satanta city attorney; Hugoton Chamber of Commerce president; was member of the Kansas Commission Bicentennial of U.S. Constitution, Governor’s Highway Advisory Commission; president of Fortune Insurance Co. Inc.; and served on the board of directors of Norton Bankshares Inc., First State Bank, State Bank of Satanta, and First National Bank in Norton.

He was a member of the Southwest Kansas, Kansas, and American bar associations; a member of the KBA Selection, Tenure, and Retirement of District Judges committees; Prospective Legislation; Veterans of Foreign Wars; American Legion; Hugoton Masonic Lodge; and Hugoton Chamber of Commerce.

Concannon is survived by his wife, Sharon; his son, Craig; his daughter, Debra Trasfer; six grandchildren; two great-grandchildren; and many nieces and nephews. He was preceded in death by his wife, Patricia; son, Chris; his parents; and his brothers, Herbert and L.O.

Douglas Lee Stanley

Douglas Lee Stanley, 57, of Wichita, died April 2. He was born August 27, 1955, the oldest of seven children, in Topeka to Lee and Joanne (Treiber) Stanley. After graduating from Seaman High School, he began working for the Topeka Police Department in 1975.

Stanley received his undergraduate degree in economics and an associate degree in criminal justice from Washburn University in 1981. He received his law degree from the University of Kansas School of Law, where he was editor-in-chief of the Law Review and then began his legal career with Foulston Siefkin in 1984. His practice focused on employment and labor law matters.

He was elected as a Fellow to the College of Labor and Employment Lawyers. He served as a member of the board of directors of the Wichita Business Coalition on Health Care and Development Coalition Steering Committee, and was a member of the Newman DeMattias Society and Wichita Legatus Society.

Stanley is survived by his wife, Sheryl; five children, Amanda Marshall, of Topeka, Katie Potter, Christopher Stanley, Rachel Stanley, and Diana Stanley, all of Wichita; his parents, Lee and Joanne Stanley, of Oswakie; aunt, Erma Treiber, of Topeka; three brothers, David Stanley, of Oskaloosa, Mark Stanley, of Topeka, and Scott Stanley, of Oswakie; three sisters, Brenda Lister, of Topeka, Susan Grey, of Valley Falls, and Kellie Puderbaugh, of Independence; two granddaughters; 16 nieces and nephews; 14 great-nieces and great-nephews; and many cousins.

Bruce Nystrom, PhD
Licensed Psychologist
River Park Psychology Consultants, LLC
www.riverparkpsych.com
727 N. Waco, Suite 320
Wichita, KS 67203

telephone: (316) 616-0260 • fax: (316) 616-0264
Coping with ED (Eminent Domain) by Mary Feighny

If you are coping with of ED (Eminent Domain), you are not alone. There is help available. Please contact a KBA attorney as soon as possible.
Your client hands you a petition and a hearing notice she received in the mail. The city intends to raze the building that houses her vegan deli business so that it can build a parking lot next to the new Cosco. She looks at you with a stricken expression and asks: “Can they do this?”

Never much of a constitutional scholar, you seem to recall something about the government taking private property for public purposes provided the owner receives “just compensation,” but, the mechanics are murky. What is a “public purpose”? How is “just compensation” determined? Can the “taking” be challenged? Should I get a retainer?

This article will address these issues in a “nuts and bolts” fashion for neophytes. For seasoned condemnation attorneys, this article contains the seminal appellate court decisions on each aspect of eminent domain, including the spate of recent cases decided by the Kansas appellate courts.

General

The U.S. Constitution prohibits the appropriation of private property for public use without “just compensation.”1 The Eminent Domain Procedure Act2 (Act) establishes the process for takings in accordance with the constitutional restriction. Eminent domain is a special statutory creature and not a civil action governed by the Kansas Code of Civil Procedure.3 It is administrative in nature rather than judicial.4 There are no pleadings and no opportunity to raise constitutional issues,5 or to litigate the right to invoke eminent domain or the extent of the “taking.”6 The only way to attack an exercise of eminent domain is through a separate civil action, such as an injunction or declaratory judgment action.7

Essentially, once the court finds that the condemner has the power of eminent domain, and that the taking is necessary for a public purpose, the judge then proceeds to appoint three disinterested appraisers and sets a date for the filing of their report.8 The appraisers view the property, hold a hearing, and determine the fair market value of the property.9 Once their report is filed with the court, notification is mailed to the property owner and other interested parties.10 While the property owner can appeal the amount of the award, the condemner acquires title, or whatever property interest was sought, as soon as the amount is paid to the court.11 The court distributes the award among the landowner, lienholders, and any other parties with an interest in the property.12

Entities having authority to exercise eminent domain

The power of eminent domain belongs to each state13 but can be delegated by state legislatures to private14 and public entities as well as political subdivisions within the state15 (e.g., cities,16 counties,17 school districts,18 public wholesale water supply districts,19 public utilities,20 cemetery corporations,21 railroads22). The Act must be followed regardless of whether the prospective condemner is governmental or private.23

Generally, eminent domain proceedings are a last and disfavored resort after attempts at negotiating a purchase or grant have failed. Clients are well-served to retain counsel during the negotiation process to ensure that the “taking” is truly for a public purpose and, if so, appropriate compensation is paid.

The petition

An authorized prospective condemner has the right to access the target property for purposes of examining and surveying it without giving rise to a trespass action, absent actual damages.24 However, that right does not include more invasive measures to evaluate the economic viability of a prospective condemnation (e.g., subsoil testing).25

Once the condemner complies with any statutory or local prerequisites to commencing a condemnation action,26 the condemner files a verified petition in the district court where the real property is located.27 The petition must contain the following information:28

(1) A statement alleging the condemner’s authority to condemn and the purpose of the “taking.” [“Taking” is defined as “the use by any authorized entity of the power of eminent domain to acquire any interest in private real property.”29] The burden is on the condemner to draft the petition so as to show the limitations of its taking.30

(2) The legal description of the property and the nature of the interest (e.g., fee simple, temporary or permanent easement); and

(3) The names of the owners, lienholders of record, and parties in possession. This includes known leasehold interests31 but not unrecorded interests.32

Defects in the form of the petition that are not prejudicial will not invalidate the proceeding.33 However, as the property rights to be taken by the condemner are determined by the petition and the appraisers’ report,34 the better practice is to correctly identify the parties and property from the beginning. A title search will disclose interests of record. Objections to the condemnation based on statutory defects are the only challenge not foreclosed by the rule requiring a separate proceeding contesting the condemnation.35

“Public use”

Private property can be taken only for a “public use.”36 Usually, the public use is obvious (e.g., street, sewer, pump station, water tower, utility line). However, both the U.S. Supreme Court37 and the Kansas appellate and federal district courts have interpreted the “public use” requirement to incorporate uses that extend beyond these traditional ones.38

Kansas appellate courts have interpreted the concept of “public use” very broadly.39 In State ex rel. Tomasic v. Unified Govt. of Wyandotte County/Kansas City,40 the Kansas Supreme Court approved the taking of private property for construction of the Kansas Speedway race track facility. In doing so, the Court rejected the argument that the condemnation benefited only a private entity.

This court has held that there is no precise definition of what constitutes a valid public use, and what may be considered a valid public use or purpose changes over time. [Citation omitted.] Further, this court has noted that as long as a governmental action is designed to fulfill a public purpose, the wisdom of the governmental
action generally is not subject to review by the courts. [Citation omitted].

The U.S. Supreme Court, in *Kelo v. City of New London, Connecticut*, considered the public use doctrine in the context of economic development when the City of New London sought to condemn private property to revitalize an economically distressed area of the city. Private property was condemned for use as a park and recreational/leisure area, hotel, and office/retail space.

In upholding the condemnation, the Court rejected earlier requirements that the condemned property had to be used by the general public. Rather, the Court interpreted “public use” to mean “public purpose,” thus reflecting the Court’s “long-standing policy of deference to legislative judgments in this field.” The Court raised but dismissed the specter that an ostensible public purpose could be simply a pretext to taking private property for a private purpose. However, practitioners representing property owners whose property is being taken for purposes where the benefit to private parties is significant should consider Justice Kennedy’s concurring opinion in *Kelo*, where he indicated that a more stringent review may be required when there is a showing of “impermissible favoritism of private parties.”

In response to the *Kelo* holding, the Kansas Legislature prohibited condemning private property for the purpose of transferring it to a private entity unless one of the statutory exceptions in K.S.A. 2012 Supp. 26-501b applies. As of this writing, no Kansas appellate decisions have considered this provision.

**Notice of the proceeding**

Notification of the hearing on the petition is published in the newspaper and both the petition and notice are mailed to the landowner and the parties named in the petition at least 14 days before the hearing. The notice gives the landowner time to consider whether to file a separate action. Defects in the notice or service do not invalidate the proceeding.

Despite the fact that K.S.A. 26-503 requires only the mailing of notice, if there are federal tax liens, federal law requires service of the petition and hearing notice on the U.S. attorney for the district where the condemnation is proposed and mailing a copy of the petition and hearing notice, by certified mail, to the U.S. attorney general. If there are state of Kansas tax liens, the author recommends mailing, by certified mail, a copy of the petition and hearing notice to both the Kansas attorney general and the secretary of the Kansas Department of Revenue.

**The hearing and appointment of appraisers**

The court makes its findings based only upon a review of the petition. If the court determines that the plaintiff/condemner has the power of eminent domain and the taking is necessary “to the lawful corporate purposes of the plaintiff,” those findings cannot be appealed. However, if the court denies the petition, the order can be appealed to the Kansas Supreme Court. Upon making the appropriate findings, the court then appoints three appraisers to value the property and sets the date for the report to be filed. The appraisers must be “disinterested” residents of the county in which the petition is
Wednesday, June 19

<table>
<thead>
<tr>
<th>Time</th>
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<tbody>
<tr>
<td>11 a.m.</td>
<td>Joint Golf Tournament @ Tallgrass Golf Course</td>
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</table>
| 11:30 a.m. – 1:30 p.m. | KBA Diversity Committee Luncheon

(Invitation Only) |
| 1 p.m.     | Registration Opens                                                                        |
| 1 p.m.     | Joint Sporting Clays @ Michael Murphy & Sons                                              |
| 3 p.m.     | Exhibitors set up                                                                         |
| 4:30 – 6 p.m. | KWAA Meet and Mingle

(Invitation Only) @ Marriott |
| 5 – 9 p.m. | SOAB’s Board Meeting (5 p.m.);
Reception and Dinner (6 p.m.);
Scotch & Sirloin |
| 6 – 7:30 p.m. | Past President’s Council Dinner

@ Marriott
(Invitation Only) |
| 6 – 8 p.m. | Joint Welcome Reception @ Marriott |
| 8 – 10 p.m. | KBA YLS Soiree
Co-hosted by WBA Young Lawyers
Other Hospitality Events: Judiciary
@ Marriott |

1:30 – 4:30 p.m. Bryan A. Garner LawProse Seminar:
Drafting Better Contracts

Afternoon Break
KBF Fellows Dinner
@ Petroleum Club
(Invitation Only)
(Transportation provided)
The Wichita Bar Show
@ Orpheum Theater
(Transportation provided)
Curtain Call Celebration
@ Scottish Rite Temple
(Transportation provided)

Friday, June 21

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<tr>
<td>7 a.m.</td>
<td>Registration Opens</td>
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<tr>
<td>7-10 a.m.</td>
<td>Washburn Law School Breakfast/Board Meeting</td>
</tr>
</tbody>
</table>
| 7:30 – 9:10 a.m. | Sunrise CLE
7:30 a.m.  |
| 7:30 a.m. – 4:30 p.m. | Fellows of the American Bar
Foundation Breakfast |
9:30-10:30 a.m. | Exhibitor Hall Opens
KBF BOT Meeting & KBF Annual Meeting |
| 9:30 – 11:50 a.m. | Morning CLE Programming
Noon – 1:20 p.m.  |
| 1:30 – 2:20 p.m. | Law School Luncheons
Afternoon CLE Programming |
| 2 – 4 p.m. | KBA BOG Meeting                             |
| 6 p.m.     | President’s Reception                       |
| 7 p.m.     | KBA Installation & Awards Dinner
Private President’s Reception
(Invitation Only) |
| 9:30 p.m. – Midnight | Bryan A. Garner LawProse Seminar:
Advanced Legal Writing & Editing |

Thursday, June 20

<table>
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<th>Time</th>
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<tr>
<td>6:30 – 7:45 a.m.</td>
<td>5k Fun Run &amp; Walk</td>
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<tr>
<td>6:30 a.m.</td>
<td>Registration Opens</td>
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</table>
| 7:30 – 8:45 a.m. | Eggs & Issues Breakfast CLE
Survey Says: A LPM review of the Kansas Lawyer economic survey |
| 8 a.m. – 4:30 p.m. | Opening Session Welcomes by KBA President Lee Smithyman & WBA President Hugh Gill
Introduction of Key Trainer Bryan A. Garner, LawProse, Inc. Dallas, Tex., by William Townsley, Annual Meeting Planning Committee Chair |
| 9 – 9:15 a.m. | Exhibitor Hall Opens                                                                     |
| 9:15 a.m. – 12:15 p.m. | Bryan A. Garner LawProse Seminar:
Advanced Legal Writing & Editing |
| 12:15 – 1:30 p.m. | Networking Luncheon                                                                      |

Key Trainer: Bryan A. Garner
Wednesday, June 19

- **Golf Tournament** $90/person $_______
  9:30 a.m. Driving range & putting greens open for practice
  • 11 a.m. Shotgun start • Lunch provided on the course • Tallgrass Golf Course • Prizes awarded!
  - Participant Name ____________________________
  - Please assign me to a foursome.
  - Please assign me to the following foursome:
    ____________________________
    ____________________________
  - Handicap or average score/18 ___________

- **Sporting Clays Shoot** $50/person $_______
  100 targets (shells not included)
  Check-in at 12:30 p.m. • Lunch on your own
  1 p.m. shooting begins
  Michael Murphy and Sons • Prizes awarded!

- **Joint Welcome Reception** N/C
  6 – 8 p.m. @ Marriott • One ticket • Two tickets

- **KBA YLS Soirée** N/C
  8 – 10 p.m. @ The Pumphouse*  
  Co-hosted by WBA Young Lawyers

**SUBTOTAL A. FROM WEDNESDAY** $_______

Thursday, June 20

**Educational CLE Programming @ Hyatt Regency Hotel**
8.0 CLE credit hours, including 1.0 LPM, pending approval in Kansas.
8.0 CLE credit hours approved in Missouri.

- **5K Fun Run & Walk** N/C
  6:30 – 7:45 a.m.

- **Eggs & Issues Breakfast CLE** N/C
  “Survey Says: A LPM Review of the Kansas Lawyer Economic Survey”
  7:30 – 8:45 a.m. (1.0 CLE, including 1.0 LPM)

- **Opening Session with Welcomes** N/C
  9 – 9:15 a.m.

- **Bryan A. Garner LawProse Seminars**
  Price includes both seminars and training books
  **Advanced Legal Writing & Editing**
  9:15 a.m. – 12:15 p.m. (3.5 CLE)
  **Drafting Better Contracts**
  1:30 – 4:30 p.m. (3.5 CLE)

**Friday, June 21**

**Educational CLE Programming @ Hyatt Regency Hotel**
7.5 CLE credit hours, including 1.0 LPM, and 2.0 ethics and professionalism credit hours, pending approval in Kansas.
7.5 CLE credit hours, including 1.0 ethics credit hour approved in Missouri.

- **Sunrise CLE – Current Topics in Trial Advocacy**
  7:30 – 9:10 a.m. (2.0 CLE)

- **One-track Educational Programming**
  Legislative Update Panel
  9:30 – 10:45 a.m. (1.5 CLE)

**One-track Educational Programming**
- Kansas Appellate Cases Update
  11 – 11:50 a.m. (1.0 CLE)

- **Law School Luncheons** $40/person $_______
  Noon – 1:20 p.m. • KU • WU • Out-of-State
  • Dietary restrictions? Please specify:

**One-track Educational Programming**
- U.S. Supreme Court Case Reviews 2012-13 Term
  1:30 – 2:20 p.m. (1.0 CLE)

**Three-track Educational Programming**
- 2:30 – 3:20 p.m.
  • Are You Prepared? Avoiding Ethical Disasters During Unexpected Disasters (1.0 CLE, including 1.0 EP) MO approved
  • Basic Employment Issues for Solo & Small Firms (1.0 CLE)
  • Immigration Reform: What Stays the Same and What Changes for Criminal, Family and Business Practitioners (1.0 CLE)

*Information on special events will be sent to you prior to the conference.
Advanced Legal Writing & Editing
9:15 a.m. – 12:15 p.m.
This newly revised workshop is our mainstay seminar, and it’s the broadest in scope. Professor Garner focuses on analytical and persuasive writing, such as letters, memos, and briefs. It covers the five major skills that legal writers need to acquire:
• Mastering the prerequisites to professional-grade writing.
• Creating a solid lead for every piece.

Drafting Better Contracts
1:30 – 4:30 p.m.
For transactional lawyers in particular, but also interested litigators, Professor Garner offers a one-day seminar devoted entirely to drafting contracts and other transactional documents (including settlement agreements). This seminar will help even the most experienced drafters improve their contracts and other legal instruments — both stylistically and substantively. Highlights of the course include:
• How to avoid the most commonly litigated ambiguities.
• How to structure complex contractual provisions to make them more readable.

• Achieving a lucid train of thought.
• Concluding with power.
• Budgeting your time as a writer.
To practice what they’re learning, participants will work on several short but challenging exercises throughout the day. Because one of these exercises involves producing a detailed outline for a writing project, it’s a good idea for participants to arrive at the seminar with a project in mind — preferably something they’ve begun researching but haven’t yet written.

• How the canons of construction affect the meaning of certain types of sentences.
• Why it’s important to edit inherited forms — even recommended ones — for clarity and accuracy.
• When to use shall, when to use must, and when to use will — words that frequently bring grief to drafters.
• How to revise a contract with a proven step-by-step method.
Although the main focus is on various types of contracts — such as commercial leases, loan documents, and license agreements — we can, depending on your needs, shift the focus to other areas, such as legislative drafting or securities-disclosure documents.
Three Ways to Register!

1. Mail this registration with payment or credit card information to:
   KBA Annual Meeting Registration
   1200 SW Harrison St.
   Topeka, KS 66612-1806
2. Fax registration to KBA at (785) 234-3813.

**Full registration** includes two days of CLE and program materials; optional and sporting event fees are not included. Wichita Bar Show tickets (limit of 2) included.

**Single day registration** includes CLEs and program materials for that day only; optional and sporting event fees are not included. Wichita Bar Show tickets (limit of 2) included with Thursday registration.

Full refunds for registration will only be issued before Friday, June 7.

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**Going Green**

All conference materials (except Bryan Garner sessions) will be available online one week prior to the conference and available on flash drives to all registrants attending the conference. Questions? Call (785) 234-5696.

Name ____________________________
Firm/Company Name _______________________
Address _______________________________________
City State Zip Phone __________________ Fax __________________
KBA Member # Email _______________________

Your name as you’d like it to appear on your name badge:
__________________________________________

Guest(s) name as they’d like it to appear on their name badge:
__________________________________________

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### Event

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**Payment Information**

- Check Enclosed (Payable to Kansas Bar Association)

- Bill to:
  - MasterCard
  - Visa
  - AmEx
  - Discover

Account Number ____________________________
Expiration Date ______________________ CVC ____________
Signature ________________________________

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The KBA sleeping room block has been reserved at:

**Hyatt Regency Hotel**

400 W. Waterman • Wichita, Kan.

Please mention you are with the Kansas Bar Association when making your reservations. Price of rooms (if reserved by Saturday, May 11): $125 single/double occupancy, excluding state and local taxes.

**Room reservations:**

Call (888) 421-1442

All program events will be held (unless otherwise noted) at:

**Hyatt Regency Hotel**

400 W. Waterman • Wichita, Kan.
filed. At least two of the three must have experience in valuing real estate. While it is not mandatory to do so, the requirement can be satisfied by selecting appraisers licensed by either the Kansas Real Estate Commission or the Kansas Real Estate Appraisal Board.

When considering who to appoint as appraisers, the judge may entertain suggestions from the condemner and landowner but, as the appraisers are officers of the court, the goal is to appoint individuals not allied with any of the parties. K.S.A. 2012 Supp. 26-505 sets forth the instructions to the appraisers but the court may also consider suggested instructions from the parties. Ex parte communications are not allowed and any materials provided by a party to the appraisers must be shared with the other parties.

Examination of the property and public hearing

The appraisers examine the property usually in the presence of the condemner, land owner, and any other party named in the petition, as well as the parties’ attorneys. Notice of the public hearing is published in a newspaper of general circulation and mailed to the parties at least fourteen days prior to the hearing. The notice of hearing is sufficient if in substantial compliance with the Kansas Judicial Council form.

The hearing is informal with all of the parties and/or their attorneys attempting to convince the appraisers that the value of the property being taken and the damages resulting are either minimal (condemner) or staggeringly great (landowner). A record is not required. Witnesses are not sworn in and the hearing can be continued, if necessary. Depending upon the predilections of the panel, the appraisers may adjourn the hearing to another time and place, or prepare their report and file it with the clerk of the district court on the day of the hearing. If they cannot complete their work by the court’s deadline, the appraisers may request an extension.

The appraisers’ award

The appraisers’ report controls the extent of the property interest taken. For example, if the report does not address mineral rights, title to such rights does not pass to the condemner. Once the appraisers file their report, they notify the condemner who then notifies the landowner and the other interested parties. The filing date is important because it triggers the 30-day time period for the parties to appeal the award and for the condemner to pay the award to the clerk of the district court.

Abandoning the condemnation

Should the condemner abandon the condemnation after the petition is filed, it faces the possibility of paying the landowner or interested parties’ any “reasonable expenses” they incurred in defending the action, including attorney’s fees.

The point at which the condemner ceases its efforts determines whether the latter has to pay defense costs. If the condemner fails to pay the award within the 30-day period after the appraisers’ report is filed, the condemnation is deemed abandoned and the condemner is obligated to pay defense costs. However, if the condemner dismisses the condemnation proceeding prior to the appointment of appraisers or prior to the filing of the appraisers’ report, the landowner and interested parties defending the action are not entitled to reimbursement.

Once the condemner pays the award, the condemner cannot dismiss the action without the consent of the parties who are entitled to all or part of the award.

Distributing the award

Notwithstanding the landowner’s right to appeal the amount of the award, the landowner may withdraw the proceeds immediately. Within 14 days after the condemner pays the award into the court, the clerk of the district court notifies the parties of interest. The parties may withdraw the amount paid to the clerk as their interests are determined by the appraisers’ report. Generally, the landowner or various parties in interest will file a motion seeking final distribution of the award. Disputes among the interest holders are decided by the district court, with appeals to the Kansas Supreme Court.

In disputes between landowners and lessees, lease provisions addressing condemnation and division of awards will control distribution. If the lease is silent, the court’s overriding consideration will be awarding “equitable and just compensation.” Such compensation can include the rent a tenant was in the habit of paying for a space larger than that occupied before the condemnation.

In a 2013 appellate court decision addressing a claim for compensation for lost advertising income derived from a billboard located on condemned property, the Kansas Supreme Court reiterated that when the property consists of both a fee interest and a leasehold, the Act requires the determination of the whole interest without consideration of the various interest holders. After that determination is made, the court then determines the value of the individual interests and apportions the award.

Finally, in another recent case, the Kansas Supreme Court opined that only parties in interest are entitled to a share of the award. In Miller v. FW Commercial Properties LLC, the attorney representing an adverse possessor sought to recover attorney’s fees for his efforts in securing an increase in the award which eventually inured to the benefit of the landowner. The adverse possessor filed a motion requesting that the award be distributed first to their attorney based on the contingency fee contract and the remainder to them.

Though the district court knew that the adverse possessor had lost the quiet title action, the court awarded attorney fees to their attorney and the remainder of the award to the landowner. The Kansas Supreme Court reversed on the basis that the adverse possessors and their attorney were not parties in interest to the condemnation. Therefore, the district court lacked jurisdiction to distribute a portion of the award to anyone but the landowner or other party in interest.

Appealing the appraisers’ award

The condemner, landowner, tenant, lienholder or any other party with an interest in the property can appeal the
sufficiency of the appraisers’ award within 30 days after the award is filed with the court. The 30-day period is jurisdictional and cannot be extended by the court. Once an appeal is filed, it serves as a cross-appeal for the rest of the interested parties, with any decision binding on all, subject to appeal to the Kansas Supreme Court. The appeal cannot be dismissed over the objection of any party with an interest in the property.

The appeal is perfected upon filing of the notice. The appealing party is responsible for mailing copies of the notice of appeal to all parties affected by the appeal within seven days of filing. Filing the appeal timely is jurisdictional; the mailing of notice is not.

The appeal is docketed as a new action, with the appropriate docket fee. The proceeding is subject to the Rules of Civil Procedure unless a provision conflicts with the Eminent Domain Procedure Act in which case the latter applies.

The party bringing the appeal is denominated the plaintiff; the other parties are defendants. Neither side bears the burden of proof as each party “has equal duty and responsibility to supply the evidence required by statute.” The action can be tried by a jury or a master pursuant to K.S.A. 60-253. The only issue is the compensation for the “taking.”

If the compensation awarded on appeal exceeds the original award amount, judgment is entered against the condemner for the deficiency, with interest. If compensation is less than the original award, the landowner is liable for the deficiency, with interest. Additionally, if it was the condemner that appealed and lost, the court may allow attorney fees for the landowner’s attorney.

Additur and remittitur are not allowed, so if the jury award is not within the parameters of K.S.A. 26-513, the trial court must grant a new trial.

**Determining compensation/fair market value**

Landowners are entitled to compensation based on the actual rights acquired by the condemner as reflected in the petition and the appraisers’ report – not on the intended use by the condemner. In other words, a condemner cannot attempt to minimize the value of the property by claiming a less valuable intended use of the property.

A landowner is entitled to have the highest and best use of the property considered. If the entire property is taken, just compensation is the fair market value at the time of the taking. Compensation for partial takings is the difference between the fair market value of the entire property or interest immediately before the taking and the value of that portion of the tract or interest remaining after the taking. “Fair market value” is the amount a well-informed buyer would pay and a well-informed seller would accept for property in an open and competitive market, assuming no compulsion. Fair market value is determined by one or a combination of any of the following methods: (1) comparable sales; (2) reproduction cost of the property at the time of taking, less depreciation; or (3) capitalization of net income from the property.

In accordance with the “unit rule,” which appraises the total value of the property without placing values on separate items, K.S.A. 26-513 establishes a laundry list of relevant factors to be weighed. As valuation is largely subjective, trial courts have considerable latitude in admitting or rejecting evidence. Damages that are speculative, conjectural, or remote are not considered.

Appellate court decisions addressing compensation are grist for another journal article. However, some of the salient holdings include:

1. A landowner can testify to the value of his or her property regardless of the owner’s knowledge.
2. Market value can be affected by psychological factors (e.g., fear of high voltage power lines).
3. Rental value is acceptable for determining fair market value of temporary easements.
4. Previous sales, recent in time, are admissible to show fair market value.
5. Valuation of property for tax purposes is generally not admissible. However, statements made by the owner as to the property’s value in tax assessment appeals are admissible if inconsistent with testimony in the proceeding.
6. Enhancement or depressing of value based on anticipated improvements is excluded in determining fair market value.
7. Loss of direct access from the property to an abutting public road is compensable; changes in traffic flow are not.
8. Lost profits are generally too speculative in determining value.117
9. Gross income from a business is not admissible to show value; rental income is admissible.118
10. Notwithstanding the “unit rule,” the value of a natural asset (e.g., gas well) may be admissible if it has an effect on the property’s value.119
11. Evidence of contamination to property is admissible.120
12. Landowners and/or lessees are not entitled to recover the cost of removing personal property from the premises.121
13. Leasehold interests are not valued separately. Such interests are addressed when the award is divided.122
14. The doctrine of assemblage applies when the highest and best use of the condemned property involves its integrated use with another property that may or may not be owned by the property owner.123 Where the evidence supports a reasonable probability that the properties can be joined, evidence of use of the condemned property as an economic unit with other properties is admissible to show the condemned property’s highest and best use.124

Relocation

If the condemnation results in the displacement of individuals, the state or political subdivision must make relocation payments.125 The payments include moving expenses, loss of personal property as a result of moving or discontinuing a business, expenses in searching for a replacement business, and expenses in reestablishing a business.126 Replacement housing payments for homeowners and tenants are also required.127

If federal funding is involved, there are additional reimbursement expenses to property owners as well as requirements imposed by the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.128

Regardless of the source of the funding, displaced persons can challenge the amount of relocation payments to a hearing examiner appointed by the state or the political subdivision, with an appeal to the district court.129

Conclusion

Attorneys representing condemning authorities and property owners serve their clients well when condemnation is avoided. While the eminent domain process is formulaic, issues involving value of the property and whether the “taking” is truly for a “public purpose” can involve considerable expense on both sides. Unfortunately, property owners generally do not contact an attorney until negotiations to acquire the property have failed and the condemnation is in full swing. Nevertheless, a practitioner willing to become familiar with the Act can be assured that ED is nothing to fear.

About the Author

Mary Feiglzy is the deputy city attorney for the City of Topeka. In that capacity, she advises the planning, public works, and finance departments. Prior to joining the city legal department, she was the deputy of the Legal Opinions & Government Counsel division of the Kansas Attorney General.

ENDNOTES

2. K.S.A. 26-501 et seq.
4. Id.
96. K.S.A. 26-509.
104. K.S.A. 26-513.
**Supreme Court**

**ATTORNEY DISCIPLINE**

**ONE-YEAR SUSPENSION IN RE SCOTT C. STOCKWELL ORIGINAL PROCEEDING IN DISCIPLINE NO. 108,929 – MARCH 1, 2013**

**FACTS:** This is an original proceeding in discipline filed by the office of the disciplinary administrator against the respondent, Scott C. Stockwell, of Lawrence, an attorney admitted to the practice of law in Kansas in 1984. Stockwell's ethical complaint involved his conduct in an estate case and ex parte communications with the court.

**HEARING PANEL:** A hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on September 18, 2012, where the respondent was personally present and was represented by counsel. The hearing panel determined that respondent violated KRPC 3.3(a)(1) (2012 Kan. Ct. R. Annot. 582) (counsel toward the tribunal), 3.5(c)(2) (2012 Kan. Ct. R. Annot. 595) (communication with a judge without delivering copy in writing to opposing counsel), and 3.5(c)(3) (communication with a judge without notifying opposing counsel). The hearing panel unanimously recommended that the respondent be suspended from the practice of law for a period of one year.

**DISCIPLINARY ADMINISTRATOR:** The disciplinary administrator recommended that the respondent's license be suspended for a period of three years. However, the disciplinary administrator also recommended that the imposition of the suspension be stayed and that the respondent be placed on probation for a period of three years, subject to the terms outlined in the proposed probation plan.

**HELD:** Court agreed with the recommendation of the hearing panel and the disciplinary administrator that probation is not appropriate in this case where the respondent failed to comply with Supreme Court Rule 211(g)(2). Moreover, Court stated that it is generally reluctant to grant probation when the misconduct involves fraud or dishonesty because supervision, even the most diligent, often cannot effectively guard against dishonest acts. Court suspended respondent’s license to practice law in Kansas for one year.

**CIVIL**

**DUI AND INDIAN NATION JURISDICTION RODEWALD V. KANSAS DEPARTMENT OF REVENUE JACKSON DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS NO. 105,098 – MARCH 22, 2013**

**FACTS:** Rodewald appeals from the district court’s summary judgment in favor of the Kansas Department of Revenue (KDR), upholding the suspension of his Kansas driver’s license. The basis for the suspension was K.S.A. 8-1567a, which prohibits any person less than 21 years of age from operating a vehicle in this state with a breath or blood alcohol content (BAC) of 0.02 or greater and which provides for a driver’s license suspension if the test results are greater than 0.02, but less than 0.08. Rodewald contends that because he is an enrolled member of the Prairie Band Pottawatomie Nation and was operating a vehicle on the reservation when stopped by a tribal officer, the tribal court had exclusive jurisdiction over any civil matter arising from the incident, and the KDR acted outside the scope of its authority.

**ISSUES:** (1) DUI and (2) Indian nation jurisdiction

**HELD:** Court held that to employ a harmonious and consistent construction of the entire implied consent act, one must interpret the phrases “within this state” and “in this state” to mean within the jurisdiction of a Kansas law enforcement officer. That definition would not include the roadways—either public or private—within the Nation’s reservation over which its tribal police have assumed jurisdiction to enforce tribal law. Court held that the KDR did not have statutory authority to sanction Rodewald for violating K.S.A. 8-1567a, and its suspension of his driver’s license must be vacated.

**STATUTES:** K.S.A. 8-252, -1001, -1002, -1015, -1219, -1566, -1568, -1567a, -2-142; K.S.A. 20-3018(c); and K.S.A. 40-277

**HABEAS CORPUS FISCHER V. STATE HAMILTON DISTRICT COURT – REVERSED AND REMANDED COURT OF APPEALS – REVERSED NO. 100,248 - MARCH 1, 2013**

**FACTS:** Fischer convicted of attempted first-degree murder, aggravated kidnapping, attempted rape, and criminal possession of a firearm. After convictions affirmed on appeal, Fischer filed a post-conviction motion claiming ineffective assistance of trial counsel. District court scheduled evidentiary hearing and appointed counsel. But for Fischer who appeared by telephone, all other witnesses and counsel were present in court. During the hearing, Fischer complained he could not hear witness testimony and counsel argument, and objected to not being physically present. Fischer appealed district court’s denial of the post-conviction motion. Court of Appeals reversed in split opinion, holding Fischer’s physical presence was required and district court had no discretion to order otherwise, and ordered Fischer to be transported for a new proceeding.

**ISSUE:** Telephonic participation in K.S.A. 60-1507 evidentiary hearing
HELD: History of K.S.A. 60-1507 and Supreme Court Rule 183(b) is discussed, and recent case law is reviewed. Court of Appeals is reversed. Here, further review by the district court is required because it did not adequately support its decision to have Fischer participate by telephone, and did not appropriately address whether Fischer's complaints about being unable to hear portions of the proceedings adversely impacted in a material way the presentation of his arguments. District court's judgment is reversed. Case is remanded to district court for further proceedings to include development of a more comprehensive record as to whether this particular inmate should be transported to courthouse or whether alternative means of his production, such as telephone conference, will be sufficient based on the considerations described by the Kansas Supreme Court.

STATUTES: K.S.A. 2012 Supp. 60-243(a); K.S.A. 20-3018(b); K.S.A. 22-4506; and K.S.A. 60-1507, -1507(b)

MINES AND MINERALS – STATUTES – CONSTITUTIONAL LAW
NORTHERN NATURAL GAS CO. V.
ONEOK FIELD SERVICES
PRATT DISTRICT COURT – AFFIRMED IN PART AND REMANDED
NO. 104,279 – MARCH 15, 2013

FACTS: In conversion action, Northern claimed defendants ONEOK and Lumen wrongfully converted natural gas by purchasing it from producers Nash Oil & Gas (Nash) and L.D. Drilling (L.D.) who operated wells on land near Northern's underground natural gas storage field. ONEOK and Lumen filed third-party indemnification claims against Nash and L.D. Nash and L.D. asserted various claims against Northern, ONEOK, and Lumen. District court granted summary judgment in favor of Nash and L.D. on third-party indemnification claims. Determining that K.S.A. 55-1210(c) preserved common-law rule of capture as to injected storage gas that migrates horizontally beyond property adjoining certificated boundaries of gas storage field, district court found Northern lost title to its migrating storage gas, and found Nash and L.D. had title to gas produced by those wells and purchased by ONEOK and Lumen. In response to Northern's K.S.A. 60-260(b) motion for modification, district court limited summary judgment to matters before June 2, 2010, the date Northern expanded the certificated boundaries of its storage field. District court certified summary judgment ruling as a final judgment. Northern appealed claiming error in district court's: (1) interpretation of K.S.A. 55-1210; (2) grant of summary judgment; and (3) denial of K.S.A. 60-260(b) motion for modification because factual findings were fundamentally altered by FERC's June 2, 2010, order. Northern also claimed district court's summary judgment ruling: (4) was an unconstitutional taking; and (5) conflicted with and thus was preempted by Natural Gas Act, 15 U.S.C. § 717 et seq. Appeal transferred to Supreme Court.

ISSUES: (1) Rule of capture and K.S.A. 55-1210, (2) summary judgment claims, (3) motion for modification, (4) unconstitutional taking, and (5) federal pre-emption

HELD: Historical context of statute is discussed. K.S.A. 55-1210(a) and (b) govern ownership rights to previously injected storage gas that remains within designated underground storage area, while K.S.A. 55-1210(c) governs ownership of migrating gas. Section (c) permits injector to maintain title to gas which migrates horizontally to adjoining property or vertically to another stratum if injector can prove by preponderance of evidence under subsections (c)(1) and (2) that the migrating gas originally was injected into injector's underground storage area. However, section (c) preserves rule of capture as to injected gas which migrates horizontally beyond property adjoining the certificated boundaries of a storage field.
field. Here, district court properly dismissed ONEOK's and Lumens' indemnification claims against Nash and LD and properly granted summary judgment in favor of Nash and L.D. regarding alleged conversion occurring before June 2, 2010. Case remanded to district court for any further proceedings necessary to finally resolve this litigation.

District court did not err in granting summary judgment without considering Northern's argument as to whether it intended to abandon its migrating gas. Whether Nash and L.D. caused Northern's storage gas to migrate beyond certificated boundaries was a factual dispute lacking legal force over the controlling issue, thus summary judgment not precluded. No abuse of district court's discretion in refusing to permit Northern to conduct further discovery.

Under circumstances that includes this affirmance of the temporally limited summary judgment ruling with remand to district court to resolve any remaining claims that might be based on matters after June 2, 2010, no abuse of district court's discretion in denying Northern's K.S.A. 20-260(b) motion.

District court's summary judgment ruling did not result in an unconstitutional taking of Northern's property without just compensation.

Northern's federal pre-emption arguments are rejected.


RIGHT OF FIRST REFUSAL AND REAL ESTATE SALE IN A PACKAGE DEAL
WASTE CONNECTIONS OF KANSAS INC. V. RITCHIE CORP.
SEDGWICK DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
COURT OF APPEALS – REVERSED
NO. 101,812 – MARCH 22, 2013

FACTS: Ritchie is the owner of real estate in Sedgwick County that contains a landfill and also a waste transfer station. The first critical event was the sale of the transfer station from Ritchie to BFI in an escrow agreement. Waste Connections (WCK) is the successor in interest to BFI. Ritchie and BFI entered into an escrow agreement for BFI to operate a nonhazardous waste transfer station for 35 years and a right of first refusal for sale of the interest in the escrow agreement. Ritchie entered into an asset purchase agreement with Cornejo for purchase of the landfill and the rights in the escrow agreement. Ritchie wanted a package deal for both the transfer station and landfill. Ritchie and Cornejo agreed on $4.95 million. Ritchie notified WCK about the asset purchase and claimed the offer was $5.5 million. Through negotiations, the parties agreed on a purchase price of $4.95 million for the package deal. Ritchie would argue that Cornejo accepted a $550,000 lower price for the transfer station. In the context of a package deal, Court of Appeals found that WCK, as possessor of the right of first refusal, is denied the benefit of the deal if it is not entitled to the reduced price for the transfer station. Court granted judgment to WCK for $550,000 and reversed for attorney fee issues.

ISSUES: (1) Right of first refusal and (2) real estate sale in a package deal

HELD: Court held the legal rule that should govern this case on remand and future similar cases demands more than the district judge appears to have demanded from a seller in Ritchie's position and more than the Court of Appeals panel appears to have demanded from a right of first refusal holder in Waste Connections' position. Ritchie must have abided by the terms of the Escrow Agreement's right of first refusal in all respects, not just by observing its implied duty of good faith and fair dealing. Behavior short of arbitrary or collusive, even innocent behavior, may have constituted breach. Because Ritchie voluntarily surrendered its unlettered judgment when it signed the Escrow Agreement containing the right of first refusal, it does not necessarily escape liability simply by invoking its business judgment and profit maximization goals. Waste Connections also must have abided fully by the Escrow Agreement; it does not get the benefit of a presumption of Ritchie's breach or bad faith from ambiguous price language in the Asset Purchase Agreement. Such a presumption fails to recognize the legitimate role of a seller's intention to sell in activation and exercise of a right of first refusal. If package deal configuration or the lack of it or some other aspect of a third-party's offer makes it unacceptable to the seller, that does not necessarily mean that the seller breached the right of first refusal by violating the duty of good faith and fair dealing or otherwise. In short, ordinary contract principles govern, and all facts are to be taken into account in determining the correct price for the transfer station.

Court concluded that because genuine issues of material fact remain on Waste Connections' breach of contract action against Ritchie, summary judgment for either party is inappropriate. This case was returned to the district court for further proceedings consistent with the opinion.

STATUTES: K.S.A. 12-519; and K.S.A. 60-1701, -1704, -1705, -1708, -1710, -1713, -1708

TRUSTS – LIMITATIONS OF ACTIONS – TORTS
JEANES V. BANK OF AMERICA
SHAWNEE DISTRICT COURT – AFFIRMED ON SINGLE ISSUE FOR REVIEW
COURT OF APPEALS – AFFIRMED
NO. 97,855 – MARCH 8, 2013

FACTS: Maxine Anton created living trust in 1991 to receive income for life, remainder to fund charitable remainder trusts, with majority of assets to pass to niece and sole heir Janes. Bank of America (Bank) was trustee. Attorney Kunard drafted trust agreement, pursuant to will, and all amendments. Estate valued at $40 million at Anton's death, but estate and inheritance taxes consumed half of the estate. Jeanes as estate administrator filed negligence, breach of fiduciary duty, contract, and trust against Bank, its local president, Bank's parent company, and Kunard based on alleged failure to protect Anton's assets from tax liability upon death, specifically alleging that setting up a family limited partnership would have saved more than $6 million in taxes. District court granted summary judgment to all defendants. Jeanes appealed. Court of Appeals held in part that Jeanes’ claims against Kunard sounded only in tort, and tort claims of legal malpractice did not survive Anton's death. 40 Kan. App. 2d 281 (2008). Jeanes’ petition for review of judgment for Kunard granted.

ISSUE: Survival of legal malpractice claim

HELD: Under facts of this case, cause of action accrued when decedent died because the alleged injury – excessive taxes on the estate – did not arise until after her death. Because the cause of action did not accrue during the lifetime of the decedent, it does not qualify as a survival claim under K.S.A. 60-1801. It is therefore barred.
STATUTE: K.S.A. 60-513(b), -1801

CRIMINAL

STATE V. HINES
SEDGWICK DISTRICT COURT – REVERSED, SENTENCES VACATED, AND REMANDED
COURT OF APPEALS – AFFIRMED
NO. 102,233 – FEBRUARY 15, 2013

FACTS: Hines convicted on plea to attempted second-degree intentional murder and aggravated battery. Charges arose from violent use of force against wife. Pursuant to plea agreement, Hines filed motion for downward dispositional departure sentence. After wife asked for leniency, sentencing court imposed concurrent downward durational departure sentences. State appealed, arguing victim's request for leniency was not legally sufficient for granting durational departure sentence. Court of Appeals reversed the sentence and remanded for resentencing, holding that testimony from victim or victim's family may furnish a substantial and compelling reason for departure, but finding victim's request for leniency in this case did not constitute a substantial and compelling reason for departure because facts established that Hines had acted with intent to kill victim. 44 Kan. App. 2d 373 (2010). Hines' petition for review granted.

ISSUE: Departure sentence – victim request for leniency

HELD: If a victim's request for leniency is substantial (i.e., the reason for the request is real, not imagined, and of substance, not ephemeral) and compelling (i.e., the reason for the request is one which forces the sentencing court, based on the facts of the case, to abandon the status quo and to venture beyond the sentence that it would ordinarily impose), then the request for leniency can, by itself, justify a sentencing court's decision to impose a departure sentence. Under facts of this case, wife's request for leniency would certainly not force a reasonable person to abandon status quo and impose sentences less than prescribed by sentencing guidelines. Sentencing court abused its discretion when it decided to impose durational departure sentence based solely on wife's request for leniency. Judgment of Court of Appeals is affirmed. District court is reversed, and case is remanded for resentencing.

STATUTES: K.S.A. 2012 Supp. 21-6820; and K.S.A. 21-4703(n), -4704(a), -4716(a), -4716(c), -4716(d), -4718(a)(1), -4718(a)(4)

STATE V. LONGSTAFF
SHAWNEE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 100,112 – MARCH 8, 2013

FACTS: For offenses involving his granddaughters, Longstaff convicted of rape of child under 14 and aggravated indecent liberties with a child. During trial district court granted state's motion for admission under K.S.A. 60-455 of Longstaff's previous conviction for attempted aggravated incest of daughter. District court determined the evidence was "strongly relevant" to show intent, plan, knowledge, and absence of mistake or accident, but conceded the sufficiently similar" evidence did not satisfy the "strikingly similar" legal standard in State v. Prine, 287 Kan. 713 (2009). In his appeal, Longstaff in part challenged admission of that evidence, and admission of his videotaped interview in which detectives claimed they could not help him unless he told them the truth. In unpublished opinion, Court of Appeals affirmed the conviction, finding the K.S.A. 60-455 evidence was admissible to show plan, and testimony's probative value outweighed any prejudice. Videotape issue not reached because Longstaff failed to include videotape in record on appeal. Petition for review filed on those two claims.

ISSUES: (1) K.S.A. 60-455 evidence and (2) videotaped interview

HELD: District court based its decision on incorrect legal standard. Under facts in case, similarities between the crimes do not rise to level of being so strikingly similar in pattern, or so distinct in
method of operation, as to be a signature as required under Prine. District court abused its discretion in admitting evidence of Longstaff’s previous conviction for attempted aggravated incest, but error was harmless in light of physical evidence presented at trial, Longstaff’s own admission, victims’ consistent testimony, and district court’s limiting jury instruction.

Court cannot reach merits of Longstaff’s argument on underlying issue of videotape’s admissibility because petition for review failed to challenge Court of Appeals’ dispositive procedural holding on this issue. Longstaff’s motion to Supreme Court to add videotape to record on appeal is moot.

STATUTES: K.S.A. 20-3018(b); and K.S.A. 60-261, -448, -455

STATE V. NEWCOMB
RICE DISTRICT COURT – AFFIRMED
NO. 104,900 – MARCH 22, 2013

FACTS: Newcomb convicted of rape and aggravated indecent liberties with third-grade stepdaughter. On appeal he claimed rape and aggravated indecent liberties were both alternative means crimes, and state’s proof of at least one means on which jury was instructed for each offense was insufficient. He also claimed his 25 life sentences were disproportional under § 9 of Bill of Rights of Kansas Constitution.

ISSUES: (1) Alternative means crimes and (2) constitutionality of hard 25 life sentences

HELD: As decided in State v. Britt, 295 Kan. 2028 (2012), Newcomb not entitled to reversal of rape or aggravated indecent liberties conviction because statutes prohibiting those offenses do not create an alternative means crime.

Applying State v. Freeman, 223 Kan. 362 (1978), and State v. Seward (decided this date), Newcomb’s 25 life sentences are not disproportional under § 9 of Kansas Constitution Bill of Rights.

STATE V. SWINDLER
SUMNER DISTRICT COURT – REVERSED
AND REMANDED
NO. 104,580 – FEBRUARY 15, 2013

FACTS: Swindler convicted of rape. On appeal he claimed: (1) rape is an alternative means crime and state failed to present sufficient evidence to support each of the means upon which jury was instructed, and (2) district court erred in denying motion to suppress incriminating statements and a drawing Swindler provided law enforcement officers during custodial interrogation in which his invocation of right to remain silent was not honored.

ISSUES: (1) Alternative means and (2) motion to suppress


District court judge’s refusal to suppress the confessions and drawing was error. Coercive effect of investigator’s failure to honor their promise that Swindler could terminate an interview at any time compelled Swindler’s confessions and inculpatory drawing in violation of Fifth Amendment. Error was not harmless under facts of this case. Reversed and remanded.


STATE V. Seward
SALINE DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 104,098 – MARCH 22, 2013

FACTS: Seward convicted on guilty plea to rape and aggravated criminal sodomy for acts committed against stepdaughter. He was sentenced to concurrent hard 25 life sentences under Jessica’s Law, and to lifetime post-release supervision. On appeal he argued his 25 life sentences were disproportionate and violative of Eighth Amendment and Kansas Bill of Rights.

ISSUES: (1) Case specific constitutional challenge to hard 25 life sentence and (2) lifetime post-release supervision


District court judge erred in sentencing Seward to lifetime post-release supervision rather than making him subject only to parole. Lifetime post-release supervision portion of Seward’s sentence is vacated.


STATE V. TAGUE
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 104,176 – MARCH 22, 2013

FACTS: Tague convicted of felony murder and aggravated robbery. On appeal she claimed the trial judge erred in: (1) excluding hearsay evidence relating to eyewitnesses unable to identify Tague in a photographic lineup; (2) admitting Tague’s out-of-court incriminating statements made to her best friend; (3) admitting certain autopsy photographs at trial; (4) allowing defense counsel to cross-examine Tague’s best friend, a witness for the state, regarding that
person’s involvement in drug sales; and (5) giving an aiding and abetting instruction to the jury. In a letter of additional authority under Supreme Court Rule 6.09(b), Tague claimed trial judge erred in failing to give lesser-included offense instructions.

** ISSUES: ** (1) Hearsay statements from unavailable eyewitnesses, (2) out-of-court statements, (3) autopsy photographs, (4) cross-examination regarding witness’s drug sales, (5) aiding and abetting instructions, and (6) lesser-included offense instruction

** HELD:** Question of whether there was a valid exception for admission of hearsay statements of unavailable eyewitnesses was not preserved for appeal.

Merits of Tague’s argument that trial judge erred in admitting evidence of out-of-court statements not reached because Tague failed to support argument with pertinent authority.

No abuse of trial court’s discretion in admitting autopsy photographs. Coroner used each photograph to support different aspects of his testimony, and photographs were not overly repetitious or more gruesome than necessary.

Under facts in case, no merit in Tague’s argument that aiding and abetting instruction confused the jury. Also, no clear error in giving the instruction where Tague’s second argument, that the instruction failed to instruct jury that victim’s death had to be a foreseeable result of the robbery before she could be convicted of felony murder, was rejected in *State v. Gleason*, 277 Kan. 624 (2004).

Lesser-included offense issue, improperly raised for first time in Rule 6.09(b) letter, is not addressed.

** STATUTES:** K.S.A. 2012 Supp. 22-3601(b)(3); K.S.A. 21-3401(b), -3427; K.S.A. 22-3414(3); K.S.A. 60-404; and K.S.A. 2007 Supp. 60-460(j)

** STATE V. TROTTER**
** WYANDOTTE DISTRICT COURT – AFFIRMED**
** NO. 106,192 – MARCH 8, 2013**

FACTS: Trotter’s conviction for premeditated first-degree murder, capital murder, and other charges affirmed on direct appeal. *State v. Trotter*, 280 Kan. 800 (2006). In K.S.A. 60-1507 motion, the premeditated first-degree murder conviction was reversed as lesser-included offense of capital murder. *Trotter v. State*, 288 Kan. 112 (2009). Trotter then filed K.S.A. 22-3504 motion to correct an illegal sentence, claiming the criminal information was defective because it named only one victim, thus district court lacked jurisdiction to impose capital murder sentence. District court summarily denied the motion. Trotter appealed.

** ISSUES:** (1) Motion to correct illegal sentence, K.S.A. 22-3504 and (2) motion under K.S.A. 60-1507

** HELD:** *State v. Sims*, 294 Kan. 821 (2012), and similar cases are directly on point and controlling. Defective claims not properly raised in a motion to correct an illegal sentence under K.S.A. 22-3504. *State v. Davis*, 281 Kan. 169 (2006), is distinguished because Trotter’s case did not involve district court’s failure to suspend criminal proceeding for competency determination.

Appellate counsel’s alternative request to treat motion as a K.S.A. 60-1507 motion is rejected because it would be a successive K.S.A. 60-1507 motion not justified by a showing of exceptional circumstances, and because it would be outside the one-year limitation period with no showing that extension of that deadline is necessary to prevent manifest injustice.

** STATUTES:** K.S.A. 2012 Supp. 22-3208(3), -3208(4), -3208(5), -3601(b)(3); K.S.A. 22-3302(1), -3504; and K.S.A. 60-1507, -1507(c), -1507(f), -1507(f)(1)

** STATE V. TRUJILLO**
** JOHNSON DISTRICT COURT – AFFIRMED**
** COURT OF APPEALS – AFFIRMED**
** NO. 102,840 – FEBRUARY 15, 2013**

FACTS: Trujillo arrested on charges arising from incident at former girlfriend’s house, and from cocaine discovered during jail intake search. While case was pending Trujillo was ordered to have no contact with victim, but Trujillo wrote her letters and called her three times from jail. Jury convicted Trujillo of possession of cocaine and violation of protective order. On appeal, Trujillo claimed jury should have been given unanimity instruction, and claimed cocaine should have been suppressed because police lacked probable cause to arrest him. In unpublished opinion, Court of Appeals affirmed the conviction, and found probable cause issue had not been preserved for review. Petition for review granted.

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- Workers Compensation

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ISSUES: (1) Unanimity instruction and (2) probable cause
HELD: While Trujillo’s calls and letters were factually separate and distinct acts, and parties conceded error in not giving unanimity instruction, no clear error under facts in this case where Trujillo presented unified defense that he did not knowingly violate protective order because he did not know he had been ordered to have no contact. Jury thus had to either unanimously find he knowingly contacted the victim in violation of the protective order, or it would have acquitted on that charge.

Preservation issue not included in petition for review, and is not considered.

STATUTE: K.S.A. 22-3414(3)

STATE V. ULTRERAS
FORD DISTRICT COURT – AFFIRMED
NO. 103,527 – MARCH 1, 2013

FACTS: Ultreras was involved in fight at the bar owned by his father when they removed several patrons from the bar. Ultreras was convicted of three counts of aggravated battery. Ultreras argues the district court erred in requiring him to prove by a preponderance of the evidence that the use of force was lawful. He also raises an alternative means argument concerning the aggravated battery statute, an error in failing to give a unanimity instruction, and improper limitations on cross-examination of witnesses.

ISSUES: (1) Self-defense, (2) alternative means, (3) unanimity instruction, and (4) cross-examination
HELD: Court held that the standard of proof for whether a defendant is entitled to immunity from criminal prosecution for justified use of force is probable cause. Court further held that the state bears the burden of establishing proof that the force was not justified as part of the probable cause determination required under K.S.A. 21-3219(b) and (c).

Court held that if the trial court erred in any aspect of the immunity defense, it was harmless. Because the evidence presented by the state meets the probable cause standard, Ultreras was not entitled to immunity from prosecution afforded by K.S.A. 21-3219, and any error in the imposition of an erroneous standard and burden of proof or in the district court’s application of a justified use-of-force defense, including potentially failing to recognize that under K.S.A. 21-3218 Ultreras did not have a duty to retreat, was harmless. Court held the super-sufficiency requirement does not apply to the alternatives for aggravated battery stated in K.S.A. 21-3414(a)(2)(A) and Ultreras’ argument that the state failed to prove sufficient evidence of a violation of that provision fails. Ultreras conceded that the victim in question suffered great bodily harm. Court rejected Ultreras’ super-sufficiency argument regarding K.S.A. 21-3414(a)(2)(B) because there was evidence that Ultreras used the baton in a manner calculated or likely to produce great bodily harm, disfigurement, or death. Court rejected Ultreras’ argument that he was entitled to a unanimity instruction. The acts inside and outside the bar were not separate. Court also found no abuse of discretion in the trial court’s decision to not allow the defense to cross-examine the victims concerning their failure to appear as required by their subpoenas. Ultreras argued he should have been able to use the evidence to challenge their credibility. Court concluded any damage from denying cross-examination was minimal because the three victims provided consistent testimony about what occurred that night and defense counsel was allowed to cross-examine the victims fully on all other areas of their testimony.

STATUTES: K.S.A. 20-3018(c); K.S.A. 21-3211, -3212, -3213, -3218, -3219, -3414(a), -5210, -5202; K.S.A. 60-261, -401, -420, -422, -1501, -2105; and K.S.A. 22-2302
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FACTS: Wright convicted of rape. Court of Appeals affirmed in unpublished opinion, finding Wright’s alternative means argument – that there was insufficient evidence to convict her under “force or fear” means of committing rape – was defeated by sufficient evidence to convict under the “unconscious or physically powerless” means of committing rape. On petition for review, Wright contended that that even though one alternative means was sufficiently proved, her conviction should be reversed because another alternative means was not sufficiently proved. Kansas Supreme Court affirmed. 290 Kan. 194 (2010). Wright filed K.S.A. 60-1507 motion claiming trial counsel was ineffective in erroneously arguing for general verdict form instead of special verdict form which would have required jury to identify specific means of committing rape. Wright also claimed ineffective assistance of appellate counsel in failing to argue in direct appeal that sexual intercourse with a person who does not consent under circumstances when victim is overcome by force or fear constitutes alternative means of committing rape. District court conducted an evidentiary hearing and denied relief on both claims. Wright appealed.

ISSUES: (1) Ineffective assistance of trial counsel and (2) ineffective assistance of appellate counsel

HELD: Trial counsel's request for a general verdict form did not fall below an objective standard of reasonable representation. District court's denial of claim of ineffective assistance of trial counsel is affirmed.

District court's finding that appellate counsel's performance did not fall below an objective standard of reasonableness is supported by substantial competent evidence. Even if counsel's performance was somehow deficient. Wright failed to show prejudice. Based on analysis in State v. Brown, 295 Kan. 181 (2012), and progeny, court concludes as matter of law that sexual intercourse with a person who does not consent under circumstances when victim is overcome by force or fear, in violation of K.S.A. 21-3502(a)(1)(A), is a single unified means of committing rape. District court did not err in denying claim of ineffective assistance of appellate counsel.


NEGLIGENCE, STATUTE OF LIMITATIONS, AND JURY INSTRUCTIONS

JOHNSTON DISTRICT COURT – AFFIRMED

FACTS: Jason Michaelis, sued the defendants, Gerald Farrell and Peggy Farrell, for an electrical shock he suffered while at the defendant's property. Michaelis was electrocuted in a lake that had been electrified by the Farrell's boat lift on the dock. A jury allowed recovery on plaintiff's claim. The jury determined that Michaelis did not reasonably ascertain that he had sustained substantial injury until five years after receiving the electrical shock, which allowed him to overcome the applicable two-year statute of limitations hurdle. On appeal, the Farrells contend that the trial court erred in denying their posttrial motions, (1) arguing that Michaelis was barred from bringing his action under the applicable two-year statute of limitations, and (2) that jury instruction 8 misstated the law regarding this issue.

ISSUES: (1) negligence, (2) statute of limitations, and (3) jury instructions

HELD: Court held the trial court did not err in denying the Farrell's motion for directed verdict on the statute of limitations question. Court held that contrary to the Farrells' assertions, when viewing the evidence in a light favorable to Michaelis, the evidence indicates that no actionable injury existed on July 2, 2005. Michaelis did not believe he suffered any injury at that time and, by all appearances, he had no physical or acute injury immediately after the electric shock. At some point Michaelis knew he was having difficulties with memory, concentration, anxiety, and depression, and
he suspected his problems were related to the electric shock. Moreover, Michaelis investigated the symptoms that he was experiencing by seeking medical help. Dr. Wurster initially dismissed any connection between Michaelis' symptoms and his electric shock. Arguably, Michaelis did not know that his injury was associated with the electrical shock until late 2009 or early 2010 when Dr. Isaacson told Michaelis that his test results and problems were consistent with electrical injuries to the brain. The statute of limitations commenced running at that time. Accordingly, Michaelis' claims would have to be brought no later than late 2011 or early 2012 for his claims not to be barred by the two-year statute of limitations. Because Michaelis filed his cause of action on July 2, 2010, the applicable two-year statute of limitations did not bar his claims. Court also rejected the Farrell's argument that the jury instruction on "substantial injury" was incorrect. Court found the jury instruction was a correct statement of the law and the jury was not misled.

STATUTE: K.S.A. 60-258a, -250, -251, -513

**REAL ESTATE, BREACH OF CONTRACT, FRAUD – NEGLIGENT MISREPRESENTATION, CIVIL CONSPIRACY, AND RESCSSION KINCAID V. DESS ET AL. JOHNSON DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED NO. 107,970 – MARCH 8, 2013**

FACTS: Matt Kincaid and Julie Kincaid purchased a house from Sirva Relocation LLC (Sirva) for approximately $1,040,000. The Desses, along with their realtor Tricia Wolfe, conspired to defraud the Kincaids by omitting known defects in the house in order to finalize the sale of the house. Court found that anyone who sells a house has a financial interest in selling the property for as much as possible, so that is not evidence of a conspiracy and the trial court properly granted summary judgment to the Desses on the Kincaids' civil conspiracy claim. Last, Court found the district court properly granted summary judgment in favor of the Desses on the Kincaids' recission claim. Court held the Kincaids failed to give the Desses prompt notice of their intent to rescind the contract.

STATUTES: No statutes cited.

**REAL ESTATE, MISTAKE, SUBSTANTIAL PERFORMANCE, ACCELERATION, AND IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING FIRST NATIONAL BANK OF OMAHA V. CENTENNIAL PARK LLC ET AL. JOHNSON DISTRICT COURT – AFFIRMED NO. 108,315 – MARCH 22, 2013**

FACTS: First National Bank of Omaha (FNB) entered into a loan agreement for nearly $10 million with Centennial Park for commercial real estate development. The defendants defaulted on the loan. The district court granted summary judgment in favor of FNB for the principal amount plus interest. The defendants raised four arguments on appeal: (1) that equitable principles should have prevented FNB from accelerating the defendants' loan debt obligation even though FNB was entitled to accelerate the loan under the terms of the promissory note; (2) that the trial court erred when it found that the defendants had not substantially performed under the terms of the loan documents and therefore had committed a material breach of the contract; (3) that FNB waived its right to accelerate the loan debt when it accepted the defendants' late payment of $9,349 by depositing the check in its account; and (4) that FNB breached the implied covenant of good faith and fair dealing when it sent the defendants a billing statement requiring a principal payment of $1,350,000.

ISSUES: (1) Real estate, (2) mistake, (3) substantial performance, (4) acceleration, and (5) implied covenant of good faith and fair dealing

HELD: First, Court held the equitable principle that the defendants rely on – mistake – does not apply here because there was no mistake made. Second, the trial court correctly held that the defendants had not substantially performed under the terms of the note and the loan documents, and, therefore, had materially breached the contract. Third, FNB did not waive its right to accelerate the loan debt when it accepted the defendants' late payment because the parties' note contained multiple anti-waiver provisions. Finally, FNB did not breach the implied covenant of good faith and fair dealing when it sent the defendants a billing statement requiring a principal payment of $1,350,000. Even though the trial court determined that the defendants did not owe a principal payment of $1,350,000 on April 10, 2010, the trial court found that Centennial Park owed an unpaid balance of $176,880.57 on that date.

STATUTES: No statutes cited.

**REAL ESTATE FORECLOSURE BANK OF AMERICA V. INDA JOHNSON DISTRICT COURT – AFFIRMED NO. 107,999 – MARCH 8, 2013**

FACTS: Bank of America, the mortgage note holder, brought an action to foreclose on Dennis Inda's mortgage after he defaulted on his loan. The trial court granted Bank of America's motion for summary judgment, finding that Bank of America was the holder of the note (Note) and the mortgage (Mortgage) and that Inda had defaulted on the loan.

ISSUE: Real estate foreclosure

HELD: Court held it was undisputed that Inda was in default on the note. Court held that the record conclusively established that at
CRIMINAL

STATE V. COOPER

ELLSWORTH DISTRICT COURT – APPEAL SUSTAINED
NO. 107,222 – MARCH 15, 2013

FACTS: Cooper charged with misdemeanor possession of marijuana, based on prescribed medical marijuana found when officer stopped Cooper in Ellsworth County. District court acquitted Cooper on stipulated facts, finding prosecution contravened protections under Privileges or Immunities Clause and impermissibly interfered with constitutional right to interstate travel. Kansas Attorney General appealed for review of question reserved – whether the Privileges or Immunities Clause of the 14th Amendment bars enforcement of Kansas criminal statutes prohibiting possession of marijuana against someone traveling through or staying temporarily in this state even though that individual possesses the marijuana in conformity with another state’s law allowing its use and possession for medical purposes.

ISSUE: Question reserved – Privileges and Immunities Clause

HELD: Based on briefing from State, the narrow answer to the question reserved is no. Kansas prosecution is not barred by Privileges or Immunities Clause. Question reserved does not embrace right of citizen to travel to and become a permanent resident of Kansas, thus no comment on that right or any other constitutional rights or protections conceivably affording a defense to Kansas prosecution of person possessing marijuana legally obtained through another state’s laws permitting its use as medicine.

STATUTES: K.S.A. 2012 Supp. 21-36a06; and K.S.A. 22-3602(b)(3)

STATE V. COTY

ELLIS DISTRICT COURT – APPEAL SUSTAINED
NO. 107,070 – MARCH 15, 2013

FACTS: State charged Coty in Ellis County with credit card fraud. Card was physically located in Ellis County where cardholder resided. Coty was never in Ellis County, and was in Sedgwick County when she made the unlawful charges. Coty filed motion to dismiss for improper venue. State argued cardholder’s lack of consent was element of the crime, and occurred in Ellis County. District court granted Coty’s motion to dismiss, finding Ellis County was not proper venue because no elements of the crime occurred there. State appealed, arguing for adoption of venue rule that permits prosecution where cardholder resides.

ISSUE: Venue – residence of cardholder

HELD: No error in district court’s determination that Ellis County was not the proper venue for state to prosecute Coty for this crime. Criminal use of a financial card in violation of K.S.A. 2012 Supp. 21-5828(a)(1) involves use of a financial card without consent of the cardholder. Here the cardholder, whose consent Coty did not obtain before using the card, resided in Ellis County where Coty had never visited. Under facts of case, state was not entitled to prosecute Coty in Ellis County where cardholder resided. Special venue statutes enacted by other states noted, but state’s arguments should be directed to legislature rather than the courts.

STATUTES: K.S.A. 2012 Supp. 21-5111(a), -5803(a), -5807, -5807(a), -5813(a)(1), -5828(a)(1); and K.S.A. 22-2602, -2603

STATE V. DINNEEN

SALINE DISTRICT COURT – REVERSED AND REMANDED
NO. 106,791 – MARCH 22, 2013

FACTS: Dinneen entered guilty plea to attempted kidnapping, criminal threat, and fleeing and eluding a police officer. District court ordered Dinneen to register under Kansas Offender Registration Act (KORA), finding no use of a weapon in crimes of attempted kidnapping and criminal threat, but use of a deadly weapon in crime of fleeing and eluding. Dinneen appealed the KORA registration finding, arguing his involvement with a weapon prior to or after his driving stopped could not be considered in resolving whether gun was used in the commission of that person felony.

ISSUE: Fleeing and eluding police officer – use of weapon

HELD: No Kansas caselaw directly addresses when the commission of the crime of fleeing and eluding begins and ends, or how a deadly weapon must be used in commission of crime in order to require registration under KORA.

Commission of person felony crime of fleeing and eluding pursuant to K.S.A. 8-1568 begins when driver of vehicle flees or attempts to elude a pursuing police vehicle after being given visual or audible signal to bring vehicle to a stop, and ends when vehicle being driven comes to stop and driver exists the vehicle. Under facts of case, Dinneen did not use a deadly weapon during the commission of that felony. Reversed and remanded with instructions to vacate KORA registration order. State’s fallback argument for KORA registration because Dinneen used firearm in his other felonies is not properly before the court because state did not file cross-appeal from district court’s rejection of that argument.

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