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The Kansas Bar Association is dedicated to advancing the professionalism and legal skills of lawyers, providing services to its members, serving the community through advocacy of public policy issues, encouraging public understanding of the law, and promoting the effective administration of our system of justice.
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Stan Davis, Shook, Hardy & Bacon LLP
Mark Hinderks, Stinson Morrison Hecker LLP
Hon. Steve Leben, Kansas Court of Appeals
Jim Griffin, Husch Blackwell Sanders LLP
Todd LaSala, Stinson Morrison Hecker LLP
Lori Schultz, Shook, Hardy & Bacon LLP
Hon. Melissa Standridge, Kansas Court of Appeals

Questions?
Contact Deana Mead, KBA Associate Executive Director, at dmead@ksbar.org or at (785) 234-5696.

June 27, 2013, 2:30 – 4:10 p.m.
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4525 Oak St.
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Parking: $5 museum non-member parking fee

June 28, 2013, 2:30 – 4:10 p.m.*
Polsky Theatre, JCCC Carlsen Center
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By Nicole Schneider

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Kansas Bar Association, Topeka, Kan.
On May 10, 2013, the chairmen of the House and Senate Judiciary committees generated a “5-4” merit selection proposal for which they requested KBA endorsement. The proposal was to generate a constitutional amendment for appointment of Supreme Court justices and Court of Appeals judges from a nominating commission subject to the following:

- The commission would be comprised of (i) five gubernatorial appointments, each serving at the pleasure of the sitting governor; and (ii) four attorneys, one elected from each Kansas congressional district;
- After completion of an application and interview process, the commission’s recommendations would expand to five names sent to the governor for selection;
- There would be Senate confirmation of the gubernatorial selection.

The legislators indicated that they would attempt to obtain approval in this legislative session if there was KBA endorsement of the proposal. Otherwise, they would not.

On Tuesday, May 14, the KBA’s Board of Governors met via telephone conference to consider the proposal. By a vote of 28-0, the Board unanimously rejected endorsement of the “5-4” proposal to change the Supreme Court merit selection process. The “5-4” proposal was considered to violate the separation of powers by providing the executive branch with too much power over judicial appointments. Having unanimously endorsed the “4-5-6” plan and, when pushed, narrowly endorsed the “4-4-1” plan, the KBA could go no further.

On Wednesday, May 15, Rep. Lance Kinzer introduced three bills to change our judiciary. The first would reduce the mandatory appellate judge retirement age from 75 to 65. That would abrogate recent legislation extending the retirement age to 75. The second would move all appellate courts to a federal appointment model by constitutional amendment. Oddly, that bill would provide appellate judges with lifetime appointments, in direct opposition to Rep. Kinzer’s previously sponsored bill. Finally, Rep. Kinzer sponsored a bill to strip the Supreme Court of jurisdiction in most criminal and civil matters. The bill would reconstitute the Court of Appeals into two seven-judge panels with final appeal responsibility for civil appeals and criminal appeals. That proposal would greatly diminish Supreme Court responsibility while completely altering the manner by which Kansas appeals are processed and reviewed.

Rep. Kinzer’s proposals were introduced in the final days of the legislature, following the KBA’s unanimous determination that it could not endorse a “5-4” merit selection proposal. Are these legitimate proposals truly intended to benefit Kansas? Or are these proposals the result of a representative displeased with the KBA’s position on merit selection?

When next year’s legislature convenes, I hope cooler heads will prevail. Kansans can and should agree upon a merit selection process that (1) receives input from each of the three branches of government, (2) appoints only our best and brightest attorneys to an appellate position, and (3) promises that each practicing attorney has the opportunity (with the right credentials and reputations) to be nominated. I sincerely believe that we can accomplish this goal. The KBA, whose governors unanimously favor merit selection, has generated two very different proposals, the “4-5-6” plan and the “4-4-1” plan. While each diminishes the responsibility of attorneys on the commission, each provides attorneys with a place on the commission while generating meaningful input from all three branches of government.

My year is coming to a close. I am disappointed that the Kansas legislature eliminated merit selection for Court of Appeals appointments, in favor of gubernatorial selection subject to Senate confirmation. Kansas is now one of the few states in our union in which district court judges, Court of Appeals judges, and Supreme Court justices are all selected in a different manner. I expect that my successor, Dennis Depew, will continue the KBA’s work to achieve a fair and reasonable merit selection appointment process to constitutionally protect selection of our appellate judiciary.

My year as the KBA president has indelibly imprinted one lesson in my mind. Our KBA performs an invaluable service to Kansas lawyers, the Kansas legal system, and the Kansas judiciary. We provide daily advice and assistance on a multitude of proposals, bills, enactments, and statutes. We provide service to our members and our state by advocating for a strong and vibrant judiciary, for wise and reasoned statutes, and for the observance of the rule of law. I am very proud of our role. I know, without question, that our efforts promote the welfare of our citizens, our legal system and our membership. We should be rightfully proud of our KBA.

KBA President Lee M. Smithyman may be reached by email at lsmithyman@ksbar.org, by phone at (913) 661-9800.
It is with great satisfaction that I prepare this last and final article for the KBA Journal. If you would have asked me three years ago, when I was just a baby board member, if I would serve as president of the YLS one day, I probably would have said there was no way. At that point, having little knowledge about the KBA or the YLS, the pure notion that I could become highly involved with the organization was something I could not wrap my mind around. Maybe I felt like it was something that only attorneys with years of experience did. How wrong was I?

Becoming involved with the KBA and YLS was one of the better decisions I have made in my career. Admittedly, at first I had no clue what the organization did, let alone what the YLS did. However, soon after becoming involved and realizing the wonderful programs that the YLS supports and the efforts made to join together young lawyers in Kansas, I knew I wanted to remain involved.

I have thoroughly enjoyed my time on the YLS, especially the past year. Part of the reason I feel like this year has run so smoothly is thanks to this year’s board. We are very lucky to have young lawyers interested in being involved in the program and serving on the board. So let’s step back and do a little year in review, so you can see what our team has been up to this year.

Several board officers have had the opportunity to attend ABA conferences in Chicago, Charleston, S.C., Dallas, and Minneapolis. Not only have we attended some good programming, but we have also met and networked with other young lawyers throughout the United States.

The mock trial tournament was a glowing success this year, thanks again to our chair Jennifer Michaels – who served three years in that position! Several substantial changes were made this year that will continue to benefit and improve the program well into the future. We had a total of 22 teams participate in the regional tournaments this year. The winner of the state tournament was Independent, and they headed to the national tournament in Indianapolis this past May.

Our social chairs were hard at work planning great and fun events throughout the state of Kansas. The year kicked off with our annual KU football tailgate in the fall. Despite a little bit of rain, there was still a great turnout. Later in the fall, a social event was held in Wichita at the local wine bar, Oeno. Because last year’s event was such a success, we hosted a social at a Roadrunners hockey game in Topeka, which completely sold out. In the spring, we held two social events in Hays and Garden City, as well as one in Kansas City. The next one is scheduled for Wednesday, June 19 during the annual meeting. Hope to see you all there!

Much thanks also goes to our fearless editors of the YLS Forum, Sarah Warner and Ashley Dopita. They did a fantastic job coordinating and arranging interesting articles for the four issues of the Forum that went out this year. We submitted the newsletter to the ABA for consideration for the newsletter award at the annual meeting, so we all have our fingers crossed!

One of the biggest accomplishments of the year was the launch of our Judicial Internship Program. We had more than 50 applicants from UMKC, KU, and Washburn, which we considered to be a great success. There were a total of eight students placed with the judges who expressed interest in having an intern for the summer. We hope that the summer is a great experience for judges and students alike, and we encourage any judges who are interested in the program to contact Sarah Warner at sarah.warner@trqlaw.com, who will be heading up the program for next year.

Just as 2012-2013 was a great year for the KBA YLS, I am confident that the next year will be even better. Jeffrey Gettler is going to be taking the reins as President for the upcoming year, and I hope you are looking forward to reading monthly musings from him in the Journal, as this is the last you will hear from me. Thanks for the wonderful year and incredible opportunity!

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.
Battlemind

By Anne McDonald, Kansas Lawyers Assistance Program, Topeka, Executive Director, mcdonalda@kscourts.org

That’s a more gripping title than “vicarious trauma” or “secondary PTSD” and there may be some substantive differences as well. Dr. Rae Sedgwick spoke about battlemind at the recent KALAP Spring Seminar held for volunteers, and the feedback on her presentation was good, as in “you should do a whole day on this topic.” And we do hope to offer more to the bar in general later this summer, but this article can be an introduction to the topic.

Wikipedia has as good a basic definition as any:

In the definition provided by the U.S. Army Medical Command

Battlemind is the Soldier’s inner strength to face fear and adversity with courage.

Key components include:

1. Self confidence: taking calculated risks and handling challenges.
2. Mental toughness: overcoming obstacles or setbacks and maintaining positive thoughts during times of adversity and challenge.

The significance of battlemind in the Medical Command’s context is that “Battlemind skills helped you survive in combat, but may cause you problems if not adapted when you get home.”

The above statement does indeed highlight the significance: battlemind can help in some situations but can hinder or harm in others. Translating battlemind to the legal arena, we can all think of times we have used it to achieve a higher level of alertness and performance in the courtroom or other legal venue. We are focused, laser-like, on our opening statement or cross examination. We may take (calculated) risks in trial strategy and we can certainly handle all sorts of challenges, from preparing for trial to comforting a client, to juggling our own family time and issues simultaneously. Stop for a minute and think about the last time you were in battlemind mode – how did it feel, what were the circumstances, and did it work for you?

It is pretty similar to what we have previously called “good stress” in that it motivates and sustains us through a specific task or event. But the catch is when we can’t let go and return to “normal” life. When our mind is racing all the time, or our emotions are at a fever pitch, our body also reacts by manufacturing stress chemicals which, over the long haul, can be harmful to our organs. And we can’t get those images and feelings out of our head – the photos of the abused child, the dead body on the ground, the tenseness that just looking at the file brings in a particularly troublesome case with very difficult clients.

Our awareness of this, and how we deal with it is vitally important.

Evaluating our response to trauma exposure is critical, because how we are impacted by our work in the present directly affects our work in the future. Our relationship with our work influences our inner life as well as our experiences with others. It can set in motion a cycle of damage that, if not for our awareness, can overtake our whole lives.


So, how to break that cycle?

One practice almost universally recommended by experts is called debriefing. After crisis situations with first responders this may take a very structured form and be led by professionals, but we can do it for each other informally as well. The main components are a discussion of what happened, what we did and how we felt. It should be done three times, once immediately after the event, then again about a week later and about six weeks later. Ideally the process will involve one or more other people but it could be done through writing or even drawing.

The former manager of a domestic violence shelter says this: “Before each advocate starts her shift she must debrief or overlap with the outgoing advocate. I’m adamant about the outgoing advocates purging before they leave ... I always tell them, when you leave here, you need to physically shake it off and walk out the front door.” *Trauma Stewardship*, 125-26.

Dr. Sedgwick said something similar in response to a question about how to deal with a particularly traumatic day at work. She recommended that once you arrive home you shed the toxicity that was generated by removing your clothing and if possible, showering and changing clothes. If that is not possible, then brush yourself off, being mindful of the intention to symbolically and physically shake it off.

Unaddressed battlemind leads to depression and burnout. At KALAP, we believe treatment and rehabilitation are good – but prevention is better.

About the Author

Anne McDonald graduated from the University of Kansas School of Law in 1982 and spent most of her legal career as court trustee in Wyandotte County. After she retired in 2006, she served as a judge pro tem in Kansas City, Kan., Municipal Court and in Wyandotte County District Court. She is a member of four boards or commissions and three book clubs, along with the Sierra Club. She frequently hikes or backpacks with her husband and other Sierra Club members. She is a prior chair of the KBA Committee on Impaired Lawyers and has been a KALAP commissioner from its inception, and now serves as Executive Director.
The wise counsel of both the Preacher and the Bard says, “there is nothing new under the sun.” Still, it is surprising to explore what we believe is uncharted land only to discover another’s footprints. That surprise hit when I discovered an article by Betsy Turner from the ABA Journal back in August, 1984 called “Getting a Competitive Edge with Software.”

Lee and Betsy Turner

That article is notable but Mrs. Turner deserves an introduction first. She and her husband, Lee Turner, sparked at least two revolutions in the legal profession from a small firm in Great Bend. Most notably, the two are credited with inventing paralegals – a development so dramatic that an audience in New York City recoiled at the innovation saying, “...it might work in Kansas, but it wouldn't work in my city.” (More information on this is coming in KU Law Magazine under the Alumni section at www.law.ku.edu.)

The Turners were also vital in the creation of what is now the Law Practice Management Section of the American Bar Association. Betsy Turner chaired the Computer Committee acting as a clearinghouse for information on law and computing and the tinkerers implementing innovative legal technologies. Mrs. Turner’s own computing credentials were hard-earned assembling a network, database, knowledge management, and finance system for a two-partner law firm in the 1970s rivaling the sophistication of a larger, modern firm. My impression from speaking with her is that she has an innate understanding of processes and can organize anything from a PTO to a multinational.

What is Old is Still New

I have just returned from the annual ABA Techshow in Chicago. My wife, daughter, and I spent hours on the vendor floor viewing the latest goods and services, attended several dozen hours of LPM-related CLE, and scoured articles and books on trending technology and practice management topics. The entire conference from 2013 is summarized neatly in Betsy Turner’s 1984 article (available at http://bit.ly/12zhILx).

Her opening justifies technology from a business standpoint by noting the increasing price pressures on lawyers and arguing that computerization makes lawyers more affordable and competitive. Those pressures observed in 1984 have exploded in strength in recent years with no end or respite in sight. Mrs. Turner notes, “Without utilizing technology and the software that guides it, there is no other way to substantially improve lawyers’ productivity.”

The rest of her article examines some key technology areas of interest to lawyers. Practice management software and document management provide great returns (though the 2012 Kansas Economics of Law Practice Report indicate that Kansas lawyers are still struggling to incorporate this advice). Her section on graphics may appear quaint today mentioning the computer mouse and video disc but she is spot on in noting two huge areas of interest today in document imaging and trial graphics.

Artificial Intelligence

The most interesting section was her discussion of “decision-making software” or artificial intelligence. She quotes a lawyer describing it as, “… used to create expert systems, which would automate what the law firms now do with paralegals, building the expertise into the computer so that a non-expert can sit down at the computer and do work that normally would require an expert to do.” This is heady and controversial stuff!

These tools are arriving and they are some of the most exciting developments in the law. What we might call artificial intelligence (AI) is popping up in discovery tools and services. Bankruptcy and divorce software layers intelligence behind the scenes applying legal knowledge automatically. Settlement analytics are merging law, game theory, and artificial intelligence to guide case development. Lawyers are testing online “virtual attorney” software which aids limited scope representation. Some legal “skunk works” teams are testing computer negotiation and trial “war game” simulators. Statistical analysis (using spreadsheets and databases that Mrs. Turner recommends) is allowing automated work flow, testing, and supervision. It is here and Mrs. Turner knew it would be.

The ethics cops throughout the country are no more comfortable with this idea now than they were with the Turners’ paralegals back in the 1970s. It rekindles the old debates about supervision, accountability, and whether law is a profession or business. As this battle heats up anew, it is comforting to know that trailblazers like Betsy Turner have been there before, innovating and improving – and won.

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.
Editor’s note: The following article is a reprint of Matt’s column that appeared in the February 5, 2012, edition of the Kansas City Star.

My mom graduated from KU with a degree in music education. Her major was piano and she imparted her love of music to her five children. And when dad bought her a baby grand, he placed it in our living room, adjacent to floor-to-ceiling windows overlooking our picturesque backyard. Many days I would come home from St. Pat’s to hear her playing away on the Yamaha. She was active in our town’s Parnassus club, and she and dad took frequent trips to Century II auditorium in Wichita to see touring artists and musicals.

I took piano and voice lessons. We all did. In 1971 my aspirations for a recording contract suffered a setback when I sang a duet in the junior high concert the Jackson 5’s “I’ll Be There.” I was there. The lyrics, on the other hand, went missing. I was devastated. My brothers? Lottery winners are less gleeeful.

The music world was not immune to the cultural upheaval in the late ’60s. I remember my older sister gaining a fondness for Iron Butterfly’s “In-A-Gadda-Da-Vida.” We understood the title to be “In the Garden of Eden.” Normally Larry wasn’t easily ruffled; Adam and Eve, however, were off limits.

Along the way, there were threads of calm, comfort and normalcy. And in 1968, it came in the form of a song. I recall very distinctly hearing it for the first time in the backseat of my parents Plymouth station wagon. It was “Wichita Lineman” by Glen Campbell. It peaked on the pop, adult contemporary, and country chart at the same time. Forty-two years later it remains a critical and popular choice—ranked as one of top pop songs of all time. Even today when I hear the song, it’s like a time machine.

A song about Wichita—two hours to the southeast of our town—elevated Campbell’s status considerably in our family. For us, Wichita was New York, Chicago, and Los Angeles rolled into one. Wichita had Towne East Mall, was the home to Pizza Hut and another business with an unlimited ad budget—Rusty Eck Motors. Wichita is where Larry and Mona honeymooned. And so, naturally, Glen Campbell was accredititing our view of the world.

Campbell’s career went on to achieve iconic proportions as one of the top-selling artists and entertainers of all time.

Mom passed away in 2002, but her legacy continues as most of her grandchildren still play the piano. Just before this Christmas I saw Glen Campbell perform on late-night television. His voice, his guitar and the song … I froze, listened, watched. He played two songs from his CD “Ghost on the Canvas” and the melodies stuck in my head.

The next day I left home on a mission. The Best Buy display rack of best sellers had the biggest collection of trash anyone could assemble. Other than Adele, none could play an instru-
On April 12, 2013, the KBA Diversity Committee and the Kansas Women Attorneys Association held its first joint speed networking event named Career Crossroads.

Seasoned attorneys were paired with attorneys who had at least three years of legal experience. Each pair was given ten minutes to network on a one-on-one basis before the bell rang; then the newer attorney shuffled to the next seasoned attorney.

The event ended with an open networking period in which the newer attorneys could mingle with non-assigned seasoned attorneys, continue their previous conversations with assigned seasoned attorneys, or network among themselves and create connections for the future.

The collaboration for this successful event came from a simple lunch networking meeting between former Washburn law school classmates.

Angel Zimmerman, president of KWAA, and Eunice Peters, chair of the KBA Diversity Committee, met to discuss the promotion of diversity within KWAA.

In their discussion, Eunice mentioned how the KBA Diversity Committee had decided to host a speed networking event to provide newer attorneys with connections to others in the legal community, and they were looking to partner with another association to make the event happen. The KBA Diversity Committee believed the speed networking focus would provide newer attorneys with the most return for their investment of time. That return would be even more beneficial if newer attorneys had some experience in the law because the answers would be more meaningful for attorneys looking for some direction on their legal careers.

KWAA generously threw in its support, and between the two associations, the event became a “[g]reat networking opportunity where experienced attorneys could input knowledge to younger attorneys to provide insight and possibly develop fruitful relationships.” [Quote from a seasoned attorney on the Career Crossroads evaluation form.]

Most of all, the purpose of the event was achieved because the newer attorneys “found it a rewarding experience” and received “very frank advice and what steps to take to get there/where I want.” [Quotes from newer attorneys on separate evaluation forms.]

We would like to publicly thank the following people because their support made the event a success:

- KBA and KWAA leadership – thank you for providing us with the financial support to host this event.
- Career Crossroads Subcommittee: Karen Hester (Chair), Christi Bright, Mark Dodd, and Angel Zimmerman – your hard work will forever be appreciated.
- Experienced/Seasoned attorneys: Tama Aga, Katherine Bailes, Mary Beth Blake, Kelly Connor Wilson, Marilyn Harp, Stan Hazlett, Janet Jackson, Amber Jeffers, Rico Kolster, Judge Patrick McAnany, Mira Mdivani, Chief Justice Lawton Nuss, Joyce Rosenberg, Rand Simmons, Judge Linda Trigg, Amy Walters, and Lisa Westergaard – thank you for giving up a Friday night to share your wealth of knowledge.
- KBA staff: Jordan Yochim (Executive Director), Danielle Hall, and Deanna Mead – thank you for brainstorming with us.

About the Authors

Eunice Chuenyen Peters is an assistant revisor for the Kansas Office of Revisor of Statutes. She is chair of the KBA Diversity Committee and a member of the Kansas Supreme Court-Kansas Bar Association Joint Commission on Professionalism. She received her juris doctorate from Washburn University School of Law in 2006, and her bachelor’s degree from the University of Illinois in 1997.

Angel Zimmerman is also a 2006 Washburn University School of Law graduate. She serves as KWAA president, as a member of the KBA CLE Committee, and as president of the KBA Law Practice Management Section. Zimmerman also serves on the board of governors for Washburn Law School and is secretary for the Washburn Law School Foundation. She serves as president-elect for the J. Reuben Clark Law Society KS/MO Chapter and serves on the international JRLCS – women in the law committee. She is managing partner for Valentine, Zimmerman & Zimmerman P.A. in Topeka.
The Very Real Benefits of Moot Court

By Sam Butler, University of Kansas School of Law, Lawrence

As my time at the University of Kansas School of Law draws to a close, I cannot help but reflect on the past three years – years which can diplomatically be described as busy. While I spent the majority of the past three years buried beneath a stack of casebooks in the law library, a number of the opportunities I found outside of the library have also been valuable. For example, participating in the Volunteer Income Tax Assistance program gave me some insight into the challenges and rewards associated with serving real clients; and serving on the editorial board of the Kansas Journal of Law and Public Policy imbued me with an appreciation of the finer points of legal scholarship (especially the art of correct Bluebooking). However, I think the law school experience that might prove most valuable to me will be the one in which I was initially most reluctant to participate.

During the fall of my second year, one of my classmates, David Austin, asked me if I would like to be his partner for the in-house moot court competition that KU Law offers for 2L students every spring. At the time I did not know David well and was hesitant to assign myself an additional commitment. Despite weeks of unequivocal answers from me, David persisted and succeeded in cajoling me into entering the competition. We were fortunate enough to finish in a position that gave us a slot on the KU Law Moot Court Council and the opportunity to compete in a national moot court competition. This past spring, David and I traveled to Buffalo, N.Y., to represent KU Law in the Wechsler National Criminal Law Moot Court competition. While I had always dreamed of spending my final spring break on the balmy shores of Lake Erie, the trip exceeded my most optimistic expectations. Based on my moot court experience, if there is one piece of advice I could offer current law students it would be to participate in your school’s moot court program. And, if I could make one humble request of the practicing bar, it would be to please volunteer as judges for moot court competitions or teams practicing for a competition.

To current law students, I suggest that participating in a moot court competition presents you with a unique opportunity to practice skills that will assist you well beyond law school. While first year legal research and writing classes instill you with the basics skills necessary to write a brief, you write your brief independently. From the little “real world” legal experience I have, it seems that a brief is seldom the product a single author. I believe that the collaborative brief writing process inherent to moot court both better approximates the actual practice of law and improves the writing of participants. Moot court also helped me maintain my legal research skills, which I am sure would have atrophied otherwise. In addition, moot court improves one’s ability to serve as an effective oral advocate. Finally, and most importantly, participating in moot court allowed me to interact with practicing attorneys in a substantive fashion.

While David and I were practicing for the Wechsler Moot Court competition, our coach, Professor Tom Stacy, arranged for us do a round in front of KU Law alumnus Brett Watson. Prior to performing in front of Watson, David, and I had only practiced in front of faculty and classmates. While Professor Stacy had prepared us very well, getting the perspective of a practicing lawyer helped us improve substantially. Like all of our practice judges, Watson thoroughly grilled us on the record and the law involved in our problem. However, Watson’s background led him to ask questions more focused on the pragmatic consequences of our positions than their theoretical underpinnings. Even more helpful than Watson’s questions during the round was his feedback afterwards. Watson offered us a number of helpful tips on our presentation and oral argument style. The real value, however, of speaking with Watson came in the form of the confidence it instilled in me. Moot court had given us the opportunity to discuss our specific work product with an actual attorney. For me, getting feedback on arguments that David and I had researched and developed entirely on our own made dissecting our performance with Watson seem more like a discussion among colleagues than the often painful Socratic examination of a law professor. Our experience with Watson was repeated at the Wechsler competition where all of our judges were practicing attorneys. The attorneys who acted as judges during the tournament offered us insightful feedback, both positive and negative, and helped ensure that David and I received much needed practical instruction.

Throughout law school I have heard about the importance of developing practical skills. Moot court has been, in my experience, one of the best incubators of practical skills offered by the law school. But those skills were sharpened best when members of the bar participated. On behalf of all future lawyers, I humbly request that more attorneys participate in giving future members of the Kansas bar this great opportunity to improve their skills by volunteering to judge competitors. Such collaborative efforts not only benefit the law students in moot court competitions – they also benefit their future clients and the overall administration of justice.

About the Author

Sam Butler graduated from the University of Kansas School of Law in May 2013. Prior to law school he worked on Capitol Hill and for a government relations firm in Washington, D.C. He graduated from Vanderbilt University in 2007.
Members in the News

CHANGING POSITIONS

Brendan J. Burke has become a member of Norton Wasserman Jones & Kelly LLC, Salina, and Caden L. Butler has joined as an associate.

Christopher D. Dandurand has joined Stueve Siegel Hanson LLP, Kansas City, Mo., as an associate and Lindsay N.T. Perkins has joined the firm as of counsel.

Summer O. Dierks has joined Seaton Law Offices LLP, Manhattan, as an associate.

Linda P. Gilmore has been appointed by Gov. Sam Brownback to the 26th Judicial District, Liberal.

Erie M. Hoestje has joined Financial Industry Regulatory Authority, Kansas City, Mo.

John B. Klenda has been appointed by Gov. Sam Brownback to the 18th Judicial District in Sedgwick County.

Trina R. LeRiche has joined Ogletree, Deakins, Nash, Smoak & Stewart P.C., Kansas City, Mo., as managing shareholder, and Nicholas J. Walker has joined the firm as a shareholder.

Faith A.J. Maughan was appointed by Gov. Sam Brownback to the 9th Judicial District, McPherson.

John B. Klenda has been appointed by Gov. Sam Brownback to the 9th Judicial District, McPherson.

Trina R. LeRiche has joined Ogletree, Deakins, Nash, Smoak & Stewart P.C., Kansas City, Mo., as managing shareholder, and Nicholas J. Walker has joined the firm as a shareholder.

Faith A.J. Maughan was appointed by Gov. Sam Brownback to the 18th Judicial District in Sedgwick County.

Lindsey D. Moore has joined the John D. Gatz Law Firm, Colby, as an associate.

Christopher Pedrole has joined the Edgar Law Firm, Kansas City, Mo., as an associate and Boyce N. Richard son has joined the firm as senior associate.

Maureen A. Redeker has joined the Kansas State University, Manhattan, legal team as an assistant general counsel.

Garrett C. Relph has joined the Franklin County Attorney’s office as assistant county attorney, Ottawa.

Kyle N. Roehler and Jacqueline M. Sexton have been promoted to principals at Poland Wickens Eisfelder Roper & Hofer P.C., Kansas City, Mo.

H. David Starkey has been named city attorney for the City of Topeka.

Christopher J. Stucky has joined Dunn & Davison LLC, Kansas City, Mo.

Justin M. Waggner has joined the Sedgwick County Office of the County Counselor, Wichita, as the assistant county counselor.

CHANGING LOCATIONS

Russel N. Barrett has moved to 1650 S. Georgetown, Ste. 120, Wichita, KS 67128.

David W. Edgar has moved to 1580 Lincoln St., Ste. 1100, Denver, CO 80203.

Sandberg Phoenix & Von Gontard P.C. has opened a new firm, 7400 W. 130th St., Overland Park, KS 66213.

MISCELLANEOUS

Chad E. Chase, Manhattan, and Timothy G. Givan, Hutchinson, were awarded the Certified Trust and Financial Advisor designation from the Institute of Certified Bankers.

Renee M. Gurney, Leawood, has been appointed by Gov. Sam Brownback for a two-year term to the Kansas Council on Developmental Disabilities Organization.

Polsinelli Shughart P.C. has changed the name to Polsinelli PC.

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

Lowell Dierking

Lowell Dierking, 76, of Caldwell, died April 13 at his home after a brief battle with pancreatic cancer. He was born December 5, 1936, in Caldwell, the son of Clarence H. and Lucille (Schiftlett) Dierking. He was raised in Caldwell and graduated from the University of Kansas School of Law with a juris doctorate.

After working one year for the Kansas Supreme Court as a research attorney, Dierking returned to Sumner County, where he joined the firm of Schwinn and Schwinn. In 1963 he opened Dierking Law Offices in Caldwell, where he would practice until his death.

Dierking was a member of the Sumner County Bar Association and a life member of both the Wichita and Kansas bar associations.

He is survived by his cousins, Gary Dierking, Karla Effland, Troy Dierking, Dorothy Varnum, Dr. Bob Varnum, and Joyce Green; and numerous friends. He was preceded in death by his parents.

John Eyer

John Eyer, 60, of Belleville, died May 7 at Salina Regional Health Center in Salina. He was born June 5, 1952, in Horton, the son of William and Mildred Crim Eyer.

He graduated from Horton High School and from Washburn University with a degree in law. Eyer was an attorney and served as Washington County attorney for 12 years. He also served as a district magistrate judge for Republic County since 1999.

Eyer was a member of the Masonic Lodge No. 129 AF & AM in Belleville, the Kansas Bar Association, and the Kansas District Magistrate Judges Association. He was a former member of the Kansas Criminal Defense Attorneys Association, the Belleville Public Library Board, and the Belleville Housing Authority Board.

Eyer is survived by his wife, Jackie Flinn LeDue, of the home; two stepsons, Mark LeDue, of Clear Lake, Iowa, and Michael LeDue, of Greenleaf; and five stepgrandchildren. He was preceded in death by his parents and one brother, Keith Eyer.
It’s 2013: Have You Checked Your Typography Lately?

By Pamela Keller, University of Kansas School of Law, Lawrence

You likely recently completed your CLE credits and are up-to-date in your practice area. When was the last time you updated the visual components of your written documents? Sound substance and a clear and efficient legal writing style are most important when crafting a legal document. But how you visually present your document matters too. The visual component of the written word is Typography.

The last time you thought about the visual presentation of a document may have been law school or whenever you purchased your last computer software package. You may be working with documents created five, ten, or even twenty years ago, and you may have fallen into the form trap: “It worked for me (or another lawyer) before, so I don’t want to change it.” Consider an update. Applying current typography standards makes good writing even better. Your documents will look modern and more professional.

This column contains typography tips that can be easily incorporated into your letters, memoranda, contracts, and briefs. All of the tips come from Matthew Butterick’s comprehensive book, Typography for Lawyers: Essential Tools for Polished and Persuasive Documents (2010). If you are skeptical of any of the tips, Butterick’s book explains why they are best practice. The book also is an excellent desk reference when you have forgotten how to make italic quotes or a hard line break with your word processor. I found the visual examples at the end of the book most helpful. They include before and after caption pages, brief pages, memorandum pages, letters, resumes, and business cards. Much of the information in the book can be found at www.typographyforlawyers.com.

Consider a different font. Most of us simply accept the font choice our computer gives us when we open a new document. The font is usually Times New Roman. Butterick describes it as a “workhorse” font: It gets the job done. It was originally designed for newspapers, so it is narrower than necessary for legal documents. As Butterick states, using Times New Roman is not really a font choice, but rather an absence of choice. Consider using other fonts, such as Baskerville, Century Schoolbook, Goudy Old Style, Gill Sans, Hoefler Text, or Palatino. If you like Arial, try Helvetica instead. The fonts are similar, but the ends of the letters are sloped arbitrarily in Arial while they are sloped exactly horizontal in Helvetica.

(Warning: After you read Butterick’s book, you will notice things like this.)

Do not use a monospaced font (in which each character is the same width) like Courier or Courier New unless you are filing a document in a court that requires one. Mono-spaced fonts were designed for the mechanical requirements of typewriters. Modern publishing uses proportional fonts.

Don’t fear white space. The margins on your documents are probably one inch around. Consider larger margins. Shorter lines are more comfortable to read than longer lines. Aim for an average line length of 45-90 characters. If you are using 8.5” × 11” paper and 12-point font, then you should have left and right margins of 1.5-2.0 inches (unless constrained by court rules).

Reconsider your line spacing. In most text, the optimal line spacing is between 120% and 145% of font size. All of the automatic settings on your word processor miss the target range (single = 117%, 1.5 lines = 175%, and double = 233%). If you are working with 12-point font, the optimal line spacing is roughly 15-17 points. To change line spacing in Word, click Format, click Paragraph, go to the menu under Line Spacing, click Exactly, and then enter a specific measurement.

Don’t underline in a printed document. Underlining is a leftover from typewriters. Typewriters had no bold or italic styling, so underlining was the only way to emphasize text. Underlining is more difficult to read than bold or italics, so bold and italics are preferred. This rule applies to citations and especially to headings.

Improve your headings. You should not need more than three levels of headings in any document. Your fourth-level heading will likely confuse rather than guide your reader. If you use three levels, use only two levels of indenting. Most headings, especially longer headings, should be anchored toward the left side of the page. Don’t underline headings. Don’t use all caps other than for a very short heading, like ARGUMENT. Use bold instead of italics.

Learn how to make nonbreaking spaces. A nonbreaking space is the same width as a regular space, but it prevents text from breaking at the end of a line. Here is how to do it in Word: Go to the Menu Bar, click Format, click Paragraph, go to the menu under Line Spacing, click Exactly, and then enter a specific measurement.

Footnotes
2. The book’s forward was written by Bryan Garner. If you are a Garner fan, you might be glad to know he is a Butterick fan.
3. According to his book, Butterick has a B.A. degree in visual and environmental studies from Harvard University and a law degree from UCLA Law School. He has worked as a font designer and engineer and founded a website design and engineering company. Since law school he has been a civil litigator. The Legal Writing Institute awarded him its 2012 Golden Pen Award for excellence in legal writing.
5. Booklet-format documents submitted to the United States Supreme Court must have a font in the Century family. Sup. Ct. R. 33.
6. The font for this column is Adobe Garamond Pro.
from flowing to a new line or page. It is especially handy when using section or paragraph symbols. The symbol won’t separate from the number or letters following it. Also use them to build Bluebook ellipses. To insert one in Word, hit control + shift + space bar. The nonbreaking hyphen is similar (in Word, hit control + shift + hyphen). Another helpful tool is the hard line break. It prevents headings and centered text from breaking awkwardly from line to line. To make a hard line break in Word, hit shift + enter.

**Put one space between sentences.** As Butterick states, “For reasons unclear, this advice provokes unusual controversy.” Two spaces after punctuation is another holdover from the typewriter era. Two spaces should be used only with monospaced fonts (and only when a court demands a monospaced font). With proportional fonts, two spaces disrupt the balance of the white space. One space is better. This rule should be near the top of this list, but I feared you would quit reading.

Butterick explains at length why one space is better. One space is the custom of professional typographers and the consensus view of typography authorities. Professionally published books, newspapers, and magazines use one space. Web publishing requires one space. The following authorities also suggest one space: Bryan A. Garner, *The Redbook: A Manual on Legal Style* (2nd ed.), p. 83; *The Chicago Manual of Style* (16th ed.), rule 2.9; U.S. Court of Appeals for the Seventh Circuit, *Requirements and Suggestions for Typography in Briefs and Other Papers*, p. 5. My only objection to the one-space rule is that I can’t make my fingers do it on my keyboard (after more than 25 years typing documents with two spaces after periods). Change is never easy, but it is worth the effort.

**About the Author**

Pamela Keller is a clinical associate professor and the Schroeder Teaching Professor at the University of Kansas School of Law. She directs the lawyering skills program and judicial clerkship clinic. Before teaching, she practiced employment law with Ice Miller in Indianapolis and clerked for the Hon. John W. Lungstrum.

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7. We noticed four or five years ago that our legal writing students were using one space between sentences. Under our formatting rules, either one space or two is acceptable. Students almost uniformly choose one space. Twenty-somethings apparently were taught long ago to use one space.
Social Media Wills – Protecting Digital Assets

By Nicole Schneider, 2013 Tulane University Law School graduate

When making arrangements for distribution of property after death, people typically worry about physical property or financial assets, but often forget about the property they access almost everyday. While it may seem easy to forget, the distribution of digital assets can be just as, if not more, important than tangible property after death. As the world becomes more interconnected through technology and as more computer users upload their photos and thoughts to the Internet, social media wills have grown in popularity and importance. A social media will or addendum to a will is a mechanism for managing digital assets and keeping privacy wishes after death. Without any provision included in a will for social media accounts and digital assets, courts have struggled to find a balance between protecting users’ privacy and distributing property contained in online accounts.

Currently, there exists almost no legally binding precedent for including digital assets as part of an estate without explicit directions in a will or trust. In the past five years, Connecticut, Rhode Island, Oklahoma, Indiana, and Idaho have all passed laws that include digital assets as part of an estate. Oklahoma and Idaho also allow the administrator of an estate to take control of email or social media accounts. Kansas, however, has not added any language regarding digital assets or social media accounts to its probate code through the 2012 legislative session. The current probate statute concerning executor access does not give the executor any power over this type of property or even mention digital assets. Since no Kansas court has yet addressed the issue of whether digital assets fall under intangible personal property, it remains unclear as to how these assets should be handled in the absence of a will. Therefore, naming an “online executor” and documenting digital assets during estate planning is the only way for Kansas to ensure their privacy will be protected or that family will be able to obtain access to accounts quickly.

Some digital media account providers have a policy for handling accounts after death. For example, Facebook allows family members or friends to memorialize an account or delete it with proof of a death certificate. In order for an executor to have access to private information in the deceased’s account, however, digital companies have typically required a court order. Google’s Gmail privacy policy specifically states that the company will provide personal information if required by law or court order. Similarly, Facebook has stated it would “provide the estate of the deceased with a download of the account’s data if prior consent is obtained from or decreed by the deceased, or mandated by law.” In the absence of state laws protecting or allowing access to the information, prior consent is likely the best option and an important consideration when drafting a will.

Family members trying to access data from accounts have caused two state courts to issue orders granting family members limited access to the deceased’s account. In 2005, a judge in Michigan ordered Yahoo to allow the family of a U.S. Marine killed in Iraq access to his emails so the family could make a scrapbook (Yahoo instead provided copies of the emails on a CD). More recently, a judge in Wisconsin ordered Google and Facebook to grant parents access to their son’s accounts after his suicide so the parents could look for answers into their son’s death. Google complied with the order but Facebook had not complied by the time of news reports on the case. A Facebook spokesperson said that company policy prohibits them from commenting on any specific case but stated generally, “For privacy reasons, we do not allow others to access a deceased user’s account.”

Feature Article: Social Media Wills ...
Cases such as these have prompted the United States federal government to discuss the importance of a social media will on its website. In the finance section of USA.gov, the government gives general advice on writing a will, including a suggestion to “write a social media will.” The site advises the appointment of an online executor, reviewing privacy policies and terms and conditions of websites where the user has a presence, stating how profiles should be handled, giving the executor a document listing all the websites with usernames and passwords, and stipulating that the online executor receive a copy of the death certificate.

Due to the lack of statutes and case law on the matter, Kansas practitioners should heed the government’s advice and encourage clients to include a social media will or addendum with several important items. First, the will must name an online executor in charge of all accounts (or specify several executors for certain accounts) and what sort of access the executor should have to private accounts. While some accounts might contain strictly private information, other accounts might contain photographs that should be shared with family and friends. Next, a social media will should specify what happens to each account after death (delete, keep completely private, allow access to the data, memorialize, etc.). Different accounts have different options so a will should be specific. The will should also stipulate that the online executor will receive a copy of the death certificate, since many service providers require a copy to delete or memorialize an account.

If the executor is granted access to any accounts, a document with usernames and passwords should be kept separate from the will in a secure location. While individual websites might grant access to the executor if clearly expressed in a will, a document with usernames and passwords would make it easier for the executor to access the information quickly. Usernames and passwords should not be included in a will, as this information will be accessible to the public when the will becomes a public document. Keeping that document in a safe place makes the granting of digital assets a much smoother process. Companies also exist to pass along digital information privately to a beneficiary and store the information securely until then, but also charge a fee to do so, such as Legacy Locker or Asset Lock. Instead of including usernames and passwords in a will, a document with that information should be given directly to the online executor.

Documenting social media wishes and naming an online executor protects users, whether they wish to maintain his or her privacy or grant access to all their accounts. Companies like Facebook and Google face a dilemma in situations where the user did not give prior consent or demonstrate a desire to have their accounts accessed after their death. With court orders like in Michigan and Wisconsin, it would benefit a user who wants to maintain their privacy to make their wishes clear beforehand. On the other hand, the families in Michigan and Wisconsin would have avoided legal troubles if their sons had consented before death, particularly in the case of the Marine, whose sentimental digital assets would have been permanently lost without access to the account.

Either way, assigning an online executor and documenting accounts ensures that online wishes will be followed after death and that digital assets are not lost forever.

About the Author

Nicole Schneider, a Coffeyville native, obtained her bachelor’s degree from Duke University in 2010 and her juris doctorate, graduating magna cum laude, from Tulane University Law School in 2013. At Tulane, she served as chief justice of the Moot Court Board, on the Dean’s Advisory Committee, and as a managing editor of The Sports Lawyers Journal. She was awarded the Dean Donald R. Moore Crest Award for Outstanding Leadership and the Order of the Barristers. Schneider spent the past two summers as an intern for the Hon. Monti Belot in Wichita and as a summer associate at Smithyman & Zakoura in Overland Park.

14. Id.
15. Id.
18. See Gaelle Faure, How to Manage Your Online Life When You’re Dead, Time, August 18, 2009, available at http://www.time.com/time/magazine/article/0,9171,19220295,00.html#ixzz1zn9ALqtR.
The Blue Book

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Welcome Spring 2013 Admittees to the Kansas Bar

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Briana Rachelle Barron, Kansas City, Mo.
Sheryl Lynn Bayes-Weiner, Overland Park
Richelle Dawn Beckman, Overland Park
Ambika Behal, Kansas City, Mo.
Jordan Walter Bergkamp, Lawrence
Jordan Ross Bergus, Kansas City, Mo.
Charles Paul Bradley, Lawrence
Ryan Kirk Bratcher, Kansas City, Mo.
Matthew Ryan Brunkhorst, Kansas City, Kan.
Jordan Bradley Burns, Lenexa
Christopher David Burton, Kansas City, Mo.
Andrew Michael Buser, Overland Park
Stephen Kyle Byfield, Topeka
Lyndzie Marie Carter, Topeka
Benjamin Dylan Clark, St. Joseph, Mo.
Shelli Jean Clarton, Raytown, Mo.
Matthew McKinley Clifford, Kansas City, Mo.
Jennifer Marie Cocking, Atchison
Cameron Heath Jones Cooper, Kansas City, Mo.
Allyson Elizabeth Cunningham, Kansas City, Mo.
Erin Liane Davis, Olathe
Leon James Davis, Olathe
Richard Kyle Davis, Wichita
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Summer Kay Ott Dier, Manhattan
Bradley Scott Dixon, Kansas City, Mo.
Kyle Duffy Donnelly, Lenexa
Austin Thomas Dowling, Leawood
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Elizabeth Elaine Eppright, Kansas City, Mo.
Johnathan Charles Fish, Dallas
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Crystal Ilene French, Junction City
John Calvin Fuchs, Kansas City, Mo.
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Ingrid Mae-Chi Wong, Mission
Laura Marie Wood, Kansas City, Mo.
Clifford Zachary Young, Topeka
Employer Use of Facebook and Other Social Media in Hiring

By Mark Bannister, Anthony Gabel, and Derek Ulrich
Overview

Hiring is a core function for all organizations. A potential employee’s skills, experiences, and work ethic should appropriately align with the needs vital to the employer-organization’s success. Time invested—in thoroughly vetting and screening applicants to ensure fit with the organization, its culture, and job expectations—is time well spent. The quality of employee performances begins with the quality of the hire. Employers traditionally relied upon the limited (and sometimes inflated) information supplied by the applicant, reference checks, and the face-to-face interview—with the scope of even these sources potentially limited by state and federal laws targeting discriminatory practices. Thanks to an Internet age rich with social media, employers have the opportunity to discover far more about potential applicants, unbounded by the traditional resources. This article examines the use of social media searches and the attendant advantages, potential legal pitfalls, and restraints Kansas employers can expect to confront when searching social media during the employee selection process.

The Power of the Internet: Employers Turn to Google and Social Media

Internet search engines such as Google are extremely powerful. Scanning and cataloging enormous volumes of data, including the burgeoning resource of personal information known as “social media,” a search engine’s power can be harnessed with a few keystrokes, listing pages of links on any subject, including the name of a job applicant. Social media is defined as “a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of user-generated content.” At the beginning of 2012, social media sites boasted hundreds of millions of users. These included specialized social media sites such as flicker (photo sharing) and Linked-In (professional networking), as well as more general use social media sites such as Friendster, Facebook, and Google+. Each of those sites contains information that potentially can help an employer learn more about a prospective employee than a cover letter, resume, or perhaps even a face-to-face interview.

With more than 900 million users—over half of whom log in daily—Facebook currently reigns as the Internet’s largest social media site. Approximately 18 percent of Facebook’s members are located in the United States with 20 percent of its users located in North American as of March 2012. Nearly one-half of the United States population count themselves as members of Facebook. Facebook permits members to create personal profiles which may contain any assortment of personal data the member wishes to share. As of January 2012, Facebook offered users 36 different categories for posting information. A driving feature of Facebook is its “wall”—a place in the member’s profile to which updates of the member’s “status” can be posted. Sharing of those updates with others creates the social aspect of the site. Those updates, though, are not limited to text-based messages. Similar to its social media peers, Facebook is media rich—full of photos and sometimes video posted by members. On average, 300
million photos are uploaded on to Facebook daily. Other areas in the member’s profile often contain substantial information about the member. Links to news, sports, entertainment, and other items of interest can be quickly added by the member to his or her wall along with the member’s commentary about the linked material. Facebook users owe the richness of their experience to these features.

While the combined potential wealth of data among all social media sites has made researching a job candidate’s background easier, human resource personnel have long been using Google, Bing, and other common search engines to their advantage—sidestepping the use of awkward questions which might reveal unseemly characteristics of a job applicant. The use of these tools is growing. A 2006 poll of employers conducted by the National Association of Colleges and Employers found that more than one-quarter (26.9 percent) had “Googled” or reviewed profiles of job candidates on social networking sites.”

A 2007 Society of Human Resource Management survey of human resources professionals revealed that nearly half of the respondents run a candidate’s name through a search engine before making an offer. Fourteen percent searched a social media website, and 40 percent of the respondents who did not use such sites indicated that they were “somewhat likely” or “very likely” to visit them in the next 12 months. A 2009 survey of 2,600 hiring managers by CareerBuilder.com found that 45 percent used social networking sites to research job candidates’ backgrounds. Of those, 35 percent had found content that had lead them not to hire an applicant after viewing the candidate’s online profile. Just as telling, savvy entrepreneurs and career services offices at colleges, universities, and professional schools, and Internet job hunting sites offer advice to help people manage and clean up their online profiles.

A number of published journal articles share examples of job applicants who make available their undesirable characteristics to potential employers conducting social media searches. A candidate for a technology director role at a non-profit organization was passed over after his potential employer learned of his interests in violent films and his boasting of romantic exploits on his Facebook account. An educational consulting firm passed on a job applicant whose Facebook account included “explicit photographs and commentary about ... sexual escapades, drinking and pot smoking, including testimonials from friends.” An otherwise well-qualified female psychiatrist was passed over by a potential employer who found Facebook photos showing her without a shirt at multiple parties. Those characteristics may not have been apparent during a job interview, nor would an employer likely have inquired of the applicant about them.

Matt Kaiser, a vice president and talent strategist for NAS Recruitment Communications, opined in a 2011 presentation that “[r]esumes will become obsolete. Your resume will be your ‘personal brand’ accessed through sites like LinkedIn, Facebook and YouTube (Video Resumes)”

If his prediction comes to pass even to a degree, employers will continue to expand their review of job applicants’ social media postings. This raises questions about the applicability of federal and state laws.

Wouldn’t you like to deal with someone who speaks your language...
Pre-Employment Screening Under Federal Employment Acts

A suite of United States federal acts addresses employment discrimination. Title VII of the Civil Rights Act of 1964 (Title VII) is the broadest of these. It is “an unlawful employment practice for an employer—(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, sex, or national origin.” The Americans with Disabilities Act (ADA) prohibits employers from discriminating against individuals “on the basis of disability in regard to job application procedures and hiring.” The Age Discrimination in Employment Act (ADEA) makes it unlawful to refuse to hire any individual because of such individual’s age. Together these acts form the nucleus of anti-discriminatory protections extended to job applicant and employee.

Charged with enforcement of these federal acts, the Equal Employment Opportunity Commission (EEOC) provides compliance guidance to employers. The EEOC publishes a Title VII guide to pre-employment inquiries. The guide seeks to help employers avoid inadvertent violations by indicating prohibited questions regarding a number of potentially discriminatory topics. For example, an employer may not ask about arrest records (inquiries into convictions are acceptable if job-related), religious observance, child care (unless this is asked of all of applicants), birthplace, national origin, ancestry, or lineage of the applicant, applicant’s parents, or applicant’s spouse. Also prohibited are questions addressing the applicant’s religious affiliation, church parish or religious holidays observed (unless religion is a bona fide occupational qualification), marital status, number and age of children, or spouse’s job, the applicant’s height and weight (unless they are related to job requirements), military type or condition of discharge, organizations a candidate belongs to (unless the inquiries concern professional organizations related to job), pregnancy, medical history of pregnancy or family plans, the applicant’s race or color of skin, and the applicant’s sex unless it is a bona fide occupational qualification. Neither can employers require photographs prior to hiring.

Another EEOC publication guides an employer away from discrimination and toward ADA compliance by warning that employers are prohibited from asking disability related questions until after making a conditional job offer. As for ADEA compliance, the EEOC warns that the ADEA does not specifically prohibit an employer from asking an applicant’s age or date of birth. However, because such inquiries may deter older workers from applying for employment or may otherwise indicate possible intent to discriminate based on age, requests for age information will be closely scrutinized to make sure that the inquiry was made for a lawful purpose, rather than for a purpose prohibited by the ADEA. If the information is needed for a lawful purpose, it can be obtained after the employee is hired.

Though prohibited by these federal acts from directly gaining access to this information through an interview, employers intent on discovering answers to proscribed questions may use access to the applicant’s social media accounts to satisfy many of its inquiries, thereby potentially circumventing (or perhaps violating) the laws.

Pre-Employment Screening Under Kansas Employment Acts

Like the federal government, Kansas, too, utilizes multiple legislative acts to prohibit discrimination in selecting employees. The seminal Kansas Act Against Discrimination (KAAD) has legislative roots stretching back to 1953, when it established that the practice or policy of discrimination against individuals in employment relations, in relation to free and public accommodations, in housing by reason of race, religion, color, sex, disability, national origin or ancestry or in housing by reason of familial status is a matter of concern to the state, since such discrimination threatens not only the rights and privileges of the inhabitants of the state of Kansas but menaces the institutions and foundations of a free democratic state.
Subsequent legislative acts prohibit discrimination based on age and military service. The KAAD provided a framework for enforcement and empowered the Kansas Human Rights Commission (KHRC) to eliminate and prevent segregation and discrimination in employment, labor unions, housing, training programs, and other settings. When it comes to the hiring process, the KAAD limits the questions to be asked by a Kansas employer of a potential employee by prohibiting any inquiry in connection with prospective employment or membership, which expresses, directly or indirectly, any limitation, specification or discrimination as to race, religion, color, sex, disability, national origin or ancestry, or any intent to make any such limitation, specification or discrimination, unless based on a bona fide occupational qualification.

More specifically by regulation, the KHRC prohibits inquiry into the birthplace of an applicant, requiring or suggesting that an applicant submit a photograph, inquiry into the name and address of any relative of an adult applicant other than applicant’s spouse or children, and, inquiry into organization memberships, the name or character of which could indicate the race, religion, color, national origin or ancestry of the applicant. Additional regulations provide detailed guidance regarding various protected classes, while others add more specificity, going so far as to provide examples of inappropriate questions. Conceding that a “pre-employment interview should elicit as much information as possible concerning the applicant’s potential to fulfill the requirements of the job applied for,” the KHRC lists acceptable areas of inquiry, which include; previous work experience; job related military service; education and training; authorization to work in the U.S.; and relevant personal characteristics.

Additional KHRC guidelines warn that “[i]nformation obtained through application forms or interviews is presumed to be used by the employer in making selection and assignment decisions. For this reason, only those inquiries needed to determine an applicant’s eligibility for employment should be made.” The KHRC likely would presume any information gathered from social media sites during the hiring process to be used by the employer in selection and assignment decisions.

### Facebook: Information Control

Inquiries into an applicant’s qualifications and history do not necessarily end with the face-to-face interview process. Social media, such as Facebook, may provide the opportunity for employers to “extend” the interview because Facebook members share personal and professional information with other members—and potentially the general public. Information availability varies considerably, with each member ostensibly controlling the availability, and thus the level of privacy, of shared items. Facebook’s privacy statement assures that “[y]ou can manage the privacy of your status updates, photos and information using the inline audience selector — when you share [that is, upload or post information] or afterwards.” Yet the privacy statement also warns users that information shared with an audience can be shared again “with others, including apps.”

Information control seemingly conflicts with the primary goal of social media: the sharing of and commenting upon bits of information posted by users which makes the social experience. When a member makes a social connection through Facebook, the member is said to “friend” the contact which results in Facebook including the new contact in a public list of the individual’s “friends.” “Friends” can include both people and organizations, which potentially reveals information about a person’s associates and interests. Facebook shares information with a member’s friends when the member chooses to “like” another member’s statements, photos, videos, books, websites, organizations, and other shared information. Members are alerted to any “likes” their postings generate. As a result, Facebook potentially reveals and shares significant amounts of information about a potential employee, painting a detailed picture of the applicant for the employer.

Prior to utilizing its services, Facebook requires assent to its end-user agreement and terms of service. The terms of service disclose to users the extent that information potentially may be shared. They state in part:

> 3. When you use an application, your content and information is shared with the application. We re-

45. K.S.A. 44-1111 to -1121.
46. Id. § 44-1125 to -1133.
48. A Kansas “employer” is “any person in this state employing four or more persons and any person acting directly or indirectly for an employer, labor organizations, nonsectarian corporations, organizations engaged in social service work, and the state of Kansas and all political and municipal subdivisions thereof, but shall not include a nonprofit fraternal or social association or corporation.” K.S.A. 44-1002(b).
49. The KAAD defines “employee” by excluding from its coverage “any individual employed by such individual’s parents, spouse or child or in the domestic service of any person.” K.S.A. 44-1002(c).
50. Id. 44-1009(a)(3).
52. See id. 21-31-2 (nationality), -31-1 (religion), -32-5 (sex).
53. See id. 21-32-4.
55. Id.
56. Id.
57. Verifying references provided by an applicant is typical at this stage of the hiring process.
59. Id.
60. Id.
61. An “application” is a third party software or utility used by Facebook members to be social. These “apps” can be used to share calendars (socialcalendar, http://www.socialcalendar.com/) (visited July 27, 2012), share with a member’s friends what music he or she is currently listening (spotify, http://apps.facebook.com/get-spotify/) (visited July 27, 2012), recently read books (goodreads, http://www.goodreads.com/) (visited July 27, 2012), identify the member’s current geographic location (foursquare, http://foursquare.com/about (visited July 27, 2012)), and play games (FarmingVille, http://www.facebook.com/FarmVille (visited July 27, 2012)). In the latter use, the apps encourage “friending” in order to increase game scores or implement strategies.
### At-a-Glance  
**June 19 – 21**  
**Hyatt Regency Hotel**  
**Wichita, Kan.**

All program events held at the Hyatt unless otherwise noted

#### Wednesday, June 19

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
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| 11 a.m.      | Joint Golf Tournament  
@ Tallgrass Golf Course                                                      |
| 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  
@ Marriott *(Invitation Only)*                                             |
| 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  
@ The Pumphouse  
*Co-hosted by WBA Young Lawyers*  
Other Hospitality Events: Judiciary  
@ Marriott                                                            |

#### Thursday, June 20

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
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<tbody>
<tr>
<td>6:30 – 7:45 a.m.</td>
<td>5k Fun Run &amp; Walk</td>
</tr>
<tr>
<td>6:30 a.m.</td>
<td>Registration Opens</td>
</tr>
</tbody>
</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. | Exhibitor Hall Opens                                                  |
| 9 – 9:15 a.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             |
| 9:15 a.m. – 12:15 p.m.| Bryan A. Garner LawProse Seminar:  
Advanced Legal Writing & Editing                                        |
| 12:15 – 1:30 p.m.| Networking Luncheon                                                  |

#### Friday, June 21

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
</tr>
</thead>
</table>
| 1:30 – 4:30 p.m. | Bryan A. Garner LawProse Seminar:  
Drafting Better Contracts                                             |
| 2:45 – 3 p.m. | Afternoon Break                                                        |
| 5 – 7:30 p.m. | KBF Fellows Dinner  
@ Petroleum Club *(Invitation Only)*  
(Transportation provided)                                               |
| 7:30 p.m.    | The Wichita Bar Show  
@ Orpheum Theater  
(Transportation provided)                                               |
| 10 – 11:30 p.m.| Curtain Call Celebration  
@ Scottish Rite Temple  
(Transportation provided)                                               |

### 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!

- **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 Welcome**: 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)

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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.*
Registration Form • Page 2

(please check those programs that you plan to attend)

All program events held at the Hyatt unless otherwise noted

- President’s Reception ........................................... N/C
  6 – 7 p.m.

- KBA Installation & Awards Dinner
  7 – 9 p.m. .................................................. $90/person $_____
  Includes Installation & Awards Dinner (wine with plated meal)
- Dietary restrictions? Please specify: __________________________

SUBTOTAL B. FROM FRIDAY ................................. $_____

(Registration form concludes on following page)

Three-track Educational Programming

3:30 – 4:20 p.m.

- Building Diversity in the Legal Profession
  (1.0 CLE, including 1.0 EP) Gen. credit, not ethics in MO
- Incorporating and Embracing Technology for Your Solo or Small Firm Practice
  (1.0 CLE, including 1.0 LPM)
- Settlement Strategy in Mediation: Preparation, Customization, Analysis and Persistence (1.0 CLE)

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 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.

Key Trainer
Bryan A. Garner

LAWPROSE®
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.

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:

Event | Price | Total
---|---|---
Full Conference Registration (KBA Member) | | |
*includes 2 LawProse seminars & books; seating limited to 200
  Full Conference* | $425 | $425
  Full Conference (YLS)* | $275 | $275

Single Day Registration (KBA Member)
*includes 2 LawProse seminars & books; seating limited to 200
  Thursday Only Attendance* | $325 | $325
  Thursday Only Attendance YLS Member* | $225 | $225
  Friday Only Attendance | $215 | $215
  Friday Only Attendance YLS Member | $155 | $155

Nonmember Registration
*includes 2 LawProse seminars & books; seating limited to 200
  Full Conference Attendance* | $525 | $525
  Thursday Only Attendance* | $425 | $425
  Friday Only Attendance | $315 | $315

SUBTOTAL A. FROM WEDNESDAY | $ | $
SUBTOTAL B. FROM FRIDAY | $ | $
TOTAL ENCLOSED | $ | $

Payment Information

- Check Enclosed (Payable to Kansas Bar Association)
- Bill to: □ MasterCard □ Visa □ AmEx □ Discover

Account Number ____________________________
Expiration Date ___________ CVC ___________
Signature ________________________________

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

Hyatt Regency Hotel
400 W. Waterman • Wichita, Kan.
Room reservations: Call (888) 421-1442
qure applications to respect your privacy, and your agreement with that application will control how the application can use, store, and transfer that content and information. (To learn more about Platform, read our Privacy Policy and Platform Page.)

4. When you publish content or information using the Public setting, it means that you are allowing everyone, including people off of Facebook, to access and use that information, and to associate it with you (i.e., your name and profile picture).62

If typical, a Facebook member has neither read the end-user agreement63 nor is aware of privacy settings—the key tool controlling access to member information. Many members do not restrict access to posted information. One study of Facebook members from a large Northeast university found that only 11.3 percent of students restricted access to their Facebook profile.64

Three general privacy settings—“Public,” “Friends,” and “Custom”65—enable members to reveal or conceal information to friends and the general public. With the most conservative, minimal setting, a public non-friend member searching for a name may find only a profile with a name and the regional city with which the user is identified. A profile photo may also be returned by the search since most Facebook members share at least that additional piece of information for identification purposes.66 Those members not employing stringent privacy or sharing settings allow other information to be returned in a search, such as current employer, and schools attended (secondary, universities, etc.). However, many members willingly


4. When you publish content or information using the


A profile photo can be anything a member desires. It can be the typical photo of the member’s face (which can reveal a great deal of discriminatory information), a photo of the member and a significant other, a family photo, a cartoon, or a political advertisement.

This can provide discriminatory information related to age.

This can provide discriminatory information related to marital status, religion, and sexual orientation.

This information can provide a wealth of information which can lead to inferences about membership in protected classes.

Only one’s imagination limits what information may be gleaned from a review of photos.

Responding to privacy concerns, Facebook announced efforts aimed at developing circles of “close friends” and “family” providing additional means to more closely guard or freely share some types of information. Mark Zuckerberg, Our Commitment to the Facebook Community (Nov. 29, 2011), http://www.facebook.com/facebook (last visited Apr. 14, 2012). These have been implemented.

72. Many members post their birthdays and enjoy the cascade of well wishes on their birthdays. Others list relationship status and identity the person with whom the relationship exists. Many members post photos—sometimes numbering in the hundreds or more—as a way to share memories. Some members “like” companies, musicians, movies, books, products, politicians, political movements or organizations, churches, and statements or postings made by other members. In particular, “likeing” an organization generally establishes a link from that organization to the member. That provides opportunities and risks for the member as discussed, infra, Discriminatory Actions.

73. In varying versions of Facebook, it has been relatively easy to almost impossible to remove tagged postings and photos.
being asked within the interview process, and may thereby invite serious legal problems.

**The Applicant, the Employer, and Facebook: Potentially Relevant Information**

Employers have readily used the information gained from public profiles in the hiring process. A 2009 CareerBuilder.com survey of hiring managers found a number of valid reasons that candidates had been rejected based on information found on social media sites. Reasons for candidate rejections included:

- Provocative/inappropriate photographs or information (53 percent)
- Content about drinking or using drugs (44 percent)
- Bad-mouthing of previous employers, co-workers or clients (35 percent)
- Poor communication skills (29 percent)
- Discriminatory comments (26 percent)
- Misrepresentation of qualifications (24 percent)
- Shared confidential information from a previous employer (20 percent).74

Conversely, the same study found that 18 percent of hiring managers have found content on social networking sites that convinced them to hire the candidate. Leading examples include:

- Profile provided a good feel for the candidate’s personality and fit within the organization (50 percent)
- Profile supported candidate’s professional qualifications (39 percent)
- Candidate was creative (38 percent)
- Candidate showed solid communication skills (35 percent)
- Candidate was well-rounded (33 percent)
- Other people posted good references about the candidate (19 percent)
- Candidate received awards and accolades (15 percent).75

Information gathered on a member’s Facebook site may be valuable and relevant to an employer for other reasons. A resume can be vetted against an applicant’s profile information for inconstancies in academic and employment histories. Applicants with inappropriate racial, sexual, or otherwise discriminatory statements posted to their profile may be wisely eliminated from the candidate pool, as will those exhibiting unwise or illegal activities in photos. All postings, whether text, photographic, links, or likes, paint a picture of the applicant which may prove to be of great value to the employer.

Additional value may be extracted by utilizing information identifying a potential employee’s protected class when us-

75. Id.
ing the information to fulfill a public goal. For example, the KAAD provides that, “[i]t shall not be an unlawful employment practice to fill vacancies in such way as to eliminate or reduce imbalance with respect to race, religion, color, sex, disability, national origin or ancestry.” Related regulations are more explicit, allowing pre-employment inquiries regarding an applicant’s sex “provided that the inquiry is made in good faith for a non-discriminatory purpose.” Another regulation specifies that any pre-employment inquiry which expresses limitations based upon age is unlawful unless based on a bona fide occupational qualification.

While restricted class information may be gathered from Facebook, there may be more accurate and methodical means of collecting information on an applicant’s sex, age, and other relevant topics in a manner to which potential employees assent. If relevant, learning whether a “Shawn” or “Taylor” is male or female can be done more efficiently in a manner other than searching on Facebook. Gathering data through social media may lead to collection of inaccurate information due to incorrectly drawn inferences or taking as truthful those statements intentionally posted in an inaccurate manner or in jest.

Inaccurate information may pale in comparison to the potential for mistaken identity. A search on Facebook for the name of one of the authors – “Anthony Gabel” – finds 11 members, including two from the author’s hometown. Celebrities and common people alike have suffered from the creation of faux sites. Bill Gates is one celebrity who has suffered from fake sites. The problem’s significance generated creation of faux sites. Bill Gates is one celebrity who has suffered from fake sites. At least two employers received blistering publicity and were threatened with legal action when they made such demands. In 2009, the city of Bozeman, Mont., received considerable attention in both traditional and web-based media after a local television station reported the city required job applicants to provide their usernames and passwords for “any personal or business websites, webpages, or any memberships in any Internet-based chat rooms, social clubs or forums, to include, www.facebook.com, Facebook Help Center, http://www.facebook.com/help/faq#1677225328796 (last visited Apr. 14, 2012).

Two recent cases illustrate the potential harm of falsifying Facebook profiles. Considered one of the more notorious cases, California man creating 130 fake Facebook profiles to harass his former girlfriend. He made additional postings to Craigslist with the woman’s name and explicit photos. In New Jersey, a woman impersonated her ex-boyfriend and posted inflammatory comments on a fake Facebook site.

Comments on the fake profile suggested the ex-boyfriend (a police detective) frequented prostitutes, had a sexually transmitted disease, and engaged in illegal drug use.

Good-faith errors also occur. Tags of photos linked to the wrong person may be bothersome; tagged photos exhibiting intoxication or nudity linked to the wrong Facebook account can taint an innocent party. A comment posted on a wall in jest by a friend may be misinterpreted or damaging. The potential employer acting on what appears to be illegal activity or demonstrations of poor judgment may be acting on faked or inaccurate material, ultimately leading the employer to pass over or disqualify a potentially valuable employee.

What if an applicant does not have Facebook or any other social media account? A potential employer may have difficulty interpreting this. It may be evidence of a very innocent background, or it may mean the applicant closed the accounts upon entering the job market, effectively hiding embarrassing or damaging information.

With a variety of potential interpretations possible, absence may reflect “probity, circumspection, good judgment, and discretion. And to the extent that’s correct, it seems all to the good. On the other hand, perhaps what it shows is: technological unsophistication, ignorance, estrangement from the community of one’s peers, or an unhealthy self-absorption with one’s own public persona.” However, “[t]he odds that twentysomethings who don’t post about their social exploits actually have fewer of them seem, to me at least, to be approximately zero. Hiring the person who doesn’t (currently) keep a blog or have a Facebook profile doesn’t say anything about whether the candidate’s actual background is squeaky-clean or not.” Tim Armstrong, Social Darknets (June 12, 2006), http://blogs.law.harvard.edu/infolaw/2006/06/12/social-darknets.

Aggressive employers have taken the tack of requesting social media site usernames and passwords from job applicants. At least two employers received blistering publicity and were threatened with legal action when they made such demands. In 2009, the city of Bozeman, Mont., received considerable attention in both traditional and web-based media after a local television station reported the city required job applicants to provide their usernames and passwords for “any personal or business websites, webpages, or any memberships in any Internet-based chat rooms, social clubs or forums, to include, www.cbsnews.com/8301-504083_162-2013755-504083/calif-man-creates-130-fake-facebook-profiles-to-harass-ex-girlfriend-pleads-no-contest/.


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www.ksbar.org

Legal Article: Employer Use of Facebook ...
but not limited to: Facebook, Google, Yahoo, YouTube.com, MySpace, etc.”91 The city was inundated with feedback and the city manager quickly announced “Effective at noon today ... the City of Bozeman permanently ceased the practice of requesting that candidates selected for positions under a provisional job offer to provide their user names or passwords for candidates Internet sites.”92

In 2011, the American Civil Liberties Union of Maryland (ACLU) entered the fray when the Maryland Department of Corrections (MDOC) required job applicant Robert Collins provide his Facebook username and password as part of the agency’s job application process.93 MDOC justified its request, stating its need “to review wall postings, email communications, photographs, and friend lists in order to ensure that those employed as correction officers are not engaged in illegal activity or affiliated with any gangs.”94

The ACLU argued that the MDOC policy was illegal95 under the federal Stored Communications Act (SCA)96 and its Maryland state analog, and it relied upon an unpublished decision awarded the employee-plaintiffs compensatory and punitive damages for SCA violations where the employer coerced an employee to surrender user credentials to a private, online forum. In 2011, the American Civil Liberties Union of Maryland (ACLU) entered the fray when the Maryland Department of Corrections (MDOC) required job applicant Robert Collins provide his Facebook username and password as part of the agency’s job application process.93 MDOC justified its request, stating its need “to review wall postings, email communications, photographs, and friend lists in order to ensure that those employed as correction officers are not engaged in illegal activity or affiliated with any gangs.”94

The ACLU argued that the MDOC policy was illegal95 under the federal Stored Communications Act (SCA)96 and its Maryland state analog, and it relied upon an unpublished decision awarded the employee-plaintiffs compensatory and punitive damages for SCA violations where the employer coerced an employee to surrender user credentials to a private, online forum. After learning of a private Myspace chat room established by its employees where workplace grievances were aired, the employer (through one of its supervisors) successfully insisted that an employee give up her identification and password. Subsequently, the employer through its agents accessed and monitored the chat room.98 Eventually the employer fired the chat room’s creators for damaging employee morale and violating the restaurant’s “core values.” The court opined that if access to the chat room “was authorized by a user of that service with respect to a communication of or intended for that user, then “there is no statutory violation;”99 however, the court upheld the grant of compensatory and punitive damages and concluded that a jury could reasonably infer from an employee’s testimony that the purported authorization was coerced or provided under pressure, and “not in fact, authorized.”100

After pressure from the ACLU and negative media regarding Collins’s complaint, the MDOC announced on April 6, 2011, that it was revising its policy and would no longer require job applicants to provide social media identification and passwords—even though 94 percent of those hired in the past year had been willing to provide that information.101 While not all juries or courts may reach the same conclusion as the jury in Pietrylo, an employer runs a legal risk (potentially including punitive damages), as well as a public relations risk, if it requires job applicants to provide social media identification and passwords. In response to these and other cases, several jurisdictions are considering laws banning this behavior, with the state of Maryland being the first to enact such legislation.102 Out of principle or a desire for privacy, for reasons unrelated to job performance or qualifications, qualified employees may be dissuaded from applying for employment if faced with turning over this personally held information to a prospective employer.103

Discriminatory Actions

By searching Facebook or other social media sites, a potential employer may become exposed not only to information that may be useful in employment decision making, but the employer may also become aware of protected class information. If an employer uses that protected class information to discriminate in hiring, the employer will have intentionally violated the relevant federal and state statutes.

Yet an employer not motivated by discriminatory intent may still run afoot of federal and state protections when its hiring practices utilize Facebook. Its social media-informed employment decision may disparately impact a protected class candidate. For example, an employer disapproving of or disliking “rap music” may tend to assign a low rating to or pass over applicants with “likes” and links to “gangsta rap” artists. Those candidates may disproportionately represent African American men. An employer may disapprove of candidates who “like” Jimmy Buffet or the Rolling Stones and may disproportionately impact applicants over 40 years of age. An employer may disapprove of candidates who “like” the Susan G. Komen Foundation or a religious figure such as Pope Benedict or the Dalai Lama and impact candidates of particular religions.

The U.S. Supreme Court has held that Title VII “proscribes not only overt discrimination, but also practices that are fair

92. Id.
94. Id.
95. “While employers may permissibly incorporate some limited review of public internet postings into their background investigation procedures, review of password-protected materials overrides the privacy protections users have erected and thus violates their reasonable expectations of privacy in these communications.” Id.
96. 18 U.S.C. §§ 2701-2712 (2012). Among its prohibitions, the SCA forbids intentionally “access[ing] without authorization a facility through which an electronic communication service is provided.” Id. at § 2701(a)(1).
98. Id. at *8.
99. Id. at *7.
100. Id. at *9.
103. See Manuel Valdes, Can Employers Ask For Applicants’ Passwords? The Washington Post, Mar. 26, 2012, at A-12. In response to the Pietrylo and other cases, U.S. Sen. Charles E. Schumer (N.Y.) and Richard Blumenthal (Conn.) have requested the Department of Justice to investigate whether “this practice [of requesting user credentials from job applicants] violates the Stored Communications Act or the Computer Fraud and Abuse Act [18 U.S.C. §§ 1030(a) – (h)].” Presumably, to request the information and subsequently access an applicant’s social media account would violate these two acts.
in form, but discriminatory in operation. The touchstone is business necessity … [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.”

Similarly, the KAAD recognizes the disparate impact theory of discrimination, proscribing any “employment procedure or practice which, in fact, results in discrimination, segregation, or separation without a valid business motive,” and it parallels the federal government’s burden of proof allocation.

The KHRC has promulgated a series of regulations addressing employee testing and screening and disparate impact in hiring. Therefore, an employer whose hiring practices produce statistical evidence of disparate impact potentially faces litigation and the burden of proving business necessity for the practice as well as the need to prove that it could not adopt an alternative employment practice that would not have a disparate impact on a protected class. An employer using screening of social media sites as part of the hiring process should proceed with those needs in mind.

**Employer Record Keeping Responsibilities**

Federal and state law requires employers to retain records used in employment searches and hiring. EEOC regulations require employers to keep records related to job searches. All application forms and records dealing with hiring must be retained by private employers for one year from the date of making the record or of the personnel action involved, whichever occurs later.

Educational institutions, state, and local governments must retain such records for two years.

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104. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971). In 1989, the Supreme Court reduced the defendant’s burden of business necessity to a burden of producing evidence of business justification in *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 657 (1989). The Civil Rights Act of 1991 overturned that portion of the *Wards Cove* decision. Allocation of proof in disparate impact cases first falls on the plaintiff to prove that the challenged practice or selection device has a substantial adverse impact on the basis of race, color, religion, sex, or national origin. See *42 U.S.C. 2000e-2(k)(1)(A)(i).* The plaintiff may attack the statistical analysis or offer differing statistics. If the plaintiff establishes a statistical disparate impact, the employer must defend the practice and prove that it is “job-related for the position in question and consistent with business necessity.” See *id. at 2000e-2(k)(1)(B)(ii).* A plaintiff may also prevail even if the employer proves business necessity, if the plaintiff can show that the employer has refused to adopt an alternative employment practice which would satisfy the employer’s legitimate interests without having a disparate impact on a protected class. *Id. 2000e-2(k)(1)(A)(i) – (ii); id. at 2000e-2(k)(1)(C).*

105. K.S.A. 44-1009(a)(1).


107. K.A.R. 21-30-2 et seq. (2012). K.A.R. 21-30-13 is particularly relevant as it addresses “unscored” selection procedures that result in differential rates of applicant rejections from various minority and non-minority groups. In such cases, the employer may be called upon to present evidence concerning the validity of “unscored procedures as well as any tests that may have been used.” *Id.* If the employer “is unable or unwilling to perform such validation studies, he has the option of adjusting employment procedures so as to eliminate the conditions suggestive of employment discrimination.” *Id.*

108. 29 CFR 1602.1 – 1602.56.


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from the date of making the record or the personnel action whichever occurs later. 110 When a charge of discrimination has been filed under Title VII or the ADA, records must be retained until final resolution of the charge or action. 111 Those federal requirements appear to mandate the keeping of records in reviewing social media websites and in retaining the information viewed.

Under Kansas law, an employer must preserve all personnel records relevant to a complaint or investigation until such complaint or investigation has been adjudicated. 112 Facebook pages used in employment selection appear to fall under the requirement. Destroying any employment records required to be kept under the KAAD or records or information involved in any proceeding brought pursuant to the KAAD is a class B misdemeanor. 113 Like in federal law, that state law apparently would require retention of data collected from social media websites if used to screen candidates.

Employers who make decisions based on negative information found via searches of social media sites clearly need to document what information was found and why its impacted the hiring decision. Demonstrating that the job candidate provided permission to search for information and was provided an opportunity to respond to negative information is wise. An employer needs to be able to demonstrate that if social media searches were used in the employment process, decisions were made based on permissible and relevant information. Employers should retain computer screen shots of materials legitimately relevant to decision making as part of the search file.

**Employer Strategies**

How should an employer approach the use of social media sites to screen employee applicants? First, an employer should make a conscious decision as to whether to employ that tool and either establish a policy prohibiting use or establish a policy for use of social networking websites that provides a uniform approach. 114 The purpose and rationale of the background check should establish in the policy required of the hiring manager as part of the documentation of the search process. In either case, a legitimate business rationale should be documented. Employer research of social networking sites should be conducted methodically to ensure consistency across all legally-protected classes. Employers should document the search process and findings and preserve the findings as part of the search record.

**Specific advice to employers includes:**

- Give notice to the job applicant and obtain written approval before searching.
- Make sure that the social media profile is that of the applicant.
- Do not seek answers to questions that your organization would not ask in an interview.
- Give applicants the opportunity to clarify information posted in order to insure that it is not incorrect or faked. If a third party has provided the report upon which adverse action is to be taken, the applicant must be notified and provided the report in compliance with the Fair Credit Reporting Act. 115
- Do not ask applicants for passwords to profiles. Asking or requiring passwords is viewed as extremely intrusive of privacy. It may violate the Stored Communications Act. 116
- Both policy and practice should prohibit use of protected class information revealed in searches.
- Factors that have a disproportionate impact on a protected class should not be used in decision making unless they have relevance to the position. A permissible factor might be if more males than females in a pool of applicants reveal drug activity.
- A person other than the decision maker should conduct reviews of social media sites and search for specified information, collect and maintain it in a uniform manner. This ensures that the decision maker is not exposed to information that would be inappropriate to use in the hiring decision. It may be relevant for the decision maker to know that an applicant is featured smoking marijuana or exposing himself, is a “friend” of a racist organization, or has complained publically about his current employer. It is not relevant for the decision maker to know protected class information.
- Satisfy federal and state record keeping requirements by establishing and complying with policies of capturing and retaining information from candidates’ social media profiles.

**Conclusion**

Employers understandably want to learn about prospective hires. Membership in social media websites, such as Facebook, includes a substantial portion of the American pool of job applicants. Search engines and search tools within social media websites allow rapid search for information about applicants, revealing substantial amounts of potentially relevant and protected class information alike. While some of the information may be highly valuable and relevant in selecting successful candidates, its use may violate federal and Kansas statutory acts against employment discrimination when the use disproportionately impacts protected classes of potential employees. Employers who use social media in hiring should do so with a policy in place guiding its uniform execution and record retention.
About the Authors

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RULE 174

JOURNAL ENTRY FORMS FOR CHILD IN NEED OF CARE, JUVENILE OFFENDER, AND DOMESTIC CARE RELATIONS

New Rule 174 is hereby adopted, effective May 1, 2013.

(a) When Use of Judicial Council Forms is Mandated. To ensure compliance with the federal Adoption and Safe Families Act, a district court must use the appropriate Judicial Council form when:

(1) placing a child in the custody of a person other than the child’s parent or legal guardian in a child in need of care, juvenile offender, or divorce proceeding; or

(2) ruling on child in need of care and juvenile offender permanency hearings.

(b) Attachments. An additional order or supplemental affidavit may be attached to a form order if a court desires to include additional information.

(c) District Court Administrative Matters.

(1) Official Court File Contents. All journal entries and attached orders must be maintained in the district court’s official file.

(2) Required Data Entry. All required data — described in the Juvenile Compliance Training Manual distributed by the Office of Judicial Administration — must be entered into the court’s case management system.

(d) Form Changes. The Supreme Court may create, modify, or delete forms under this rule after review by the Judicial Council and the Supreme Court Task Force on Permanency Planning.

By order of the Court, this 24th day of April, 2013.

FOR THE COURT

Lawton R. Nuss
Chief Justice

RULE 610

DISMISSAL NOTICE; LETTERS OF CAUTION AND INFORMAL ADVICE

If the investigation does not disclose sufficient cause to warrant further proceedings, the judge and the complaining party, if any, shall be notified, and other interested persons may be notified at the discretion of the panel. The panel may, in its discretion, issue to the judge a letter of caution or of informal advice with copies to the complaining party or other interested persons as deemed appropriate.

If the investigation does not disclose sufficient cause to warrant further proceedings, the judge and the complaining party, if any, must be notified, and other interested persons may be notified. If the panel finds no violation has occurred, the panel may issue a letter of informal advice to the judge. If the panel finds a violation has occurred, the panel may issue a letter of caution to the judge. In either instance, copies may be provided to the complaining party or other interested persons as deemed appropriate.

By order of the Court, this 24th day of April, 2013.

FOR THE COURT

Lawton R. Nuss
Chief Justice
DISCIPLINARY ADMINISTRATOR: On April 22, 2013, the office of the disciplinary administrator filed a response stating that the respondent had provided appropriate documentation that she is in compliance with the conditions imposed by the court and is prepared to resume the practice of law with the conditions imposed by the court.

HELD: Court reinstated Harrington to the practice of law in the state of Kansas with the following conditions: (1) Comply with all recommendations of her Professional Treatment Services evaluation or other identified treatment provider; (2) continue her monitoring agreement with KALAP; (3) allow her supervising attorney to review her practice and provide written reports to the disciplinary administrator as requested by the disciplinary administrator; (4) maintain an ignition interlock device; (5) submit to drug and alcohol screenings when requested to do so by the disciplinary administrator or the proposed supervising attorney and seek additional treatment when requested by the disciplinary administrator or her proposed supervising attorney; and (6) refrain from consuming alcohol or cereal malt beverages.

REAL ESTATE AND SELLER’S DISCLOSURE STATEMENT
STECHSCHULTE ET AL. V. JENNINGS ET AL.
JOHNSON DISTRICT COURT – REVERSED AND REMANDED
COURT OF APPEALS – AFFIRMED IN PART AND REVERSED IN PART
NO. 103,340 – APRIL 19, 2013


ISSUES: (1) Attorney fees and (2) appellate attorney fees

HELD: Court stated that Snider asks the court to overrule Evans v. Provident Life & Accident Ins. Co., 249 Kan. 248, 265, 815 P.2d 550 (1991), where the court held that a party’s request for civil appellate attorney fees is to be determined by the appellate court hearing the appeal. Supreme Court Rule 7.07(b) (2012 Kan. Ct. R. Annot. 66) provides a procedure for making such a request and specifies the time period after the appellate oral argument in which the request must be made. Snider asked the Court to exclude Evans’ holding from those cases where a fee applicant did not prevail in the district court. Court rejected Snider’s requests and concluded that some aspects of Snider’s arguments were not preserved; the Court of Appeals correctly applied Rule 7.07(b), Evans, and K.S.A. 40-908; and the Court of Appeals did not abuse its discretion in determining the amount of reasonable attorney fees related to this current appeal. Court affirmed the Court of Appeals.

DISSENT: Justice Moritz dissented and would find that Snider followed the proper procedural requirements for recovering appellate attorney fees and is not barred from recovery of such fees. Justice Johnson joined in the dissent.

STATUTES: K.S.A. 40-908; and K.S.A. 60-2106
Appellate Decisions

[Image -567x679 to 9x792]

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“matters” section that “several windows leaked after construction; full warranty repairs were performed, and correction is complete.” The seller’s disclosure statement had a buyer acknowledgment and agreement that stated that the Seller was selling the property as is without warranties or guaranties of any kind. The Stechschulte’s purchased the home. After a heavy rain, extensive water damage occurred in the house. The Stechschulte’s sued Jennings for fraud, negligent misrepresentation, and breach of contract. The Stechschulte’s sued Golson and the real estate company for negligent misrepresentation and violations of the Kansas Consumer Protection Act. The district court granted summary judgment to all the defendants on all the claims based on to prior case law and that the Stechschulte’s had waived their right to rely on Jennings’ representations. The Court of Appeals reversed the summary judgment ruling against Jennings, but affirmed in favor of Golson and the real estate company. The Court of Appeals found that the representations Jennings provided in the disclosure constituted a writing signed by the Seller and that the buyer acknowledgement did not waive the Stechschulte’s right to rely on those representations. The Court of Appeals also found the Stechschulte’s fraud claim was not limited to a fraud by silence claim and summary judgment was inappropriate.

ISSUES: (1) Real estate and (2) seller’s disclosure statement

HELD: Court stated that the Buyer Acknowledgment in the residential real estate seller’s disclosure form merely protected the seller and his or her broker from the buyer’s later argument that the seller made oral representations upon which the buyer relied. It does not protect a seller or broker from the buyer’s lawsuit based on representations and failure to disclose in the form itself or relieve a seller of the obligation to make accurate and complete disclosures, and both contract and reliance-based tort and Kansas Consumer Protection Act claims are not subject to summary judgment. Court found that a buyer of residential real estate may qualify as an “aggrieved consumer” under the Kansas Consumer Protection Act. K.S.A. 50-634. Court held that the reasonableness of a home inspection, as true of the existence of fraud generally, poses a question of fact for trial. Court found that new opinions of the Kansas Supreme Court generally are binding on all other future cases and all cases still pending on appeal when the new opinions are filed. Court found no exception applicable in this case. Court concluded that genuine issues of material fact existed on the Stechschulte’s fraudulent inducement, fraud by silence, negligent misrepresentation, and breach of contract claims against the defendant seller and against the defendant broker. Court found that K.S.A. 50-625(a) provides that a consumer cannot waive or forego rights under the Kansas Consumer Protection Act. Court held that genuine issues of material fact exist on the plaintiff buyers’ negligent misrepresentation claim against the agent and the respondent superior liability of her defendant broker. Court found that K.S.A. 50-625(a) provides that a consumer cannot waive or forego rights under the Kansas Consumer Protection Act. Court held that genuine issues of material fact exist on the plaintiff buyers’ KCPA claims against the defendant real estate agent for seller and against the defendant brokerage company.


Appellate Practice Reminders . . .

From the Appellate Court Clerk’s Office

Dispositions of Petitions for Review

When a party files a petition for review of a Court of Appeals decision under Rule 8.03 (2012 Kan. Ct. R. Annot. 72-76), the typical expectation is that the review will be granted, with a Supreme Court opinion to follow, or that the review will be denied. That is the result in most instances; however, other dispositions are possible under the rule.

• The Supreme Court may grant review but limit the issues which will be considered, resulting in a partial grant of review. See Rule 8.03(g)(1).
• The Supreme Court may, subsequent to a grant of review, determine that review was improvidently granted and issue an order stating that review was improvidently granted and that the Court of Appeals opinion or disposition is final. See Rule 8.03(h)(1).
• The Supreme Court may grant review and remand the appeal to the Court of Appeals, district court, or agency for reconsideration of issues in light of authority identified in the Supreme Court’s order. See Rule 8.03(h)(3).
• The Supreme Court may dismiss if it is determined that the case has become moot after the petition for review was granted. See Rule 8.03(h)(5).
• Before an opinion on review is filed, a party that filed a petition for review may dismiss the petition by stipulation or by filing with the clerk of the appellate courts and serving on all parties a notice of dismissal. Note, however, that a dismissal of one party’s petition does not affect any other party’s petition or cross-petition. See Rule 8.03(h)(2).

Requests for Transcripts After Docketing

Requests for transcripts are required to be filed at the time of docketing an appeal; however, additional transcripts may be requested after a case is docketed. Under Supreme Court Rule 3.03(d) (2012 Kan. Ct. R. Annot. 21-22), those additional transcript requests must be filed and served in the same manner as the original transcript request. The original of the transcript request is filed in the district court with service on the court reporter and all parties. It is critical that a copy of the additional transcript request be mailed to the clerk of the appellate courts. If the appellate clerk does not receive a copy of the additional transcript request, briefing schedules may be set before all transcripts are completed.

If you have questions about these rules or appellate procedure generally, call the Clerk’s Office and ask to speak with Carol G. Green, Clerk of the Appellate Courts, at (785) 296-3229.

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Appellate Decisions

TRUSTS
HAMEL V. HAMEL ET AL.
ROOKS DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
WITH DIRECTIONS
NO. 102,744 – APRIL 5, 2013

FACTS: This case arises from a dispute over the administration of a trust between a beneficiary of the trust, Lawrence Hamel (Lawrence), and the trustees of that trust, Dennis Hamel (Dennis) and Leona Newell (collectively Trustees). Lawrence sought termination of his deceased father’s trust, the Arthur L. Hamel Living Trust, dated February 7, 2003, and the First Amendment to the Arthur L. Hamel Living Trust, dated February 17, 2003, (collectively Trust) and immediate distribution of Trust assets based on the Trustees’ alleged failure to properly administer the Trust. Lawrence later moved to set aside a contract for deed executed between Dennis and his wife, as buyers, and the Trustees, as sellers, for the sale of farmland owned by the Trust. Lawrence also sought to remove the Trustees, alleging they engaged in self-dealing and breached their fiduciary duties. The district court concluded that (1) Arthur did not intend the Trust to terminate immediately upon his death; (2) the Trust permitted the Trustees to finance the sale of the farmland to Dennis under the terms set forth in the contract for deed; (3) Lawrence violated the Trust’s no-contest clause by challenging, without probable cause, the Trustees’ sale of the farmland to Dennis; (4) Lawrence’s violation of the no-contest clause required his disinheritance; and (5) Lawrence was not entitled to attorney fees and costs under K.S.A. 58a-1004. The Trustees cross-appeal from the district court’s determination of the effective date of Lawrence’s disinheritance and from the court’s conclusion that they acted in bad faith by failing to provide Lawrence with an adequate accounting before being ordered to do so by the court.

ISSUE: Trusts

HELD: Court held that the district court reasonably interpreted ambiguous Trust provisions as not requiring the Trust’s immediate termination upon Arthur’s death. However, Court concluded the Trustees lacked authority to sell the farm to Dennis under a contract for deed that exceeded the three-year-period expressly provided by the Trust. However, Court declined to set aside the sale. Instead, because the Trustees’ execution of the contract for deed violated the terms of the Trust, Lawrence had probable cause to challenge the Trustees’ sale of the farm to Dennis under the terms set forth in that contract. Court reversed both the district court’s ruling regarding the Trustees’ authority to finance the sale of the farm as well as its enforcement of the no-contest clause against Lawrence and remanded to the district court for further proceedings necessary, if any, to effectuate its rulings and for consideration of Lawrence’s claim for attorney fees and costs. Court held that the remand rendered the cross-appeal moot.

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DISSENT IN PART: Justice Biles dissented in part. Justice Biles would hold the Trustees completed a purchase by reducing what was a farmland asset to a contract for ongoing installment payments. The Trust did not preclude the transactions and Justice Biles would affirm on that basis.

STATUTES: K.S.A. 16-207(b); K.S.A. 20-3017; K.S.A. 58a-112, -410(a), -813, -1004; and K.S.A. 79-3101

CRIMINAL

STATE V. ALONZO
MIAMI DISTRICT COURT – JUDGMENT VACATED
COURT OF APPEALS – REVERSED
NO. 101,805 – MARCH 29, 2013

FACTS: Alonzo convicted on guilty plea to possession of methamphetamine. In July 2005, district court sentenced Alonzo to underlying seven-month prison term, and granted 18-month probation and mandatory drug treatment with no findings for extending probation beyond presumptive 12 months. Alonzo did not appeal his sentence. In February 2007, district court revoked probation and reinstated probation for additional 18 months. In March 2008, state filed second motion to revoke probation. District court held resentencing hearing to correct failure to make findings under K.S.A. 21-4611(c)(5) for extending probation from 12 to 18 months. Alonzo appealed his resentencing, arguing district court lacked jurisdiction to revoke and reinstate his probation in February 2007. In unpublished opinion, Court of Appeals affirmed. Alonzo’s petition for review granted.

ISSUE: Probation revocation – jurisdiction

HELD: If a district court fails to comply with requirements of K.S.A. 21-4611(c)(5) by imposing an extended period of probation without making required finding and state agrees the sentence is therefore illegal, district court only has jurisdiction to resentence the defendant during the period of probation that complied with K.S.A. 21-4611(c)(5) – in this case the 12-month presumptive sentence - unless jurisdiction is retained because the original sentence is on appeal. State v. Holt, 39 Kan. App. 2d 741 (2007), is distinguished. Here, district court imposed the “corrected” sentence after the 12-month probation period had expired. The Court of Appeals’ judgment is reversed. The “corrected” sentence and all orders relating to the revocation of Alonzo’s probation are vacated.

STATUTES: K.S.A. 20-3018(b); K.S.A. 21-3301, -4611(c), -4611(c)(5); K.S.A. 22-3504, -3504(1), -3605, -3607; K.S.A. 2004 Supp. 21-4705, -4729; and K.S.A. 2004 Supp. 65-4160(a)

STATE V. CONRAD
RENO DISTRICT COURT – SENTENCE AFFIRMED IN PART AND VACATED IN PART
NO. 104,579 – APRIL 12, 2013

FACTS: Conrad was convicted of sexual conduct with both his biological and step children. In return for his plea to three counts of aggravated indecent liberties with a child and one count of lewd and lascivious behavior, the state dismissed six additional counts. The district court sentenced Conrad pursuant to K.S.A. 21-4643(a)(1)(C), imposing a controlling sentence of 25 years to life. Conrad challenged the constitutionality of the sentence.

ISSUE: Jessica’s Law

HELD: Court held that sentencing challenges under § 9 of the Kansas Constitution Bill of Rights are analyzed through application of the three-part test outlined in State v. Freeman, 223 Kan. 362, 367, 574 P.2d 950 (1978), which considers: (1) The nature of the offense and the character of the offender, particularly the degree of danger present to society; relevant to this inquiry are the facts of the crime, the violent or nonviolent nature of the offense, the extent of
culpability for the injury resulting, and the penological purposes of the prescribed punishment; (2) a comparison of the punishment with punishments imposed in this jurisdiction for more serious offenses, and if among them are found more serious crimes punished less severely than the offense in question, the challenged penalty is to that extent suspect; and (3) a comparison of the penalty with punishments in other jurisdictions for the same offense. Court held that because of the egregiousness of Conrad’s conduct, the first *Freeman* factor directs the outcome in this case. The facts underlying Conrad’s crimes and the findings of the district court dictate a conclusion that Conrad’s sentence is not disproportionate to his crime and his sentence is constitutional. Court rejected Conrad’s claim that he should be paroled after 20 years instead of 25 years because of confusion as to parole eligibility. However, Court vacated Conrad’s lifetime post-release supervision because defendant’s sentences under Jessica’s Law are not subject to lifetime post-release supervision.

**STATE V. EVERETT**  
**SMITH DISTRICT COURT – REVERSED**  
**COURT OF APPEALS – REVERSED**  
**NO. 100,529 – MARCH 29, 2013**

**FACTS:** Jury convicted Everett of manufacturing a controlled substance. Everett appealed, claiming that cumulative error denied him a fair trial, and specifically claiming that the trial court erred in: admitting evidence of a prior conviction, allowing late amendment of the complaint, answering jury’s question about consequences of a hung jury, and not recalling jurors to determine if there had been juror misconduct. In unpublished opinion, majority of Court of Appeals panel affirmed. Everett’s petition for review granted. Appeal decided on single issue of whether a defendant’s presentation of evidence that he was on probation when current crime was committed opens the door to rebuttal evidence regarding a prior crime that may be admitted independent of K.S.A. 60-455.

**ISSUE:** Evidence of prior crime

**HELD:** While defense introduced evidence that Everett had committed a felony and was on probation with community corrections, it was error to allow state to present rebuttal evidence regarding the specific nature of that prior conviction for possession of drug paraphernalia with intent to manufacture methamphetamine. This rebuttal evidence was not material to prove the charged offense of manufacturing a controlled substance, and instead was merely prospective evidence inadmissible under K.S.A. 60-455. Under facts of case, this error was not harmless. Everett’s conviction is reversed, and remaining claims on appeal are not addressed.

**STATUTES:** K.S.A. 2012 Supp. 60-261; K.S.A. 20-3018(b); K.S.A. 60-404, -455; and K.S.A. 65-4159(a)

**STATE V. GARCIA**  
**SHAWNEE DISTRICT COURT – REVERSED AND REMANDED**  
**NO. 104,998 – APRIL 26, 2013**

**FACTS:** A jury convicted Garcia of felony murder based upon the underlying felony of aggravated robbery, for which he was also convicted. During the robbery, Eliel Fernandez shot and killed the robbery victim, Andres Vega. Garcia’s guilt was premised upon his alleged participation in the planning and execution of the robbery. Garcia was shot in the foot during the robbery. During a police interrogation, Garcia admitted that he participated in the robbery, and the district court denied Garcia’s motion to suppress that statement. The only issue addressed on appeal is Garcia’s claim that the district court should have suppressed as involuntary the confession elicited from him during an interrogation because of Garcia’s requests for medical attention/pain medication and the promise for leniency.

**ISSUE:** Interrogation

**HELD:** Court stated that even for an accused with Garcia’s prior experience with the legal system, the withholding of medical attention until the completion of the interrogation had to influence the ultimate decision to tell the police what they were asking to be told. Even if Garcia did not confess solely to obtain medical treatment, the tactic of withholding requested relief for an obviously painful untreated gunshot wound over the course of a several-hours-long interrogation was inherently coercive and must play a significant role in our totality-of-the-circumstances test. Court stated that one of the purposes of the exclusionary rule is to prevent inhumane and unacceptable interrogation techniques. Court also found the promise for leniency and the potential for a murder charge and accompanying life sentence to go away would be a strong motivator for prevarication. Court stated that promise and the officer’s actions in this case fit within the parameters of those promises that may be deemed to have rendered a confession involuntary. Court remanded for retrial.

**STATUTES:** K.S.A. 2012 Supp. 21-6319; and K.S.A. 2012 Supp. 60-460(f)

**STATE V. HERBEL**  
**MARION DISTRICT COURT – AFFIRMED**  
**NO. 103,558 – APRIL 5, 2013**

**FACTS:** On appeal from Jessica’s Law convictions for rape and aggravated indecent liberties with a child, Herbel claimed: (1) district court violated Herbel’s constitutional and statutory rights when it replayed Herbel’s recorded statement to deliberating jury in the courtroom but outside Herbel’s presence; (2) presence of comfort person on stand alongside child victim violated Herbel’s right of confrontation, and was error where district court made no finding that victim needed a comfort person; and (3) older stock PIK Crim. 3d 52.02 instruction on reasonable doubt given to the jury was legally inappropriate. Thirteen days before oral argument, Herbel filed three two-page letters per Supreme Court Rule 6.09 in support of supplemental brief regarding reasonable doubt instruction.

**ISSUES:** (1) Playback of recorded video – right to be present at critical stage of trial, (2) presence of comfort person, (3) reasonable doubt jury instruction, and (4) Supreme Court Rule 6.09

**HELD:** K.S.A. 22-3420(3) was violated by Herbel’s presumed absence where record does not affirmatively specify presence of Herbel or his counsel when recorded statements were replayed for jury. Under facts of case, where both constitutional and nonconstitutional error clearly arose from very same acts and omissions, analysis for constitutional error is first applied. After reviewing factors in *State v. McGinnes*, 266 Kan. 121 (1998), and considering overall standard of review or determining magnitude of constitutional error as articulated in *State v. Ward*, 292 Kan. 541 (2011), error in replaying the recorded excerpts was harmless.

Herbel repeatedly failed to raise or contest issue of comfort person’s presence to trial court, and trial court was not required to raise issue sua sponte. Issue cannot be raised for first time on appeal. No error in giving a reasonable doubt jury instruction that was legally appropriate, even if not the preferred instruction. Court agreed with rationale and holding in *State v. Beck*, 32 Kan. App. 2d 784 (2004).

Letters filed pursuant to Supreme Court Rule 6.09 were improper and not considered. Combined length of letter, plus various arguments made and older legal authorities cited in each, could easily have been included in Herbel’s supplemental brief.

**STATUTES:** K.S.A. 21-3501(1), -4643; K.S.A. 22-3405, -3414(3), -3417, -3420(3), -3502(a), -3601(b)(1); and K.S.A. 60-252, -261, -404, -1507
STATE V. JACKSON
WYANDOTTE DISTRICT COURT – SENTENCES
VACATED AND CASE REMANDED WITH DIRECTIONS
NO. 106,184 – APRIL 12, 2013

FACTS: Twenty-six-year-old Jackson pled guilty to one count of off-grid person felony of rape (sexual intercourse with a child under 14 years old) and one count of off-grid person felony of aggravated criminal sodomy (sodomy with a child under 14 years of age). The state recommended that the district court depart to the Kansas Sentencing Guidelines Act's grid (K.S.A. 21-4704) from the hard 25 mandatory minimum sentence under Jessica's Law. With an agreed-upon departure to the grid, for sentencing purposes only, the parties appeared to agree to reduce the off-grid offenses to on-grid offenses. The on-grid offenses of rape and aggravated criminal sodomy are both severity level 1 person felonies. Jackson ended up with a category H criminal history and his presumptive sentencing range was 166-186 months. The discussion at the later sentencing hearing suggests the parties intended for Jackson to receive departure sentences totaling 310 months—two consecutive sentences of 155 months each (for on-grid rape and aggravated criminal sodomy). For the rape count, the district court sentenced Jackson to 166 months. For the aggravated criminal sodomy count, the court sentenced him to 144 months—a number that does not appear in the grid block appropriate to both the defendant’s criminal history and the severity level assigned to the crime when it lacks the element of disparity between the defendant’s and the victim’s ages. Court also stated that once the sentencing court under Jessica’s Law has departed to the sentencing guidelines, nothing precludes the court from granting a further departure. The additional departure also requires the sentencing court to both state on the record the substantial and compelling reasons for the departure and to make findings of fact regarding them. Court held Jackson’s sentence was illegal because it did not comply with these rules for departure sentencing.

CONCURRENCE: Justices Rosen and Johnson concurred in the opinion but wrote separately to emphasize the lack of an accurate criminal history as the cause of the problems in this case when considering the current plea negotiation process.

STATUTES: K.S.A. 21-3502, -3506, -4643, -4701, -4703, -4704, -4716, -4718; and K.S.A. 22-3601

STATE V. LAWSON
LEAVENWORTH DISTRICT COURT – REVERSED AND REMANDED
NO. 103,509 – APRIL 5, 2013

FACTS: Lawson convicted of aggravated criminal sodomy of child less than 14 years of age. On appeal he raised three sentencing issues and claimed that his right to counsel under federal and state constitutions was violated when he was interrogated without his attorney being present and the resulting statements were admitted at trial when trial court denied motion to suppress.

ISSUE: Right to Assistance of Counsel, K.S.A. 22-4503

HELD: Police initiated its polygraph examination and interview of Lawson the day after he asserted his right to counsel when he submitted application for court-appointed counsel at first appearance. After a statutory right to counsel has attached, the defendant’s uncounseled waiver of that right will not be valid unless it is made in writing and on the record in open court. A Miranda waiver form, signed by the defendant during a police-initiated custodial interrogation, is not a valid waiver of a defendant’s entitlement to assistance of counsel under K.S.A. 22-4503. District court erred in refusing to suppress Lawson’s uncounseled statement. Lawson’s convictions were reversed and remanded for new trial. Sentencing issues not addressed.


CONCURRING: Nuss, CJ., Luckert and Biles, JJ., concur in the result.

STATUTES: K.S.A. 21-3506(a)(1), -4643(a)(1)(D); and K.S.A. 22-3426, -3426(a), -3426(e), -3717(b)(2), -4503, -4503(a)

STATE V. MARKS
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 103,289 – APRIL 19, 2013

FACTS: Rickey Marks stabbed his wife, Rozeta, eight times in her chest, arm, and back while driving to a store. Marks appeals his conviction for the first-degree premeditated murder, arguing: (1) the prosecutor committed misconduct during closing arguments; (2) the district court erred when it denied his motion in limine to exclude evidence that his wife filed for divorce in the weeks prior to her murder; (3) the Wyandotte County district attorney’s open file discovery policy violates K.S.A. 22-3212 and K.S.A. 22-3213; and (4) cumulative error deprived him of a fair trial.

ISSUES: (1) Prosecutorial misconduct, (2) exclusion of evidence, (3) open file discovery policy, and (4) cumulative error

HELD: Court stated that the prosecutor misstated the law on premeditation by explaining to the jury regarding premeditation

scribed by Jessica’s Law to a sentence pursuant to the Kansas Sentencing Guidelines Act grid, the judge must first move to the grid block appropriate to both the defendant’s criminal history and the severity level assigned to the crime when it lacks the element of disparity between the defendant’s and the victim’s ages. Court also stated that once the sentencing court under Jessica’s Law has departed to the sentencing guidelines, nothing precludes the court from granting a further departure. The additional departure also requires the sentencing court to both state on the record the substantial and compelling reasons for the departure and to make findings of fact regarding them. Court held Jackson’s sentence was illegal because it did not comply with these rules for departure sentencing.

CONCURRENCE: Justices Rosen and Johnson concurred in the opinion but wrote separately to emphasize the lack of an accurate criminal history as the cause of the problems in this case when considering the current plea negotiation process.

STATUTES: K.S.A. 21-3502, -3506, -4643, -4701, -4703, -4704, -4716, -4718; and K.S.A. 22-3601

STATE V. LAWSON
LEAVENWORTH DISTRICT COURT – REVERSED AND REMANDED
NO. 103,509 – APRIL 5, 2013

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HELD: Police initiated its polygraph examination and interview of Lawson the day after he asserted his right to counsel when he submitted application for court-appointed counsel at first appearance. After a statutory right to counsel has attached, the defendant’s uncounseled waiver of that right will not be valid unless it is made in writing and on the record in open court. A Miranda waiver form, signed by the defendant during a police-initiated custodial interrogation, is not a valid waiver of a defendant’s entitlement to assistance of counsel under K.S.A. 22-4503. District court erred in refusing to suppress Lawson’s uncounseled statement. Lawson’s convictions were reversed and remanded for new trial. Sentencing issues not addressed.


CONCURRING: Nuss, CJ., Luckert and Biles, JJ., concur in the result.

STATUTES: K.S.A. 21-3506(a)(1), -4643(a)(1)(D); and K.S.A. 22-3426, -3426(a), -3426(e), -3717(b)(2), -4503, -4503(a)

STATE V. MARKS
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 103,289 – APRIL 19, 2013

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ISSUES: (1) Prosecutorial misconduct, (2) exclusion of evidence, (3) open file discovery policy, and (4) cumulative error

HELD: Court stated that the prosecutor misstated the law on premeditation by explaining to the jury regarding premeditation
that “intent can be formed during the act itself.” However, Court held that looking at the record as a whole, the trial’s outcome would not be different if the misstatements were omitted. There was sufficient evidence showing a strong inference that Rozeta’s stabbing was premeditated. And the jury was properly instructed on the law regarding premeditation and was also instructed that arguments of counsel were not evidence. As a result, the prosecutor’s misstatements here do not warrant reversal. Court held that the evidence of Rozeta’s divorce filing was relevant and more probative than prejudicial. Court held the district court did not abuse its discretion in denying the motion in limine and admitting testimony regarding the divorce filing. Court held that Marks was entitled to copies of the discovery under K.S.A. 22-3212 and K.S.A. 22-3213. However, the error was harmless because there was no allegation Marks’ defense was compromised due to his inability to obtain copies of discovery or that counsel failed to review that discovery with Marks. Rather, Marks was permitted to review all discovery information and take notes if he chose to do so. Both errors were harmless in this case, and Court affirmed the conviction. Court rejected Marks’ cumulative error finding that the identified errors did not overtake the strength of the evidence against Marks.

DISSENT: Justice Johnson dissented and would grant a new trial on the prosecutorial misconduct based on the prosecutor’s improper definition of premeditation. Justice Moritz joined in the dissent.

STATUTES: K.S.A. 21-3401; K.S.A. 22-2302, -3212, -3213, -3601, -4503; and K.S.A. 60-261, -407, -2105

STATE V. MITCHELL
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 107,022 – APRIL 12, 2013

FACTS: In 1995, a jury convicted Mitchell of felony murder, and his conviction was affirmed. Mitchell then unsuccessfully sought relief based on allegations of ineffective assistance of counsel through two K.S.A. 60-1507 motions, one filed in 1998 and the other in 2005. This time Mitchell filed a motion pursuant to K.S.A. 2012 Supp. 60-260(b)(4) in 2011, claiming that the district court’s refusal to give his requested lesser-included offense instructions on the felony-murder charge rendered void his conviction and sentence for that charge. The district court summarily denied the 60-260(b)(4) motion for three reasons. First, the district court determined that the motion was filed outside of the applicable statute of limitations for motions to correct an illegal sentence and K.S.A. 60-1507, respectively, making the motion untimely. Second, the district court found that the issues could have and should have been raised in Mitchell’s direct appeal or two prior 60-1507 motions, making the current motion a successive claim. Finally, the district court determined that failure to instruct the jury on lesser-included offenses of felony murder was not erroneous, i.e., the motion was without merit. Mitchell filed a direct appeal to the Supreme Court.

ISSUES: (1) Illegal sentence and (2) lesser-included offense instruction

HELD: Although Mitchell raised three issues, the case was resolved by a determination that K.S.A. 2012 Supp. 60-260(b)(4) does not provide a procedure for a criminal defendant to obtain post-conviction relief from his or her conviction or sentence. Court held that K.S.A. 60-1507 provides the exclusive statutory remedy to collaterally attack a criminal conviction and sentence. K.S.A. 2012 Supp. 60-260(b)(4) cannot be used in a criminal proceeding to collaterally attack a criminal conviction and sentence. Accordingly, Court affirmed the district court’s summary denial of Mitchell’s motion to void judgment.

STATUTES: K.S.A. 22-2101, -3414(3); and K.S.A. 60-1507, -260(b)(4)

STATE V. MOSES
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 105,991 – APRIL 5, 2013

FACTS: Moses convicted on 1992 guilty plea to first-degree murder and aggravated robbery. In 2004, after unsuccessful habeas petition and unsuccessful motion to correct illegal sentence, Moses filed motion to withdraw his pleas because district court did not advise him of constitutional rights in open court. Kansas Supreme Court affirmed district court’s denial of that motion. 280 Kan. 939 (2006) (Moses I). Four years later, Moses filed second motion to withdraw pleas, arguing appointed counsel in Moses I was ineffective and pleas not voluntary. District court summarily denied the motion. Moses appealed.

ISSUE: Timely filing of motion to withdraw plea

HELD: Second motion to withdraw pleas was untimely filed and procedurally barred. One year filing period required by K.S.A. 22-3210 began running for pre-existing claims on effective date of that statute, April 16, 2009. Moses filed his second motion to withdraw pleas on May 20, 2010, and made no showing of excusable neglect for his untimely filing.


STATE V. QUALLS
SHAWNEE DISTRICT COURT – REVERSED AND REMANDED
NO. 104,504 – APRIL 12, 2013

FACTS: Jury convicted Qualls of premeditated first-degree murder, but district court denied Quall’s request for voluntary manslaughter instruction. Qualls admitted killing victim during bar fight, but appealed his conviction arguing: (1) there was insufficient evidence of premeditation, (2) district court erred in refusing to instruct jury on voluntary manslaughter based on Qualls’ honest but unreasonable belief that deadly force was necessary to protect himself or his family from victim’s imminent use of unlawful force, and (3) Qualls was entitled to instruction on self-defense.

ISSUES: (1) Sufficiency of evidence, (2) voluntary manslaughter instruction, and (3) self-defense instruction

HELD: Sufficient evidence of premeditation supported the jury’s verdict.

The defendant’s subjective beliefs are considered when determining whether a lesser-included offense of voluntary manslaughter as defined in K.S.A. 21-3403(b) is appropriate. Here, district court erroneously applied objective standard. Record of this case viewed in light most favorable to Qualls was sufficient to submit the voluntary manslaughter instruction to the jury. Under facts in case, evidence of first-degree murder was not so strong that it rendered the instructional error harmless. Quall’s conviction was reversed. Remanded for new trial.

Self-defense instruction claim was not addressed.

CONCURRENCE AND DISSENT (Rosen, J., joined by Moritz, J.): Agrees there was sufficient evidence of premeditation. For reasons stated in previous dissents, disagrees that a voluntary manslaughter instruction was warranted, and that any error in failing to give the instruction was harmless.

STATUTES: K.S.A. 21-3107(2)(a), -3211, -3401(a), -3403(b); and K.S.A. 22-3414(3), -3601

STATE V. ROCHELLE
SALINE DISTRICT COURT – AFFIRMED

FACTS: Jury convicted Rochelle of aggravated criminal sodomy and aggravated indecent liberties with a child. Rochelle filed sen-
tencing departure motion based solely on lack of prior criminal convictions. District court allowed departure from Jessica's Law hard 25 life sentence, and sentenced Rochelle to consecutive 21/4 month prison term. Rochelle appealed, arguing he was denied fair trial when district court allowed child victim to testify with school counselor sitting next to her without the court first making any findings that comfort person was necessary to victim's testimony. Rochelle also claimed the Allen-type instruction was coercive and legally incorrect. State cross-appealed district court's grant of downward departure motion.

ISSUES: (1) Comfort person – district court's authority and findings, (2) Allen-type instruction, and (3) sentencing departure

HELD: No statute or case law from Kansas Supreme Court directly addresses this issue. Whether a comfort person may accompany a witness is within district court's discretion and power to regulate presentation of evidence during trial. Approach by New Hampshire court is adopted. Specific findings of substantial need are not required. K.S.A. 22-3434 is distinguished. Guidelines are stated for other courts confronting similar issues. Under facts in this case, no abuse of district court's discretion in allowing comfort person.

Allen-type instruction challenge is defeated by adherence to prior case law, e.g., State v. Salis, 288 Kan. 263 (2009). Although the instruction was erroneous, error was harmless in light of substantial evidence against Rochelle.

Appellate courts review grant of sentencing departure motion for abuse of discretion. A single mitigating factor alone can constitute a substantial and compelling reason for departure. Under facts in case, district court did not abuse its discretion in relying upon single factor of Rochelle's lack of criminal history.

STATUTES: K.S.A. 21-4643, -4643(a)(1)(D), -4643(a)(1)(E), -4643(d)(1)-(6); and K.S.A. 22-3414(3), -3434, -3434(b), -3601(b) (1)

STATE V. ROGERS
MONTGOMERY DISTRICT COURT – AFFIRMED IN PART AND VACATED IN PART
NO. 105,143 – APRIL 12, 2013

FACTS: Rogers entered no contest plea to aggravated criminal sodomy. District court imposed life sentence without possibility of parole for 25 years, and lifetime post-release supervision. District court rejected Rogers' claim that both aspects of his sentence were unconstitutionally disproportionate to his crime. On appeal, Rogers argued the district court's findings of fact and conclusions of law regarding factors in State v. Freeman, 223 Kan. 362 (1978), were deficient, and remand for sufficient findings and conclusions was warranted as in State v. Seward, 289 Kan. 715 (2009). Rogers also claimed sentence was disproportionate.

ISSUES: (1) Adequate Freeman findings, (2) constitutionality of hard 25 life sentence, and (3) constitutionality of lifetime post-release supervision

HELD: Outcome in Seward does not apply because Rogers was sentenced after Seward and thus was responsible for ensuring district court's findings were adequate for appellate review, and because Rogers essentially seeks another chance to present additional evidence and legal arguments he should have presented at sentencing to support his Freeman argument.

Application of Freeman factors to record in this case indicates that Rogers' sentence is constitutional.

Constitutional challenge to lifetime post-release supervision is rendered moot by court's sua sponte correction of sentence to vacate that part of Rogers' sentence. Under K.S.A. 2009 Supp. 22-3717(u), Rogers is subject to parole for life if ever released from prison.


STATE V. STEVENSON
GOVE DISTRICT COURT – AFFIRMED
NO. 103,508 – APRIL 12, 2013

FACTS: Jury convicted Stevenson of premeditated first-degree murder. On appeal Stevenson claimed prosecutor committed misconduct during voir dire by using "Wheel of Analogy" while questioning jurors about their understanding of concept of reasonable doubt. He also claimed trial court erred in refusing to give Stevenson's request for instruction defining "reasonable doubt," and in giving pattern instruction (PIK Crim. 3d 51.10) instead of expanded instruction that Stevenson thought was warranted under circumstances of court allowing attorney comment on reasonable doubt during voir dire.

ISSUES: (1) Prosecutorial misconduct and (2) jury instructions on reasonable doubt instruction

HELD: Use of "Wheel of Fortune" analogy during voir dire to explore distinction between proof beyond reasonable doubt and proof beyond all doubt is not prosecutorial misconduct under facts in this case, although use of the analogy is discouraged. Circumstances of this case did not justify departure from general rule that a definition of reasonable doubt should not be given. No error in refusing to give separate expanded reasonable doubt instruction that was not legally appropriate.

Instructions given to jury in this case were accurate statements of law, not in conflict, and when read together accurately instructed the jury on state's burden of proof.

STATUTES: K.S.A. 2012 Supp. 22-3601(b)(3); and K.S.A. 22-3414(3)

STATE V. STIMEC
WYANDOTTE DISTRICT COURT – REVERSED AND REMANDED
NO. 103,229 – APRIL 19, 2013

FACTS: Stimec appealed his jury conviction of two counts of aggravated indecent liberties with a child, arguing the prosecutor committed misconduct during rebuttal closing argument by encouraging the jury to return to the jury room and take a poll to determine whether any of them had engaged in conduct similar to the allegations against Stimec. Stimec also asserts other allegations of prosecutorial misconduct and argues his sentence was illegally imposed under Jessica's Law.

ISSUES: (1) Prosecutorial misconduct, (2) closing argument, and (3) sentencing

HELD: Court held that the prosecutor's statements during rebuttal were so patently egregious and prejudicial as to deprive Stimec of a fair trial. Court stated that the comments went directly to the heart of the issue the jury was asked to decide – who was telling the truth as to the nature and extent of Stimec's actions, Stimec or his son. Court did not reach Stimec's remaining allegations of prosecutorial misconduct or his sentencing claims.

STATUTE: K.S.A. 2006 Supp. 21-4643

STATE V. TOAHTY-HARVEY
DOUGLAS DISTRICT COURT – AFFIRMED
NO. 105,351 – APRIL 12, 2013

FACTS: Toahty-Harvey entered no contest plea to one count of aggravated indecent liberties with a child. Pursuant to plea agreement, district court granted motion for departure from hard 25 life term to impose sentence of 60-month prison term with lifetime post-release supervision, and denied Toahty-Harvey's claim that lifetime post-release supervision violated § 9 of Kansas Constitution Bill of Rights. Toahty-Harvey appealed. State challenged appellate court's jurisdiction because both parties had jointly requested 60-month departure sentence.

ISSUES: (1) Appellate jurisdiction and (2) Kansas Constitution – lifetime post-release supervision
HELD: Parties’ agreement did not encompass period of post-release supervision. State’s argument that K.S.A. 21-4721(c) deprives appellate court of jurisdiction to review constitutionality of lifetime post-release supervision is rejected.

Constitutional challenge is limited to § 9 of Kansas Constitution Bill of Rights, and does not include a separate Eighth Amendment argument. Applying factors in State v. Freeman, 223 Kan. 362 (1978), as in State v. Mosman, 294 Kan. 901 (2012), Toahty-Harvey’s sentence of lifetime post-release supervision upon conviction for aggravated indecent liberties with a child is not cruel or unusual punishment under § 9 of Kansas Constitution Bill of Rights. Sentence is not so disproportionate to the crime that it shocks the conscience and offends fundamental notions of human dignity.

STATUTE: K.S.A. 21-3504(a)(3)(A), -3504(c), -4643, -4643(a) (1)(C), -4721(c)

STATE V. WAGGONER
JEFFERSON DISTRICT COURT – CONVICTION
AFFIRMED, SENTENCE AFFIRMED IN PART AND
VACATED IN PART, AND CASE REMANDED WITH
DIRECTIONS

FACTS: A jury convicted 58-year-old Waggoner of one count of aggravated indecent liberties with a child under the age of 14. Under Jessica’s Law, the trial court sentenced Waggoner to life imprisonment with a mandatory minimum term of imprisonment of not less than 25 years, lifetime post-release supervision and lifetime electronic monitoring. Waggoner contends the jury was instructed on alternative means of committing aggravated indecent liberties with a child and, because the trial court did not give a unanimity instruction, he was denied his right to a unanimous verdict. Second, he takes issue with language in the burden of proof jury instruction that he contends violated his constitutional right to have a jury determine whether the state had met its burden of proving his guilt beyond a reasonable doubt. Waggoner also challenged his lifetime electronic monitoring and that the sentencing journal entry incorrectly reflects that the sentencing court imposed post-release supervision rather than parole.

ISSUES: (1) Jessica’s Law, (2) alternative means, and (3) burden of proof instruction

HELD: Court held that because the phrase “either the child or the offender, or both” in K.S.A. 21-3504(a)(3)(A) does not state material elements of the crime of aggravated indecent liberties with a child but merely outlines options within a means, a jury instruction reiterating the options does not include alternative means of committing the charge of aggravated indecent liberties. Court also held that a jury instruction is not favored but is not erroneous if it states: “If you have a reasonable doubt as to the truth of any of the claims made by the state, you must find the defendant not guilty; if you have no reasonable doubt as to the truth of any of the claims made by the state, you should find the defendant guilty.” However, Court held that a sentencing court has no authority to order a term of post-release supervision in conjunction with an off-grid indeterminate life sentence and that although lifetime electronic monitoring is mandated by K.S.A. 2012 Supp. 22-3717(u), the sentencing court does not have the authority to impose parole conditions.

STATUTES: K.S.A. 21-3504, -4643; and K.S.A. 22-3414, -3504, -3601, -3717
CIVIL

CHILD IN NEED OF CARE
IN RE A.E.S.
DOUGLAS DISTRICT COURT – AFFIRMED

FACTS: M.S., the father of the minor child A.E.S., appeals from an order entered by the district court of Douglas County granting temporary custody of A.E.S. to Social and Rehabilitation Services (SRS). M.S. argues that K.S.A. 38-2243(f)(3), which allows a court to enter an order of temporary custody in a child in need of care (CINC) case, is constitutionally vague and overbroad. M.S. also argues that the evidence was insufficient to support the district court’s findings and orders. SRS filed an application for an ex parte order of protective custody for A.E.S., a minor child born in 1998. The district court conducted a temporary custody hearing and found probable cause existed to believe the health and welfare of A.E.S. may be endangered without further care pending a formal CINC hearing. The court placed A.E.S. in the temporary custody of SRS pending a formal CINC hearing which was scheduled for April 24, 2012. M.S. filed a timely appeal from the order of temporary custody. A.E.S. was adjudicated as a CINC and was specifically ordered to remain in the custody of SRS. The court took some dispositional evidence and continued the dispositional hearing to September 28, 2012, due to time constraints. On September 28, 2012, the parents of A.E.S., their attorneys, the GAL, and the assistant district attorney appeared and requested that the court approve an agreed order of disposition. An agreed order set forth that the father, M.S., supported the agreement and participated in its development through his attorney. The agreed order provided that custody of A.E.S. “shall remain vested with the Secretary [of SRS],” and further determined that “[r]eturning the child to a parental home on a full-time basis is contrary to the child’s welfare.” The detailed journal entry set forth the terms and conditions that the parents would have to meet in order to reintegrate the family. A permanency hearing was scheduled for February 11, 2013.

ISSUE: Child in need of care

HELD: Court held that M.S.’s appeal of the temporary custody order is moot. However, the Court retained the appeal because by the time an appeal of a temporary order reaches the Court, it would likely be moot and it is a matter of public importance. Court held that K.S.A. 38-2243(f)(3) is not constitutionally vague because it gives sufficient warning of prohibited conduct under common understanding and provides an adequate safeguard against arbitrary enforcement. Court also held the statute was not overbroad because a common-sense reading of the statute requires reasonable efforts to maintain the family unit or the existence of an emergency prior to entry of an order removing a child from parental custody.

STATUTES: K.S.A. 21-3608; and K.S.A. 38-2201, -2242, -2243(f)(3), -2251, -2273

FORECLOSURE AND FINAL JUDGMENT
PRIME LENDING II LLC V. TROLLEY’S REAL ESTATE HOLDINGS LLC ET AL.
JOHNSON DISTRICT COURT – APPEAL DISMISSED

FACTS: Prime Lending filed an action to foreclose its mortgage on certain real property owned by Trolley’s Real Estate Holdings, LLC. Prime Lending also sued Aaron Buerge, Trolley’s LLC, and Trolley’s Overland Park LLC (collectively Trolley’s). Later, Prime Lending was granted permission to add Blue Moose O.P. LLC, as a party defendant for the purpose of foreclosing Blue Moose’s leasehold interest in the property. Prime Lending moved for summary judgment, asking to foreclose on the property. The trial court granted Prime Lending’s motion for summary judgment and ordered a sheriff’s sale of the property. Prime Lending, based on its bid of $2,200,000, was the high bidder for the property. The trial court issued an order confirming the sheriff’s sale. The trial court later issued an order certifying its previous August 24, 2011, memorandum decision of summary judgment as a final judgment under K.S.A. 2012 Supp. 60-254(b) and denying Trolley’s motion for leave to amend its answer.

ISSUES: (1) Foreclosure and (2) final judgment

HELD: Court stated that neither the memorandum decision nor journal entry of judgment of foreclosure contained the express determination that there was no just reason for delay and direction required by K.S.A. 2012 Supp. 60-254(b). Moreover, both the memorandum decision and the journal entry of judgment of foreclosure failed to make any reference to K.S.A. 2012 Supp. 60-254(b). As a result, the summary judgment rendered in favor of Prime Lending in the foreclosure action and the judgment of foreclosure did not become final. Absent a K.S.A. 2012 Supp. 60-254(b) determination that there is no just reason for delay and an express direction for the entry of judgment, no appeal can be taken from a trial court’s partial judgment on a claim before entry of a final judgment disposing of all claims against all parties. Because court determined that the trial court abused its discretion when it retroactively certified its memorandum decision of summary judgment as a final judgment under K.S.A. 2012 Supp. 60-254(b) and because the trial court has failed to make a proper determination required by K.S.A. 2012 Supp. 60-254(b), court dismissed the appeal as interlocutory.

STATUTE: K.S.A. 2012 Supp. 60-254(b), -258, -2101, -2103

FORECLOSURE, QUIET TITLE, AND SUMMARY JUDGMENT
BANK OF BLUE VALLEY V.
DUGGAN HOMES INC. ET AL.
JOHNSON DISTRICT COURT – REVERSED AND REMANDED
NO. 107,738 – APRIL 26, 2013

FACTS: Over the course of several years, Duggan Homes granted multiple mortgages to the Bank of Blue Valley in partial consideration for loans to fund its real estate development projects in Johnson County. The loans were also secured by personal guaranties from John Duggan and his spouse. Duggan Homes later defaulted on the loans, and the Bank sued to collect on the notes and the Duggans’ guaranty agreements. The Bank also sought to foreclose on the mortgages. After the suit was filed, the parties entered into a settlement agreement. Under the terms of the settlement agreement, Duggan Homes agreed to convey several properties to the Bank in full satisfaction of the indebtedness. The Bank took the properties subject to the judgment liens of several subcontractors of Duggan Homes. Later, the Bank filed an amended petition naming the subcontractors as defendants. The amended petition sought to foreclose the mortgages that were included in the Bank’s and Duggan Homes’ settlement agreement. The Bank moved for summary judgment, and the subcontractors also filed a cross-motion for summary judgment. The subcontractors maintained that the Bank was not entitled to foreclose on its mortgages. The trial court held that although the Bank “identifies the cause of action as a foreclosure,” the Bank “simply desires to quiet title to the property.” As a result,
the trial court granted summary judgment in favor of the Bank and quieted title to the real property in the Bank. On appeal, the subcontractors contend that the trial court erred in granting summary judgment in favor of the Bank based on a quiet title theory that was never requested nor pleaded by the Bank.

ISSUES: (1) Foreclosure, (2) quiet title, and (3) summary judgment

HELD: Court stated that the Bank has never sought or established a basis to obtain quiet title to the three properties in question. Rather, the Bank in its second amended petition, in its initial motion for summary judgment, and in its amended motion for summary judgment has sought to foreclose the mortgages and to obtain an order foreclosing the subcontractors’ judgment liens on the properties. Moreover, no pretrial order has ever been entered allowing the Bank to assert a claim for quiet title and the Bank conceded in its brief that it never used the word “quiet” in its pleadings. Court found that the trial court surmised that “[a]lthough Plaintiff identifies the cause of action as a foreclosure, Plaintiff simply desires to quiet title to the property.” Court held that the trial court cannot supply the claim by “supposition.” Court held that because the subcontractors objected to the quiet title theory and because they never consented to the use of the theory, the trial court erred in granting the Bank’s motion for summary judgment.

STATUTE: K.S.A. 60-208, -254(c), -1002(b)

INSURANCE POLICY
GOLD MINE INVESTMENTS INC. V. MOUNT VERNON FIRE INSURANCE CO. ET AL.
ATCHISON DISTRICT COURT – REVERSED AND REMANDED

FACTS: Mount Vernon Fire Insurance Co. issued a policy to Gold Mine Investments d/b/a/ Gold Realty that contained a requirement in a “Protective Safeguards” endorsement to a fire insurance policy that “All Electric is on Functioning and Operational Circuit Breakers.” The policy provided for fire coverage on a commercial building Gold owned in Atchison. The building was destroyed by fire, and Mount Vernon denied coverage, claiming that Gold breached the policy by having both a fuse box and circuit breakers protecting the electrical service in the building. According to Mount Vernon, the building’s electrical circuits had to be protected by circuit breakers to the exclusion of any fuses. Gold sued Mount Vernon for its denial of coverage, and the district court granted summary judgment in favor of Mount Vernon on Gold’s claims.

ISSUE: Insurance policy

HELD: Court stated that in considering the language of a fire insurance policy, the court examines the language of the policy without applying any rules of construction if the terms of the policy are clear. The test for determining the meaning of the language of the policy is what a reasonable person in the position of the policyholder would understand the language to mean. Unless a contrary intention is shown, words used in an insurance policy are to be given the natural and ordinary meaning they convey to the ordinary mind. Court held that it was willing to reconstruct the Protective Safeguards Endorsement to make some sense out of it. But it was unwilling to read into the policy a wholly new provision: a requirement that there be no fuses in any electrical circuit serving the building. Court found that a reasonable policyholder would not read the language of the policy as prohibiting the use of fuses. While Mount Vernon’s expert sees danger in this practice, the average, reasonable policyholder would view the presence of multiple protective devices as a cautious belt-and-suspenders approach. Whole commercial product lines are built around downstream ground fault interrupters and surge protectors (some of which may use fuses) to protect expensive computers and other sensitive electronic devices. Whatever meaning can be derived from Mount Vernon’s policy language, that meaning does not reasonably include a requirement that only circuit breakers may be used to protect an electrical circuit in the insured building. Court found summary judgment was improper.

STATUTES: No statutes cited.

PERSONAL PROPERTY TAXATION AND WIRELINE EQUIPMENT
IN RE TAX APPEAL OF WEDGE LOG-TECH LLC/ PIONEER WIRELINE SERVICES
COURT OF TAX APPEALS – AFFIRMED

FACTS: Ellis County appeals the order of the Court of Tax Appeals granting an application for exemption from ad valorem taxation filed by Wedge Log-Tech LLC/Pioneer Wireline Services (the taxpayer). COTA granted the exemption based upon its finding that the taxpayer’s wireline equipment is included in the category of commercial and industrial machinery and equipment as defined under subclass 5 of class 2 of § 1(a) of Article 11 of the Kansas Constitution. Personal property in this subclass is exempt from ad valorem taxation pursuant to K.S.A. 2012 Supp. 79-223(b). The County argues that the taxpayer’s wireline equipment is properly classified with mineral leasehold interests under subclass 2 of the constitutional provision because wireline equipment is intrinsically related to the oil and gas industry.

ISSUES: (1) Personal property taxation and (2) wireline equipment

HELD: Court stated that commercial and industrial machinery and equipment, as defined by the Division of Property Valuation (PVD) of the Kansas Department of Revenue, is “any taxable, tangible personal property [except for state assessed property and motor vehicles] that is used to produce income or is depreciated or expensed for IRS purposes.” 2008 Personal Property Valuation Guide, § 2.05 at 58. At the hearing before COTA, the taxpayer showed, by a preponderance of the evidence, that the wireline equipment met those criteria. Court held that under the current constitutional and statutory scheme in Kansas, wireline equipment is properly classified as commercial and industrial machinery and equipment, thereby making the property exempt from ad valorem taxation pursuant to K.S.A. 2012 Supp. 79-223(b).


SEXUALLY VIOLENT PREDATOR, JURISDICTION, INEFFECTIVE ASSISTANCE OF COUNSEL, AND PROSECUTORIAL MISCONDUCT
IN RE CARE AND TREATMENT OF LOWRY SEDGWICK DISTRICT COURT – AFFIRMED
NO. 102,862 – JUNE 8, 2012 (MOTION TO PUBLISH)

FACTS: A jury determined Lowry was a sexually violent predator under the Kansas Sexually Violent Predator Act (KSVPA), K.S.A. 59-29a01 et seq. Lowry appeals from the jury’s verdict, arguing that the district court lacked jurisdiction over him, that he was denied his statutory right to effective assistance of counsel, and that the state’s attorney committed reversible misconduct during closing arguments.

ISSUES: (1) Sexually violent predator, (2) jurisdiction, (3) ineffective assistance of counsel, and (4) prosecutorial misconduct

HELD: Court rejected Lowry’s jurisdictional argument and found that the state’s petition clearly set forth factual allegations sufficient to support the ultimate allegation that Lowry may be a sexually violent predator. Court rejected Lowry’s allegations of ineffective assistance of counsel based on the following claims against Sevart, his attorney: (a) Sevart misconstrued the parties’ stipulation to the foundation of the documents, which prevented Lowry from
challenging unfavorable testimony provided by Dr. Shannon; (b) Lowry’s cross-examination of Dr. Shannon was ineffective because he failed to use two specific documents to contest Dr. Shannon’s conclusions regarding Lowry; (c) Sevart failed to argue that the state’s evidence did not establish all of the elements of pedophilia contained in the Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994) (DSM-IV); and (d) Sevart failed to ask the district court for funds for an expert witness based on a mistaken belief that funds for such an expert were unavaiable. Court was not persuaded that Sevart’s representation fell below an objective standard of reasonableness. Court rejected Lowry’s claim that the state’s comments during its rebuttal argument suggested to the jurors that Lowry had the burden of proving to them that he did not pose a risk to reoffend if released on parole. Court found Lowry misconstrued the reference made within the state’s comments and they were simply comments on the evidence.

STATUTES: K.S.A. 59-29a01, -29a02, -29a04, -29a06; and K.S.A. 60-1501

TAX APPEAL AND OIL AND GAS IN RE TAX APPEAL OF TRANSCANADA KEYSTONE PIPELINE L.P.

FACTS: TransCanada Keystone Pipeline L.P. (Keystone) applied for a tax exemption under K.S.A. 2010 Supp. 79-227 for a portion of its pipeline known as the Cushing Extension. That portion of the pipeline transports Canadian crude oil through Kansas to a terminal located in Cushing, Oklahoma. Although it is undisputed that Kansas refineries have access to the Canadian crude oil by means of existing pipelines that connect to the Cushing terminal, the Director of Property Valuation (Director) recommended denying the application because refineries do not have direct access to the pipeline in this state. The Court of Tax Appeals (COTA) granted summary judgment in favor of Keystone, finding that the plain language of K.S.A. 2010 Supp. 79-32,223(d)—which defines the term “qualifying pipeline”—does not require Kansas refineries to have a direct connection to the Cushing Extension within the boundaries of Kansas.

ISSUES: (1) Tax appeal and (2) oil and gas

HELD: Applying a strict and reasonable interpretation of the plain language of K.S.A. 2010 Supp. 79-32,223(d), Court held as a matter of law that direct access to a pipeline within the boundaries of Kansas is not required. To find otherwise would require the Court to rewrite the statute, which it had no authority to do. Court concluded that COTA properly granted Keystone’s application for a property tax exemption for the Cushing Extension under K.S.A. 2010 Supp. 77-227.

STATUTES: K.S.A. 77-601, -621; and K.S.A. 2010 Supp. 79-227, -32,223(d)

WORKERS COMPENSATION, WORK DISABILITY, SUBSTANTIAL COMPETENT EVIDENCE, AND TEMPORARY TOTAL DISABILITY BENEFITS MESSNER V. CONTINENTAL PLASTIC CONTAINERS ET AL.
WORKERS COMPENSATION BOARD – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS NO. 107,035 – MARCH 29, 2013

FACTS: In Messner’s first workers compensation claim (No. 253,153), she sought compensation for injuries she sustained as a result of a fall which occurred on July 18, 1999. Messner claimed that her disability increased from a functional impairment to a work disability when she left her employment with Continental Plastic Containers. Thus, she sought an award of functional disability followed by an award of general disability, or work disability. In her second claim (No. 261,143), Messner alleged that she received additional injuries to her right shoulder from repetitive job duties she performed for Continental after returning to work following her fall. On October 21, 2011, the Board determined that both of Messner’s alleged injuries were work-related and awarded compensation for both claims. Continental and its insurance carrier, American Home Assurance Co., appealed the decision of the Workers Compensation Board affirming claims to Messner. Continental raises three issues. First, Continental challenges the award of work disability in 253,153, asserting that K.S.A. 44-510e(a) prohibits an award of work disability because Messner’s award for functional disability would have been paid in full before she became eligible for work disability upon leaving her employment. The remaining issues relate to the Board’s award in 261,143. Continental appeals the Board’s finding that Messner’s shoulder injury arose out of and in the course of her employment. Continental claims the Board erred in awarding Messner temporary total disability (TTD) compensation from April 26, 2001, to December 13, 2002, because Messner’s list of work restrictions was not from an authorized treating physician.

ISSUES: (1) Workers compensation, (2) work disability, (3) substantial competent evidence, and (4) temporary total disability benefits

HELD: Court stated that if, after an award is made, a claimant can obtain a modification of the award upon showing an increased level of disability, it naturally follows that the same can be accomplished in the first instance when the Board is considering for the first time all of the disabling consequences of a single job-related injury, provided that its award is confined to the 415-week limitation for benefits set forth in K.S.A. 44-510e(a). Court stated that the Board found that Messner showed an increase in disability during the 415-week benefit period provided for in K.S.A. 44-510e(a). Court concluded that the Board had the authority to enter a lump-sum award that provided benefits for Messner’s functional disability as well as her later work disability, both of which occurred as a result of her work related injury. Court found there was substantial competent evidence in support of the Board’s factual determination that Messner’s right shoulder injury arose out of her work activities from August 2000 to April 2001. However, court held that under K.S.A. 44-510c(b)(2), an authorized treating physician needed to find Messner to be “completely and temporarily incapable of engaging in any type of substantial and gainful employment” in order for Messner to be eligible for TTD benefits. Messner did not meet that burden. Court reversed the award of TTD compensation for Messner’s right shoulder for the period from April 26, 2001, through December 13, 2002, and remanded for the Board to recalculate Messner’s award for her right shoulder injury.

STATUTES: K.S.A. 44-501b, -508, -510c, -510d, -510e, -528, -556; and K.S.A. 77-621

CRIMINAL

STATE V. GALLARDO
SHAWNEE DISTRICT COURT – REVERSED AND SENTENCE VACATED IN PART NO. 101,067 – APRIL 5, 2013

FACTS: Gallardo was convicted of unlawful sexual relations and the district court required him to register as a sex offender after finding the crime fell under K.S.A. 22-4902(c)(14), as it was sexually motivated. Gallardo appealed to the Court of Appeals arguing that the district court erred in requiring him to register as a sex offender. Gallardo claimed the Kansas Offender Registration Act, K.S.A. 22-4901 et seq., was not applicable to the crime of unlawful sexual
relations as it pertains to two consenting adults and the district court erred in determining that his crime fell under the “catch-all provision” of K.S.A. 22-4902(c)(14). The court rejected Gallardo’s claim. In doing so, the court first noted that Gallardo’s crime is not among those specifically listed at K.S.A. 22-4902(c)(1)-(13)—a list of crimes deemed “sexually violent,” but then held there were sufficient findings to support the district court’s determination that Gallardo’s crime was sexually motivated. The Supreme Court ultimately granted review in Gallardo’s case and remanded it to this court for reconsideration in light of Coman, 294 Kan. 84—a case decided in March 2012.

ISSUES: (1) Sexual offender registration and sexually motivated crimes

HELD: Court held that based on the holding in Coman, this court must hold that the district court erred in requiring Gallardo to register as a sex offender under the catch-all provision at K.S.A. 22-4902(c)(14). Gallardo was convicted of unlawful sexual relations in violation of K.S.A. 21-3520(a)(1). At that time, K.S.A. 22-4902(a)(5)(F) defined any person convicted of unlawful sexual relations (as defined in K.S.A. 21-3520) as a sex offender as long as one of the parties involved was less than 18 years of age. It is undisputed that neither of the parties involved in Gallardo’s case was under age 18. Furthermore, K.S.A. 22-4902(c) did not include the crime of unlawful sexual relations in its list of sexually violent crimes. Under Coman, then, the district court erred in determining that Gallardo’s crime fell under the catch-all provision of the statute and requiring him to register as a sex offender. Following the directions established by the Kansas Supreme Court in Coman, court reversed the district court’s finding that Gallardo must register as a sex offender under K.S.A. 22-4902(c)(14) and vacated that portion of his sentence.

STATUTES: K.S.A. 21-3520(a)(1); and K.S.A. 22-4901, 4902(a)(5)(F), (c)(14)

STATE V . SMYSER
MARION DISTRICT COURT – AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH DIRECTIONS
NO. 105,077 – APRIL 26, 2013
FACTS: Robert F. Smyser appeals his conviction for aggravated criminal sodomy of his 7-year-old stepdaughter, K.S. He asserts four issues: (1) an alternative means argument based upon K.S.A. 21-3501(2), which is the statutory definition for criminal sodomy; (2) whether a jury instruction incorrectly recited the state’s burden of proof; (3) whether the sentencing court erred by imposing electronic monitoring and an order for no contact with the victim; and (4) whether the sentencing court erred in imposing BIDS attorney fees without considering Smyser’s ability to pay.

ISSUES: (1) Alternative means, (2) jury instruction, (3) sentencing, and (4) BIDS fees

HELD: Court rejected Smyser’s alternative means argument. Court affirmed its precedent that the anal penetration charged, which was based upon the definition in K.S.A. 21-3501(2), only presents options within a means—that is, various factual circumstances that would prove the crime without creating an alternative means problem. Court found that Smyser conceded in his appellate brief that there was evidence of anal penetration by a body part to support his conviction absent the acceptance of his alternative means argument. Smyser is not entitled to reversal of his convictions for aggravated criminal sodomy. Court found the trial court’s reasonable doubt jury instruction was legally appropriate and not error. Based on the state’s conceding of the issue, court reversed that portion of Smyser’s sentence requiring electronic monitoring and no-contact order. Court also remanded for proper findings to assess BIDS fees.

STATUTES: K.S.A. 21-3501, -3506, -4603d; and K.S.A 22-3414, -3421, -3601
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