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By Shannon K. Barks

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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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Q-and-A with ALPS President and CEO David Bell

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Kansas Bar Association, Topeka, Kan.
One of the things that the Kansas Bar Association is constantly striving for is better value for you, our members. We are always looking for ways to improve our products and services. We are and have been working on a number of ways to accomplish this. One of the biggest areas of effort has been the KBA website. KBA staff has been working on a new and improved website for some time.

As the new president of the KBA, it is my pleasure to introduce to you our new website – www.ksbar.org. It is the same address as before, but the site is brand new. Here you can still find all the great programs and services that the KBA has provided for many years – excellent and topical CLE (now available on demand), the KBA Journal (you can even read it online), legislative reports and overviews (with online bill tracking, and direct legislator search and contact links), the ability to purchase KBA publications in our new storefront (with immediate download soon to come), and, of course, Casemaker legal research.

But the new website offers so much more – all of which is designed to enhance your experience as an attorney and KBA member. Professional networking tools now provide you with new ways to connect and interact with your colleagues. Now, with an advanced search engine tied directly to the KBA membership you can find contacts and provide and receive references and referrals. In your own KBA blog you can share your insights and expertise. If you have a particular question to pose or issue to raise, you can do so in one of the Section forums. And, as a member of one or multiple KBA Sections, you automatically become connected to an online community of attorneys across the state who are actively developing the law through CLE programming, published expertise, and networking opportunities. Now more than ever Section membership is a great way to advance your own practice and play a role in shaping the law for the next generation.

One of the most important first steps you should take is to complete your KBA member profile. This is important because it allows you to not only make the connections with your colleagues that I mentioned above, but also allows you to set out your areas of practice and the geographical scope of your practice. You can even upload your picture so that the world knows what you look like! The areas of practice and geographical scope of your practice are critical for what is also coming to our new website, which is the ability of the general public to go to the website and search for an attorney by area of practice and geography. This feature is going to be a huge marketing tool for you, and is why your member profile is so important to keep current with the latest information about you and your practice.

Another feature of the KBA member profile is the ability to add a direct link to your personal or law firm website, if you have one. That direct link will allow another attorney or a member of the general public who is looking for more information about you to simply click on that link and be taken instantly to your website. That promotes not only you, but other members of your firm as well. It allows you the opportunity to provide more information in more detail and further market yourself in that manner. All of this can be accomplished by merely fully updating your personal profile on the new KBA website.

As our younger members can attest, the Internet is a huge part of the future of legal marketing. It is not so gradually replacing the tried and true yellow pages advertising of the past. With the proliferation of smart phones, tablets, and the like, potential clients have the ability to get information about you with only a few keystrokes on their device. An Internet presence is critical for every member of the KBA, regardless of where you are located. Even solo practitioners and small firms in rural areas need an Internet presence. In metro areas, the Internet is a great equalizer for solos, small firms, and new firms. Your member profile on the new KBA website is a start toward that Internet presence for those who have been reluctant to jump into the creation of your own website. Take the plunge and update your member profile today!

Check the ‘Your KBA Weekly’ e-newsletter over the coming weeks for more information about each of these great new features. Better yet, start exploring the new site. New content will be coming each week. And we’ll soon launch the mobile app giving you access to all the KBA resources any time. As always, we welcome your input and feedback regarding the new website and any other aspect of the KBA. The KBA is your organization and exists to serve you, its members.

KBA President Dennis D. Depew may be reached by email at ddepew@ksbar.org or by phone at (620) 325-2636.
I n 2009, President Barack Obama challenged Americans to make volunteerism and community service a part of their daily lives. Contrary to popular belief, community service is not just a condition of probation, it is something for which all of us should make time. Additionally, according to the Rules of Professional Conduct, we have a duty to provide pro bono services. Rule 6.1 states, “A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.”

As attorneys, we are equipped with a unique skill set, and license, that afford us volunteer opportunities not available to most. The Kansas Bar Association and Kansas Legal Services have been instrumental in making many of those opportunities available. For example, the KBA and KLS recently teamed up to provide no cost legal assistance to returning military service members and their families. Service members often face a myriad of legal issues upon their return and these pro bono services go a long way in helping the most deserving of persons get their affairs back in order. KLS operates the Kansas Elder Hotline, which allows Kansas seniors to call in and ask volunteer attorneys questions concerning legal issues impacting their lives. Again, that is another worthy group of individuals getting the much needed help they deserve. These are just two of many pro bono services and volunteer opportunities available through the KBA and KLS. There are a number of other organizations that offer volunteer opportunities. I encourage everyone to seek them out and help where help is needed most.

While people don’t expect to get recognition for their volunteering and community service efforts, it is important to highlight those that go above and beyond. It provides a great example for others and might even push those recognized to raise the bar even higher. The KBA and the American Bar Association do an excellent job of recognizing attorneys giving their time and efforts to others. The ABA Journal has a section each month dedicated to pictures of “Lawyers Giving Back” highlighting the volunteer activities of attorneys across the country. At the KBA Annual Meeting this past June, several attorneys were recognized for exceptional pro bono services. Their dedication to providing legal services to those who can’t otherwise afford it is commendable, and you can read about their work in last month's issue.

I was also delighted to attend the KBA Annual Meeting this past June and applaud the unparalleled talent of the Wichita Bar members who volunteered many lunch hours and evenings of rehearsal to pull off the Bar Show. Not only was this year’s show extremely entertaining, but it also raised enough money and food to provide more than 12,000 meals to the Kansas Food Bank for distribution to those in need!

Providing pro bono services is not the only way attorneys can or should give back. Volunteering in your own community is an excellent way to get involved. Joining local clubs and organizations and participating on the board level are just a couple of examples. Watch your local newspaper for volunteer opportunities. For instance, there might be food drives, local animal shelters, needing transportation to special events, etc.

I personally have participated on several local boards and am currently Generalissimo of our annual Neewollah (or Halloween spelled backwards) celebration. Neewollah is the largest annual celebration in Kansas. It began in 1919 and during the 10-day celebration consisting of three parades, a chili cook-off, musical theatre, a queen’s pageant, a fun run, and a band competition, all put together over the course of the year by the efforts of more than 500 community volunteers, our community of 10,000 will grow to approximately 75,000! Now that’s volunteerism at its finest. However, one of my most memorable and rewarding volunteer activities is mentoring at the local grade school where I read with students, help them with homework, and talk about any issues they might be facing.

Volunteering along with getting involved in community organizations is an excellent opportunity to network within your professional circle and career and to also connect with others outside your social circle. You will enrich your own life and better your community and all the people you help. In addition to the benefit they receive, it just makes us feel good! And admit it, we all want to feel good. And if you do it for no other reason, do it for your health. A recent study published by the Corporation for National and Community Service indicates that volunteering has health benefits. “Those who volunteer have lower mortality rates, greater functional ability, and lower depression later in life than those who do not volunteer.” Amazing.

Lastly, we all know we have a reputation. We’re attorneys. Maybe if more of us made more of an effort to volunteer ... see what I mean?

About the Author

Jeffrey W. Gettler is a partner at the firm of Emert Chubb & Gettler LLC in Independence. He maintains a general practice of law with an emphasis in family law and criminal defense. He is also the prosecutor for the City of Independence. Gettler graduated from Loyola University Chicago in 2003 and the University of Kansas School of Law in 2005. He may be contacted at jgettler@sehc-law.com.
A Lawyer Assistance Program director in New York shared a recent article in the Times Union (http://www.timesunion.com/default/article/Judging-a-judge-less-harshly-4469530.php), which told the story of a New York Appeals Court judge who himself ended up in federal prison after pleading guilty to a charge of threatening to kidnap a minor. “First elected to the Court of Appeals in 1972, Wachtler was smart, attractive, and confident. He built a solid reputation as a brilliant jurist during his over two decades on the bench. Then came his shocking arrest in 1992.” The kidnap threat was the final event over 13 months in which he engaged in bizarre and threatening behavior after the woman with whom he was having an affair broke off the relationship. “In the lead-up to his downfall, Wachtler had been quietly unraveling, and was convinced his mental instability was the result of a brain tumor. Psychiatrists explained to a handcuffed Wachtler that the manic highs and depressing lows he’d been living with, and which influenced his criminal behavior, were manifestations of his severe bipolar disorder.”

In his 60s, he found out that his family had a history of mental illness. “Some mental illnesses are so complicated, and difficult to see, it can take years before symptoms become self-destructive. Bipolar disorder is one. A patient alternates between a depressed state and mania, which is marked by energetic and often euphoric periods.

It’s not uncommon for manic individuals to be highly productive and fun to be around. This eventually gives way to depression, where patients find concentration difficult, life uninteresting. Over time, the cycling can become more extreme and more apparent.

Treatment requires vigilance. “I take my medication religiously,” said Wachtler.

“Wachtler, now 82, is living out his later years advocating for, as he described it, ‘a population that no one gives a damn about’: mentally ill prisoners.” As a judge he had once written an opinion saying solitary confinement was not cruel and unusual treatment but now he has come to believe that seriously mentally ill prisoners should be treated and not put in solitary confinement. He has lobbied for a change in New York law to that effect and he often writes about this topic to raise awareness.

Wachtler was reinstated to the New York bar in 2007 and “does mediation and arbitration work as well as consultation on law briefs. He also teaches First Amendment law at the Touro Law Center on Long Island, ...” But he has devoted most of his time to advocating for prisoners who are mentally ill, particularly veterans.

Because he came to find out that he himself suffered from mental illness, he gained a whole new perspective. But we don’t have to be diagnosed with bipolar disorder or depression to shape a new perspective on mental illness for ourselves and within society. There are diseases of the body and diseases of the mind. For the most part, there is no longer a stigma attached to having cancer, or kidney disease or heart failure. The origins of those conditions are varied and not always apparent; they usually include both genetics and environmental factors. While there may be some voluntary behavioral aspects involved, few of us think cancer is a moral weakness. Is mental illness really so different?

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.
Q-and-A with ALPS President and CEO David Bell

You’ve lived all over the country and as far away as Bermuda. What brought you to Missoula, Mont.?

I fell in love with the west when I was young. I came to the University of Montana (UM) as a teenager and knew right away that Montana was a special place. I met my wife, Brittany, while we were both attending UM. She’s from Conrad, so as we moved to different parts of the country and internationally, Montana was always “home base” and we knew we would return. When I met ALPS Founder Bob Minto on one of my trips back to Montana, we made a connection and as the opportunity at ALPS unfolded, I knew it was time to come back home.

What drew you to the insurance industry originally? What has kept you there?

Like many others in senior positions I found the industry (or it found me) by accident. I went to work for Chubb out of college, mainly because it was a large, highly reputable organization with an international footprint, and that was the experience I was looking for out of school. The “trade” of insurance – focused on the transfer of risk from one corporate balance sheet to another – was fascinating. It has been called the DNA of capitalism. It’s also an industry full of good people. In my experience, compared to other financial service industries, it seems to have a higher concentration of leaders who came from humble means and are committed to giving back to the industry and their communities.

How does the lawyers’ professional liability insurance line differ from your previous experiences in the industry?

It has been fun to focus on a single industry niche. In my previous role as COO of Allied World, a large public company, we had significant resources and more than 40 different coverage lines. That did have its advantages, but I was never able to get “in the trenches” as ideas were first incubated. At ALPS, our mission is to provide the best coverage protection to the legal community. Because of our niche focus, we have been able to successfully build a culture focused on customer service and ease of doing business. I am now able to participate at the grass roots level to help ensure we live up to the faith our policyholders place in us.

ALPS was started in 1988. Now, 25 years later as you are taking the helm, how has the company changed?

As I learned about the ALPS story it became clear that some things have changed a lot, and some things not at all. What has changed is the utilization of technology, policyholder expectations regarding customer service and a general business model that has evolved over a quarter century. ALPS has done a fantastic job of staying ahead of the curve, and is regularly out front as the innovation thought leader. What hasn’t changed is the hallmark of the ALPS value proposition. We are a “by lawyers, for lawyers” professional liability carrier committed to making the legal profession better through risk management and stable risk transfer. From the beginning when Bob Minto and his colleagues started this company, ALPS made a commitment to provide the broadest coverage in the marketplace at a reasonable price. ALPS made a promise to our policyholders that if you have a claim it will be handled honestly, promptly and professionally. Those values are the same today as in 1988, and will be the same for many years to come.

As a non-lawyer, how do you view the challenges and opportunities facing the legal community of today?

New issues in the legal community are constantly emerging. At ALPS, we have the good fortune to have long-standing affiliations and endorsements from more state and local bar associations than any other insurance carrier. As a non-lawyer myself, these relationships are truly valuable for me to gain a better understanding of what today’s lawyers are grappling with and to be able to offer real solutions.

For example, right now, we have law school students emerging with significant debt and fewer opportunities. With less “big firm” options they are increasingly hanging a solo shingle. On the flip side we have our baby boomer lawyers reaching retirement age. As they leave the practice of law, with them go some of our most experienced and knowledgeable legal practitioners. ALPS is responding by launching ALPS-LegalMatch.com, a new tool that will pair “new” lawyers with soon-to-be retiring lawyers. This tool will help retiring lawyers identify a successor. It will help new lawyers find a practice, and will partner them with a mentor during the transition. The result: for ALPS we have our best lawyers training our newest lawyers, which make the new lawyers a better risk for us to insure. For retiring lawyers, they will have a succession plan using a process that allows them to pick the right person without months of painstaking diligence. For the new lawyer, nothing takes the place of experience, and this provides an opportunity to work with someone and gain the benefit of that experience … as well as potentially take over a practice.

I view this challenge and others like it as opportunities, and there are plenty of both on the horizon. ■

David Bell joined ALPS in 2012 from Allied World Assurance Co., where he served as the company’s senior vice president and global professional lines manager before becoming COO. Bell’s diverse knowledge, ranging from underwriting to government relations to being a founding executive of a global insurance corporation, has served ALPS Corp. well.

A University of Montana graduate, Bell now serves on the board of directors of The Maureen & Mike Mansfield Center, and he founded and serves on the board of Grateful Nation, a Montana-based organization that provides college education for the children of Montana soldiers killed in active duty in Iraq and Afghanistan.
Need clients?  
Need increased visibility?

Join the Kansas Bar Association’s Lawyer Referral Service
Join LRS online at www.ksbar.org/LRS

Why is the LRS good for business?

“I participated in the KBA Lawyer Referral Service for much of the nearly 20 years that I practiced in Dodge City. During the time I was involved with the LRS, I also advertised intensively in the local telephone directory. Although paid advertising and LRS referrals both generated a substantial volume of inquiries from potential new clients, I found that LRS-generated clients tended to bring more ‘solid’ legal matters and were more reliable than those who initially responded to phone book advertising.”

“The effectiveness in my experience of LRS referrals is demonstrated by my having sent a check to LRS for its 10 percent referral fee of nearly $54,000.”

- Henry Goertz, Goertz Law Office, Dodge City

Your trusted legal source.
It’s Time to Dance

By Christi L. Bright, The Bright Family Law Center LLC, Overland Park, christi@thebrightfamilylawcenter.com

Recently, I co-presented a CLE at the KBA Annual Meeting titled “Building Diversity” in the Legal Profession. As part of that seminar we discussed the meaning behind “diversity” and “inclusion.” Diversity was described as numbers, traditionally referring to categories like race, gender, age, or sexual preference. Inclusiveness was described as moving beyond numbers, valuing the perspectives, backgrounds, life experiences, and contributions of every person. In the words of Vernã Myers, “Diversity is being invited to the party, but inclusion is being asked to dance.”

The seminar also presented rationales, explanations, case studies, and methods for achieving diversity and inclusiveness. We also discussed some of the hidden barriers that prevent diverse attorneys from gaining the opportunities critical to advancement in our profession. Some of those barriers include limited networking opportunities, not being provided meaningful work assignments, not being assigned mentors, and not having substantive clients.

After the seminar, one of the diverse attendees questioned whether our seminar should have included more discussion on the need for diverse attorneys to address their own biases that may be inhibiting their career. I disagreed with her assessment and was surprised that someone would consider placing some level of responsibility on the diverse attorney. Later, I would discover that I had dismissed this thoughtful point too quickly.

My awakening came when I was sitting at a table enjoying a gratuitous conversation with close colleagues when two unfamiliar people chose to join us. The dilemma I encountered was whether to engage these unfamiliar individuals in my conversation or pretend that they were not there and continue with my own enjoyment.

It was at that point that it seemed like a loud bell went off in my head. As life had it, I had come face to face with my own obligation of responsibility. I had to face the same set of choices that I had just presented in the CLE a few weeks prior. Do I choose what is familiar and comfortable or do I opt for inclusion? Never being the one to run from a challenge, I offered the individuals a seat and invited them into the conversation. When the evening was over I was amazed at how these once “unfamiliar” individuals had become people that I was adding to my contact list and looked forward to meeting with in the future just to talk. Their perspective on life and the legal profession was one that I had never given much thought to being relevant.

I left that moment feeling grateful for having had the opportunity to have my world expanded and be able to represent clients from a larger spectrum of the community that I had once been unfamiliar and suspicious of.

Justice O’Connor once wrote that our society draws its leaders from the ranks of the legal profession. Grutter v. Bollinger, 539 U.S. 306 (2003). For our legal profession to remain the profession in which our leaders are derived, we must begin to include every member of our profession in those positions that are necessary and critical achievements to advancement. Just as I had to face my own bias with choosing to include those new and different people in my comfortable environment, so must the non-diverse group of legal professionals. Too often, it is not that a person fails to recognize the lack of inclusion but that to recognize it requires a response and that response may come at a price higher than what the diverse or non-diverse attorney wants to pay. We as diverse attorneys must also continue to question the lack of diversity in our judiciary or the relatively low number of diverse partners in firms across our state. We must also accept our responsibility to be involved and present. I have learned that it is extremely difficult to overlook the person who is sitting right across from you.

I am grateful for those attorneys and judges, both non-diverse and diverse, who have taken an interest in my career and have networked and connected me to people and places beyond my sole reach. I am thankful that they personally invited me to dance at the party instead of mailing me a generic invitation. As the at-large member of the KBA’s Board of Governor and co-chair of the Diversity Committee, I am excited to welcome our new president Dennis Depew to the helm of the KBA. I am confident that under his leadership the term inclusion will not be just a noun but a verb.

About the Author

Christi L. Bright is the senior attorney for The Bright Family Law Center LLC, where she represents clients in the areas of family law as well as some civil litigation. Prior to opening her own practice, Bright investigated and represented plaintiffs in employment and housing discrimination actions, as well as working as in-house counsel for a local corporation. She has conducted lectures and trainings for companies on many issues including diversity in the workplace. Bright is currently the at-large member of the KBA’s Board of Governor, representing diverse attorneys across the state, as well as co-chair of the Diversity Committee.

www.ksbar.org
Efficiency is the dominant theme of every management strategy, tool, or technique – what can I do to produce more but cost the same or less? Nearly every book, pamphlet, or seminar on efficiency for the past 100 years has promised that being more efficient at work would provide more leisure time. But what if that is not true? What if the only reward for efficiency is more work with no light but an oncoming locomotive at the end of the tunnel? That is the question posed in a July Slate article titled, “Down with Lifehacking!”

Lifehacking

Lifehacking is a newer buzzword but not a new concept. Computer programmers (good ones) use a variety of shortcuts to speed up and provide consistency in their work. The shortcuts, or hacks, speed up redundant, boring tasks so more time is available for complex and interesting puzzles. A lifehack simply attempts to find shortcuts in day-to-day life that do the same. Examples of the sorts of mundane tasks attacked by life-hackers are best reviewed at sites like lifehacker.com, lifehack.org, or hackcollege.com. In essence, it is simply a revived take on the same sorts of personal betterment that interested Benjamin Franklin in his 1793 autobiography (available at http://bit.ly/og580C).

Autopilot by Smart

“Down with Lifehacking!” gives a quick look at the “movement” in the context of two books providing insight from neuroscience research. The first is called Autopilot: the Art & Science of Doing Nothing by Andrew Smart (available in print or ebook at http://www.orbooks.com/catalog/autopilot/). Smart argues, using research in neuroscience about how much our brains actually do at rest, that lifehacking and obsession with efficiency is both inefficient and harmful.

Smart says, “... when you leave important parts of your brain unattended by relaxing in the grass on a sunny afternoon, the parts of your brain in the default mode network become more organized and engaged. In your brain, the dishes do wash themselves if you just leave them alone. It turns out your brain is never idle. In fact, it may work harder when you’re not working at all.” That we use only 10 percent of our brains is a myth; we use it all and it is always on consuming, by weight, the lion’s share of the energy our bodies consume to survive.

The theory of Autopilot is that a perpetual focus on efficiency creates at least two threats. First, whatever our brains are doing at rest – and research suggests a resting brain is busy with high-order, creative work – is impaired if it is flooded with requests to do more directed work. Second, the high energy needs of the brain require a body at rest or under less stress. Each situation, Smart argues, is triggered with lifehacks which attempt to squeeze more and more work into our days with less rest and rejuvenation.

24/7 by Crary

Jonathan Crary, an art historian at Columbia University, wrote the second book – 24/7: Late Capitalism and the Ends of Sleep – discussed in the Slate article (available at Amazon.com). 24/7 is a much darker and, frankly, more depressing look at issues implicated in lifehacking. Specifically, the expansion of global markets and pressure for an always-on capitalism pushes individuals and communities into constant activity with a negative impact on both.

Crary kicks off 24/7 with two stories about U.S. military attempts at creating a “sleepless soldier” and Russian research into satellites to illuminate ten-square-mile swatches of the earth at night with a brightness “nearly 100 times greater than moonlight.” Each story illustrates the shockingly serious lengths we will go to in attempts to lifehack ourselves and our environments. Slate picks up the theme by introducing sleep hackers. These folks compile detailed sleep logs and tinker around with their own sleep patterns to improve the quality of their sleep. Tim Ferriss, author of The 4-Hour Body and The 4-Hour Workweek, tinkers around with sleep in a way that seems aimed at improving quality of sleep such that the quantity needed is reduced. Forget sleepless soldiers; Slate worries that some life-hackers seem aimed at becoming sleepless civilians.

Balance

Efficiency is a powerful evolutionary drive. Ideally, improving efficiency helps us by providing better rest for the brain and body with some apparent community benefits as well. Without balance, efficiency may fill every moment with risks for the individual and culture.

About the Author

Larry N. Zimmerman, Topeka, is a partner at 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.
Our family just returned from a family vacation. And I need a vacation. Alone. In a dark soundproof room, with my wallet locked in a safe.

These days it seems the time, effort, and money to get six Keenans to embrace one idea, one calendar, one plan, 10 pieces of luggage, five phone chargers and six computer cords and then execute it is, well, exhausting. Military invasions involve less planning. And no yelling.

It didn’t used to be this way. Larry and Ramona tossed their five kids in the Plymouth station wagon and our destinations were often not shared until we hit Interstate 70. East meant Kansas City. West meant Colorado. We rolled around the back seat, fought, shared one bottle of Dr Pepper while the wind howled and no one ever said “buckle up.” AM radio blared with the corn futures. I miss those days. Sort of.

And so while I was waiting for our connection in MSP, I found a story on the New York Times titled, “The secrets to a successful family vacation.” The writer offered tips to making the vacation successful—he described things like checklists, vacation games and finding ways to get the kids to buy into your concepts.

That guy operates in an alternative reality.

For us, our adult boys spend 51 weeks of the year avoiding me and tolerating me only when they need something. And then for one week it all changes when we travel together. Whether it’s riding in the car to the airport, on the plane together, sharing adjoining hotel rooms—we are on top of each other.

I embarrass my family. I admit it. So sue me. They do anything to avoid acknowledging my presence. Text, tweet, pretend to call someone. Pull a fire alarm, find a tornado shelter, cave, sink hole. I’m still a foot away. Sorry.

What’s my biggest sin? I talk to people. Not intrusive, annoying talking like the guy did to you on your last Southwest flight. Not “I see you are using an iPad, how do you like it?” type of questions. I mean friendly conversation that starts with “Good morning. How are ya?” If the spirit moves me, I will greet the gate agent, the TSA guys, the airline attendants, and always the pilots. After every flight—every one—when I depart I thank the pilots: “Good job, guys!”

Often in five minutes I’ve learned where they are from, how many children, what they do, and how their day is going. These are not long “let me tell you about my life” type of conversations. If there are three degrees of separation of most people, I can find them.

So why does this make me Satan? Someone help me with this. Old-school vacations were an exercise in Larry Keenan introducing us to people. Anywhere, anytime we could be subjected to a two-hour cross exam that in reality lasted 30 seconds. Anyone in the clergy got our attention. “Father Finnerty, meet our children.” We didn’t drop to the fetal position, roll the eyes, or feign a seizure. Sometimes Larry would say things like, “Father, what’s your confession schedule” just to push our buttons.

I can say, with 100 percent certainty, that I never told my parents they embarrassed me. Did they? Sometimes. But every awkward moment was an opportunity for my own brand of humor. And I threw bullets Larry’s way with comebacks, one-liners, and zingers that brought chuckles.

But then everything changed. Someday the archeologists will write a treatise about what happened to the art of conversation. And they will conclude one thing: The cellphone did it. From stories on Sunday morning television to best-selling books like “Alone Together: Why We Expect More from Technology and Less from Each Other” by Sherry Turkle.

Is there any reason today’s youth is a mess? So I guess this is our reality now, but that doesn’t mean I’m giving up. I could go on longer but I just noticed someone who wants to talk to me.

About the Author

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

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Editor’s note: This article was reprinted from the Kansas City Star.
One of the most frustrating things to hear when a new law school graduate pursues that first permanent position is that he or she does not have enough work experience. This seems to be a problem many prospective employees face regardless of class rank or GPA. As is true in many fields, employers want experience but few will hire you to give you that necessary experience. Law students must find creative ways of gaining experience to conquer this dilemma. One way that law students can resolve the conundrum is to enroll in law school clinics. Clinics are a great way to gain valuable legal experience while also earning law school credit. Most ABA-approved law schools have at least one or two clinics in which students gain practical legal experience while working under the direction of a supervising attorney. Some law schools, such as KU Law, offer a wide variety of clinical courses for students to choose from.

Clinics offer numerous advantages for students. The first is seeing how a small to mid-sized law firm works. Many clinics operate with only a handful of students and supervising attorneys, so the experience feels very much like a smaller firm. Second, clinics offer the opportunity to draft legal documents. Many critics of the law school experience argue that classes teach too much theory and not enough practical skills. Drafting documents for clients provides students with the practical elements many classes lack. Third, clinics give students the chance to meet with clients. Regardless of what area of law one practices upon graduation, solving client problems is one of the most important responsibilities for a new lawyer. The practice that law students gain by working with clients during the clinical experience is crucial to career success.

Fourth, clinics illustrate the importance of legal ethics in real world scenarios. Going beyond the requirement that all students take a course in professional responsibility, clinics place the value of legal ethics into sharp focus since those rules for professional conduct guide almost every decision the student makes when serving his or her clients. Fifth, collaborating with other students is also vital to success in legal clinics. Students can often feel isolated within the highly individualized law school experience, but clinics tear down this wall and place students in a collaborative environment. Finally, serving those who are underserved is perhaps one of the most beneficial elements of the clinical experience. The clients in many clinics are those who could not likely afford expensive legal counsel. Clinics provide those clients with a legal voice without exacting a heavy financial toll.

Additionally, clinics offer the opportunity to work with practitioners who are also skilled teachers. Those practitioners can help bridge the gap between the legal theories taught in the regular classroom and the legal experience that employers seek. Clinics also grant students the chance to see how a particular area of law works. If a student was thinking about entering a given field of law following graduation, a clinic focused in that field allows the student to examine in-depth how that practice area works. He or she could then consider whether entering that particular area was the right career choice. Each of these benefits is invaluable when one graduates and begins seeking that first big position.

During my tenure at KU Law, I have participated in a couple of very useful clinics. The Kansas Supreme Court Research Clinic was a great experience that afforded me the chance to perform informative research for the Kansas Supreme Court and the Office of Judicial Administration. The experience was uniquely valuable and greatly advanced my research, writing, and presentation skills. I also participated in the Externship Clinic, which allowed me the chance to earn school credit for a summer internship at the Kansas Department of Revenue. Researching and writing memoranda on a variety of tax issues for the KDOR was a priceless experience, because I am also looking at practicing in the field of taxation following graduation. Additionally, working for the department of revenue will afford technical knowledge that firms practicing in taxation will seek from their new associates.

Clinics are truly the best kept secret in the J.D. curriculum. With the variety of clinical offerings that are now available, there is no reason for any law student to go into that big job interview without some experience on his or her resume. Because the job market remains extremely competitive, newly minted lawyers will need every advantage they can obtain. Law students should not overlook law school clinics as they plan their upper level curricula these clinics build skill sets and enhance resumes for all participants.

About the Author

Stephen Jones is a third-year law student at the University of Kansas School of Law. He grew up in southwest Missouri and earned his bachelor’s degree from Missouri Southern State University in Joplin. Jones taught in the public schools for several years before attending law school. Following graduation, he plans to practice in the areas of taxation or estate planning.
Avoid Passive Voice: Keep It Simple

By Betsy Brand Six, University of Kansas School of Law, Lawrence, bsix@ku.edu

The dreaded passive voice. Most of us are a little nervous that we do not know for certain what it is. Maybe we know when it is most obvious, like in the sentence, “the ball was kicked by Sam.” Some of us may even notice it when the word “by” is missing and the subject of the sentence has been left out entirely, like in the sentence, “the defendant was sued.” But when the sentence gets more complex, it becomes increasingly difficult to know whether a sentence is in passive voice.

So what is passive voice? When I was in school, I remember being told to look for the state of being verbs: is, are, was, were, etc. That, of course, doesn’t really work. While “the car was driven by Emily” is passive voice, “Emily was driving the car” is not. Passive voice is when an object of the sentence becomes the subject. The subject, or the actor in the sentence, either gets moved to the end of the sentence or left out entirely. For me it is sometimes just easier to find the verb and then ask myself who is performing the action in the verb. The car is not doing the driving; Emily is.

Passive voice is not, of course, always wrong to use. Sometimes you have to use it because you do not know who performed the action, such as when you write, “my car was stolen,” or when you want to de-emphasize who did the action, like the defense attorney who writes, “the plaintiff’s car was struck.” But most of the time when passive voice is used, we are not even aware we have used it.

So what is the problem? Why do pesky grammarians get all worked up about passive voice? Passive voice can be a problem because it can make the sentence ambiguous or at least not as clear as it could be. If you leave out who is doing the action, like in the sentence, “the ball was kicked,” you have failed to tell your audience who did the kicking. This can be important. If the ball hit your client in the face and broke his nose, you want to know who kicked it. In fact, you probably want to emphasize that Sam kicked that ball to whomever you are writing: Sam, the court, or even your client.

I will admit, even when we don’t have an excuse such as those mentioned above, the occasional use of passive voice is just fine. Sometimes the actor is obvious by inference. If someone writes, “the defendant was sued,” it is not hard to figure out the plaintiff did the suing. Likewise, if I write, “the motion should be granted,” it is pretty obvious, particularly in context, I want the court to grant the motion.

The problem arises when the inferences are not so simple. Take, for example, this sentence: Actions to avoid the crash at the last second were taken. Taken by whom? If you rewrite the sentence in active voice, it is clearer and easier to follow: The plaintiff took actions to avoid the crash at the last second.

Legal writers often use passive voice because we frequently write about complex ideas and thoughts. We need, however, to be able to explain those complex ideas in a way that is easy to understand. A sentence is almost always easier to read when it begins with a simple subject. By simple, I mean something tangible that can be seen, heard, or touched. In other words, try to avoid beginning your sentence with a concept or idea. If you do that, you will eliminate many instances of passive voice or at least those instances that are the most problematic.

In the example above, the subject of the sentence is a complex idea – “actions” or “actions to avoid the crash at the last second.” The sentence is much easier to read if it begins with a simple subject, “the plaintiff,” which we can easily identify and understand.

So if you are not confident you know when a sentence is in passive voice, you don’t necessarily need to try to figure it out. Just keep your sentence simple. Begin your sentence, or at least its main clause, with a simple subject, closely followed by the verb. You will likely end up with a sentence in active voice and easy for your reader to follow.

About the Author

Betsy Brand Six is a Lawyering Skills Professor and Director of Academic Resources at the University of Kansas School of Law. Six, a native Kansan, has taught legal writing for eight years. Before she began teaching, she practiced environmental law for 13 years. Six received her juris doctorate from Stanford Law School in 1992.

Footnotes

1. This clause uses passive voice. You can make it active by rewriting it as follows: “But most of the time when we use passive voice ... .”

2. It is not always easy to identify the subject of a sentence. I suggest you start by looking for your verb, which is usually easier to find. The subject usually precedes the verb.

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Law-Related Education and “Celebrate Freedom Week”

The Kansas Legislature recently passed HB 2261, which is a collection of school related proposals aimed at school policy and curriculum. The law allows schools to use unencumbered balances to fund general operating expenses and updates school “bullying” definitions. It also created “Celebrate Freedom Week” as an opportunity to further educate school age children on the U.S. Constitution.

“Celebrate Freedom Week” will start this year in the week containing September 17 (or any other full school week as determined by the local school board), during which public schools are required to teach to grades kindergarten through eight the history of the country’s founding. On or before December 31, 2013, the Kansas State Department of Education (KSDOE) is responsible for adopting rules and regulations to require history and government curriculum for kindergarten through grade eight that includes instruction on the meaning and context of the Declaration of Independence and the U.S. Constitution, including their relationship to the nation’s diversity by way of immigration, major wars, and social movements in American history. The KSDOE, along with other volunteers, is required to promote “Celebrate Freedom Week.”

As a supplemental tool, the Kansas Bar Association is working to partner with other associations to use a new computer based educational curriculum called it iCivics in conjunction with “Celebrate Freedom Week.” It is a free civics education program started by U.S. Supreme Court Justice Sandra Day O’Connor in 2007, following her retirement from the high court.

The resources of iCivics are off-the-shelf and aligned to state standards. It seeks to improve civics education and support teachers by providing off-the-shelf solutions which can be integrated with existing curricula, by taking a digital approach to engage students and by leveraging media that the students are already using – video games.

In Kansas, iCivics is being organized by attorney Ted J. McDonald, of Overland Park, the Kansas coordinator, and supported by a Kansas iCivics Advisory Committee formed in cooperation with Kansas Supreme Court Chief Justice Lawton R. Nuss. “I am excited about the educational possibilities iCivics offers, and several other state chief justices around the country are very supportive of the program also,” said Nuss. Judicial Branch staff, judges, teachers, other professionals, and KBA and KSDOE members are participating on that committee.

You can learn more about iCivics and KBA’s involvement by visiting http://www.icivics.org/. In the future you will be able to find information about iCivics on the KSDOE website at http://www.ksde.org/LinkClick.aspx?fileticket=RBvx3H1qRGs%3d&tabid=2249&mid=5774.

Curriculum Overview

There are currently several curriculum units: Foundations of Government; the Constitution; Three Branches; the Judicial Branch; the Executive Branch; the Legislative Branch; Government & the Market; Persuasive Writing; Citizenship and Participation; Budgeting; Influence Library; Politics and Public Policy; International Affairs; Landmark Library; State and Local Governments; Civil Rights; County Solutions; and Media and Influence. New curriculum units are developed periodically. Each unit has corresponding lesson plans, web quests and a game that allows teachers to approach the curriculum in a variety of ways. If used together, iCivics lesson plans and games make up more than a semester’s worth of instruction and learning. If teachers pick up lesson plans and games here and there, each curriculum unit can independently supplement the teacher’s existing plans.

Lesson Plans

The curriculum provides traditional paper-type lesson plans to provide context for each of the offered games. Using pedagogical best practices, the more than 70 lessons include a variety of simulations, foldable activities, skits, vocabulary development, graphic organizers, and active participation opportunities, all with appropriate scaffolding. All lessons include teacher keys and begin with a Teacher’s Guide that clearly states the objectives, timing, resources, and steps needed to complete the activities. The Teacher’s Guide provides standards-based learning objectives to guide teachers and students to the lesson’s end goal. Resources of iCivics are designed to give the students a variety of approaches to learning about civics.

Teacher Resources

The iCivics website provides all necessary teacher resources. Teachers can quickly access classroom resources by clicking on the Teachers, This Way button anytime, anywhere on the website. That will take educators to a specific teacher portal where they can find curriculum units, lesson plans, web quests, standards matching, or games.

In addition, the KBA’s Law-Related Education Committee members have selected several opportunities for students and teachers who want to learn or teach about civics and law related issues. One resource that the committee supports is Law Wise, an electronic newsletter published multiple times during the school year. Law Wise provides teachers with lesson plans, resources and fun information to assist in helping students learn about government, civics, and law.

Another resource is the Law-Related Clearinghouse in Emporia. Kansas teachers can checkout DVDs, books, and other materials at no charge. Last year, the committee approved purchasing a set of DVDs that focus on Symbols of America. Included in that set are: the Declaration of Independence, the Constitution of the United States, the U.S. Flag, Freedom and Democracy, Uncle Sam, Images of Liberty, and the White House.

The Hon. G. Joseph Pierron Jr. is chair of the Law-Related Education Committee, and he has partnered with Seaman
USD 345 in Topeka and other Kansas judges to provide several presentations to students during Constitution Day and Celebrate Freedom Week.

“I think the kids understand after the program that the court system is how we solve a lot of problems. I use as many props as possible like a judges’ robe and gavel (although we really never use them) and sometimes just silly things like Viking helmets just to make it fun,” said Judge Pierron. “I use a big stuffed dog in one of my cases. ‘Spike the Wonder Dog’ is better known than I am. I have had high school students stop me and ask if I was the one who brought the big dog. A kid coming to a basketball game in Lawrence recognized me and thanked me for coming to his school.”

This year, Washburn University School of Law students will have the opportunity to attend the presentations and be on hand to assist the judges in their presentations and with videotaping them for future use.

For additional information on these resources and others, please visit http://www.ksbar.org/?educator_resources.
Members in the News

Changing Positions
Charles P. Bradley and Rachel B. Zenger have joined Galloway, Wieggers & Brinegar P.A., Marysville.
Matthew J. Donnelly has become an associate with the Topeka law firm of Henson, Hutton, Mudrick & Graggson LLP.
Aaron K. Friess has joined Hinkle Law Firm as a law clerk, Wichita.
Michael L. Hughes has joined Sanders Warren & Russell LLP, Overland Park.
Samuel H. Jeter has joined Polsinelli P.C., Kansas City, Mo., as an associate.
Tad C. Layton joined Post Anderson Layton Lindstrom LLP, Overland Park.
James P. Maloney has been named a shareholder with the Kansas City, Mo., firm of Poland, Wickers, Eisfelder, Roper & Hofer P.C.

Joshua A. Ney has been appointed Kansas Securities Commissioner, Topeka, by Gov. Sam Brownback.

Changing Places
John C. Kennyhertz has opened a firm, Kennyhertz Perry LLC, 7301 Mission Rd., Ste. 107, Prairie Village, KS 66208.

Miscellaneous
Steven F. Coronado, Kansas City, Mo., was named president of the Missouri Organization of Defense Lawyers.
Michael J. Day, St. Francis, has been appointed council member of the St. Francis City Council.
David J. Heinemann, Topeka, has been reappointed to the Kansas Guardianship Program board of directors.
Jay E. Heidrick, Overland Park, has been elected president of the Johnson County Bar Association.

Denise Kilwein, Topeka, will receive the Judicial Education Award in recognition of her 25 years as director of judicial education for the Kansas Judicial Branch.
Hon. John W. Lungstrum, Kansas City, Kan., has been selected to receive the American Inns of Court Professionalism Award for the Tenth Circuit.
Dale E. Pike, Dighton, has been appointed council member of the City of Dighton Council Meeting.

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.

In the State of Kansas, Workers’ Compensation insurance is mandatory when an employer’s gross annual payroll exceeds $20,000.

As a business owner...
Part of your focus is to protect your employees. If your employees suffer, your business suffers. We would like to provide you with the opportunity to receive a quick quote for obtaining workers’ compensation insurance for your law firm. This insurance will be administered by The Bar Plan Insurance Agency, Inc. and underwritten by The Hartford.

Highlights of the Workers’ Compensation policy:

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- Low Affordable Rates

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Dale Howard Cooper

Dale Howard Cooper, 83, of Wichita, died July 1. He was born January 24, 1930, and spent most of his days as an attorney in the Wichita area. He is survived by his wife, Collette Cooper, of Wichita; sister, Ruth Ann Mitchell, of Carlsbad, Calif.; brother, Dr. John Cooper, of Estes Park, Colo.; daughters, Collette Miller, of Leawood, Kelly Williams, of Olathe, and Kim Merrill, of Leawood; son, Kris Cooper, of Branson, Mo.; 16 grandchildren; and 11 and 1/2 great-grandchildren.

Verlin A. Ingram

Verlin A. Ingram, 61, of Wichita, died June 21 after a short illness. He is survived by his wife, Brenda, of Wichita; son, Jason, of Wichita; daughter, Sabrina, of Wichita; brother, Vaughn, of McPherson; and five grandchildren.

Charles Ivan Prather

Charles Ivan Prather, 67, of McPherson, died June 27. He was born March 18, 1946, the son of Mary (Bechtel) and Frederick Hilton Prather in Dodge City.

He graduated cum laude with a bachelor’s degree in history and political science from Southwestern College in 1968. After completing his law degree on 1976 from Washburn University School of Law, Prather moved to McPherson where he joined a local law firm. He later started his own practice and served for a time as McPherson County’s assistant county attorney. Prather was also appointed district court trustee for the 9th Judicial District.

He was a member of the Washburn Law Alumni Association, Kansas Bar Association, and Kansas Child Support Enforcement Association. Prather was a longtime member of the Kiwanis Club of McPherson and recently served as lieutenant governor for the Kansas District Division 5 of Kiwanis International.

Prather is survived by his children, Tanya, of Nashua, N.H., Christa Prather Stern, of Leesburg, Va., Nathan Prather, of McPherson, and David Prather, of Atlanta; his siblings, Larry Prather, of Buhler, Carol Zart, of Waverly, Iowa, Linda Prather, of Leavenworth, and Benay Richardson, of Leavenworth; his ex-wife, Cynthia; and three grandsons. He was preceded in death by his parents and a brother, John Prather.

George Wayne Probasco

George Wayne Probasco, 87, of Topeka, died July 14 at his home. He was born January 4, 1926, to Everett T. Probasco and Ada Smalley Probasco in Topeka, where he graduated from Washburn University in 1950 and Washburn University School of Law in 1951. He practiced law in Topeka for 62 years.

After finishing high school, Probasco enlisted in the Army Air Corps and became a staff sergeant gunner on a B-29. He served 12 years as a Shawnee County auditor, and he was also a charter member and first president of the 20-30 club of Topeka. Probasco was also a member of the Kansas Bar Association, Topeka Bar Association, YMCA, and Rotary.

Probasco is survived by his wife, Lou, of the home; four children, Paula Freeman, of Castle Rock, Colo., Jeff Probasco, McKinney, Texas, Kristi Hellmuth, Mason Neck, Va., and Jennifer Massengalte, Frisco, Texas; 13 grandchildren; and five great-grandchildren. He was preceded in death by his parents and sister, Betty.

Edward F. Wiegers

Edward F. Wiegers, 80, of Marysville, died June 28 in Lincoln, Neb. He was born January 19, 1933, in St. Joseph, Mo., the son of Richard and S. Ann Koelzer Wiegers. He graduated in 1954 from Emporia State University with a bachelor’s degree in education, and in 1957 he received a law degree from Washburn University School of Law.

Wiegers enlisted in the Kansas Army National Guard in 1949. He served as judge advocate, was a member of the Kansas Military Board, and Kansas Armory Board. After 35 years of military service, he retired as a colonel in 1984. Wiegers was a longtime attorney in Marshall and Washington counties, and served on many local and state boards, including Marshall county attorney, mayor of Marysville, Marysville Township Board, Marysville Planning Commission, Community Healthcare, St. Gregory’s School, Kansas Bar Association Ethics and Awards committees, Marshall County Habitat for Humanity Foundation, Kansas Behavioral Sciences Regulatory Board, and Kansas Commission on Veterans’ Affairs. He served a trustee of the Helvering Trust, Viola Cooksey Trust, and president of the Guise-Weber Foundation.

Wiegers is survived by his wife Mary, of the home; two daughters, Patty Holle, of Marysville, and Susan Kannerr, of Topeka; two sons, Michael Wiegers, of Baldwin City, and Robert Wiegers, of Orlando, Fla.; three sisters, Rosemary Meador, of Marysville, Helen Pierson, of Arizona, and Ann Dabbas, of Amman, Jordan; and two grandchildren.

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The Kansas Bar Association would like to extend a special thank you to and recognition of the following individuals who gave so generously of their time and expertise in speaking at our Continuing Legal Education seminars from April through June 2013. Your commitment and invaluable contribution is truly appreciated.

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Overview

We all know that the old axiom “you can’t take it with you” is true, but you sure can direct where it goes and who enjoys it when you are gone. Clients engage lawyers to prepare estate planning documents to make legally binding provisions for the distribution of their property after death. However, a client’s wishes can be subverted by a will contest. A will contest is a lawsuit challenging the validity of a will or its terms. A lawsuit can also be brought to challenge the terms of a revocable trust or other donative instrument; however, for purposes of this article, all such contests will be generically referred to as “will contests.”

In working with clients, an attorney should elicit information whether or not any person affiliated with the client might be inclined to contest the will. Because clients frequently know the natures of the parties they wish to benefit, it is important to have this discussion with the client before beginning the process of preparing documents. Is there someone whose bequest will be less than that person would have received under a previous plan or under the laws of intestacy? Is there a potential for argument over assets, particularly business assets? Litigation over an estate can have a disastrous effect on the plan the client so carefully prepared; the cost can deplete the estate, cause extensive delay in distribution to the beneficiaries, and take an emotional toll on the parties.

An example of a situation with the potential for a will contest is when a client leaves unequal shares to children. Under Kansas laws of intestacy, children take equal shares upon the death of a parent. But for whatever reason (e.g., one particular child spends more time taking care of an elderly parent), the parent may wish to make an unequal distribution among the children. The other children may see the unequal distribution as a result of undue influence by the “favored” child. In such a case, the parent may be concerned that the other children will contest the will.

If there is concern that a beneficiary may contest the will, the client should consider incorporating a “no-contest” clause in the dispositive document. A no-contest clause is “a provision in a donative document purporting to rescind a donative transfer to, or a fiduciary appointment of, any person who institutes a proceeding challenging the validity of all or part of the donative document.” A no-contest clause is also called an “in terrorem” clause, which probably describes more accurately the “terrorem” to be struck into the heart of any beneficiary contemplating challenging a will or trust. The purpose of such a clause is to discourage a disappointed beneficiary from contesting the dispositive document. The use of a no-contest clause is not uncommon; even celebrities use them. Michael Jackson’s trust apparently contained a no-contest clause. Both Jerry Garcia of the Grateful Dead and Frank Sinatra included no-contest clauses in their wills.

What Does a No-Contest Clause Look Like?

A simple no-contest clause for a will might look like this:

If any legatee, devisee, or beneficiary hereunder directly or indirectly contests this will or attempts in any manner to prevent its probate or to set it aside or to alter any of the provisions, then in any such event, I hereby revoke all legacies, bequests, and devises and trust provisions in favor of such legatee, devisee, or beneficiary, and direct that the share that such legatee, devisee, or beneficiary would otherwise receive hereunder shall become part of my residuary estate and be disposed of in accordance with the articles of my will dealing with the disposition of my residuary estate, but with such legatee, devisee or beneficiary having no right to participate therein and to be excluded from any interest in my residuary estate.

No-contest clauses are not restricted to wills. They can also be included in other kinds of donative instruments, including gift agreements. Further, Kansas courts have recognized the validity of no-contest clauses in trust agreements. No-contest clauses cannot be used, however, to preclude an inheritance to which a beneficiary has a statutory right, e.g., the elective share right of a surviving spouse.

What Constitutes a Will Contest?

Generally, an action brought to alter or nullify the provisions of a dispositive document constitutes a will contest, though what constitutes a will contest may be defined in the document itself. There are many different reasons why someone might initiate a will contest. Grounds for contesting dispositive documents include undue influence, lack of testamentary capacity, duress (coercion), and forgery. If a will contest is successful, the disposition of the property will be governed by a prior document (unless it is also invalidated) or under the laws of intestacy. A will contest may only be brought by a contestant who has standing, that is, someone who would benefit if the suit is successful. For example, beneficiaries who would take under intestacy or by a prevous will would have standing to bring a will contest, as would any fiduciary appointed in a previous will. Certain actions, though not brought directly to contest a will, may have the effect of nullifying provisions in a will. In that case, those actions may be determined to be “will contests,” and as a result, the party involved may be subject to the terms of a no-contest clause.

Several Kansas cases have clarified what actions constitute will contests. For example, a suit to construe, reform, or modify the language of a donative document is generally not a contest if its purpose is considered to be seeking the donor’s intent. Such a suit therefore would not be a violation of a no-contest clause unless the construction, reformation, or modification advocated by the person bringing the suit would invalidate the donative document or any of its provisions. Similarly, a party who participates in an action for the construction of a will or some part thereof, whether as plaintiff or defendant, does not come within the provisions forfeiting the share of a beneficiary instituting a contest or other proceeding in opposition to the instrument. However, the mere allegation of ambiguity is not sufficient to avoid characterizing the suit as a will contest; there must be a bona fide issue as to the interpretation of the document. There are no cases addressing whether an action to modify or terminate a trust under the Kansas Uniform Trust Code would constitute a will contest. Actions against an estate to recover a bona fide debt owed by the decedent do not constitute a will contest. In Wright v. Cummings, the administrator brought suit to enforce the terms of the no-contest clause, which provided that any per-
son attempting to set the will aside “or otherwise interfere with the execution of the same” would receive nothing from the estate.\(^\text{15}\) The court found that the filing of such a claim was not a will contest, stating that “the assertion of a legal right independent of the Will was not an interference with the Will.”\(^\text{16}\) The court also noted that there was a clause in the will directing the administrator to pay all just debts, and that “it would be clearly against the policy of the law to extend the terms of a forfeiture of this character beyond the express terms of the condition itself.”\(^\text{17}\)

On the other hand, motions filed in a probate matter can constitute will contests if they are filed without probable cause and if they would have the effect of subverting the testator’s intent. For example, in *Estate of Barfoot*, an executor filed a motion to enforce the terms of the no-contest clause contained in the will. Two of the beneficiaries had previously filed a motion in the probate proceedings to have the court strike a clause in the will that would have reduced their share of the estate by the amount of outstanding promissory notes. The beneficiaries also filed a motion to require the executor to post bond. The court enforced the no-contest clause on the grounds that the will explicitly exonerated the executor from the requirement to post bond and that the expiration of the statute of limitations on the collection of a debt was irrelevant to a testator’s intent to offset such debt in a bequest. Those motions, if successful, would have had the effect of overturning the testator’s intent as expressed in the will, and thus, the filing of them amounted to a will contest.\(^\text{18}\)

Less clear is whether an action for intentional interference with inheritance or gift (or tortious interference with the expectancy of an inheritance) would constitute a will contest. This tort is based on the claim that another party has “by fraud, duress or other tortious means intentionally prevent[ed] another from receiving from a third person an inheritance or gift that he would otherwise have received.”\(^\text{19}\) Any recovery must be based on the inheritance or gift that a plaintiff would have received but for the tortious interference by the wrong-doer.\(^\text{20}\) Sometimes a will contest and an intentional interference claim are both brought, but the intentional interference claim is generally against a third party and not a challenge to the validity of a document. For example, a claim that an individual has exercised undue influence over a testator may be brought as a will contest (to render the will invalid) or as an intentional interference claim against the alleged undue influencer. Thus, the outcome of a successful tortious interference claim may have the effect of subverting a testator’s intent.

Some states’ courts have held that an intentional interference claim can constitute a will contest and some have found that they do not, but a key factor seems to be whether or not the proof for the two causes of action is the same. Courts also sometimes hold that an intentional interference claim, particularly one founded on a theory under which a will could be invalidated (such as undue influence), is precluded because an adequate remedy already exists in the form of a will contest. Kansas courts follow this general rule.\(^\text{21}\) Therefore, a no-contest clause may also operate on a practical level to cut off an intentional interference claim.

### Is a No-Contest Clause Enforceable?

Of course, the other matter to consider is whether or not courts will enforce no-contest clauses. In two states, Indiana and Florida, no-contest clauses are not enforceable. In the other 48 states, they are enforceable in varying degrees but may be unenforceable in certain circumstances.\(^\text{22}\) Some states take the position that a no-contest clause is unenforceable against a minor or an incompetent. Kansas adopted the rule that no-contest clauses are enforceable unless there is probable cause to bring the will contest. The Uniform Probate Code (which Kansas has not adopted) takes a similar position.\(^\text{23}\) By contrast, Missouri law provides that a no-contest clause is generally enforceable and specifically rejects the probable cause rule.\(^\text{24}\)

Kansas first adopted the rule that a bona fide belief in the invalidity of a will supported by probable cause prevents the application of a no-contest clause to a beneficiary under a will.\(^\text{25}\) However, that rule only applied to contests based on public policy grounds.\(^\text{26}\) In *In re the Estate of Campbell*, Kansas adopted a narrower, perhaps somewhat more objective, definition of probable cause and expanded it to contests based on other grounds.\(^\text{27}\) Probable cause is “the existence, at the time of the initiation of the proceeding, of evidence which would lead a reasonable person, properly informed and advised, to conclude that there is a substantial likelihood that the contest or attack will be successful.”\(^\text{28}\)

The *Campbell* definition requires the existence of “evidence” to support probable cause. Although normally a question of fact, whether probable cause exists can be a mixed question of fact and law or a pure question of law. When the sufficiency of the evidence is at issue, determination of probable cause is “applied to the specific facts on a case-by-case basis.”\(^\text{29}\) But when the record reflects no factual dispute, the determination of probable cause is a question of law.\(^\text{30}\)

The *Campbell* case also illustrates a potential caution about the enforceability of no-contest clauses. How much evidence is necessary to produce a reasonable belief in a substantial likelihood of success? In *Campbell*, a will was contested on the grounds of the testatrix’s incompetency. The trial court found that the testatrix had capacity at the time she executed the will, but it noted that her medical records indicated that she had suffered from many medical complications and intermittent periods of confusion. The court refused to enforce a no-contest clause in the testatrix’s will on the grounds that the contestants had probable cause to challenge the decedent’s testamentary capacity.\(^\text{31}\) Apparently periodic confusion was enough evidence to create probable cause.

Following *Campbell*, then, it may not be enough to rely on a no-contest clause to discourage litigation, particularly for a client with less-than-stellar medical records to support competency. But the probable cause requirement can provide guidance on how to support a client’s intentions. The burden to show that no probable cause exists is on the person seeking to enforce the clause. If the burden is not met, the no-contest clause will not be enforced, but the burden of proving the claim then shifts to the contestant. Thus, evidence gathered at the time of a will’s execution could head off a finding of probable cause. In *Campbell*, for example, perhaps the proponent of the will could have secured more medical evidence than the contestant, such as a more current medical evaluation.
that found that the client was competent, and specifically, that the client had testamentary capacity. Planning for the existence of sufficient evidence to establish probable cause may go a long way toward shoring up a client’s no-contest clause.

Although probable cause was a fact issue in *Campbell*, occasionally courts analyze it as a question of law. In *In the Matter of the Estate of Wells*, a surviving spouse brought suit to invalidate a will that had been revoked under K.S.A. 59-610 (because the decedent had married and adopted a child after the execution of the will). Kansas law had long recognized the right of a testator to revive a prior revoked will, and the testator in this case had done so by valid codicil. The will contained a no-contest clause. In reviewing whether probable cause existed, the court cited the standard adopted in *Campbell* but stated that because there was no disputed material fact, the review of whether probable cause existed was a question of law. Since the law clearly permitted the revival, the court enforced the no-contest clause.

*Tustin v. Baker*, an unpublished opinion from the Kansas Court of Appeals, appears to deviate from the *Campbell* standard. In *Tustin*, the court found that a conversion claim brought against a trustee by a beneficiary was not so lacking in good faith that the mere pleading of it engaged the no-contest clause. However, the court noted that the claim could not have a substantial likelihood of success, and so it failed to meet the probable cause definition adopted in *Campbell*. Instead, though, the *Tustin* court adopted the rule in Comment J of the Restatement (Second) of Property § 9.1 (1983), which provides that “a factor which bears on the existence of probable cause is that the beneficiary relied upon the advice of disinterested counsel sought in good faith after a full disclosure of the facts.” The *Tustin* court appears to have focused on the good faith belief that the claim had a likelihood of success given the advice received by counsel, rather than the claim’s actual likelihood of success. The court did not analyze whether evidence to support the pled claim was required to find probable cause. But the court also noted that the “facts more properly supported a breach of fiduciary duty or negligence, not conversion.” The plaintiff in *Tustin* brought several claims and all were found to meet the *Campbell* standard except the conversion claim; thus perhaps, the court was reluctant to disinherit the beneficiary merely because one claim out of several had no likelihood of success. Or it could be that the existence of counsel for a contestant shifts the burden of establishing no probable cause.

**Does a No-Contest Clause Violate Public Policy?**

Litigation about the enforceability of no-contest clauses frequently includes discussion over whether no-contest clauses violate public policy. Some argue that such a harsh penalty as disinheritance for using the court system to redress wrongs violates public policy. “Public policy should be as much concerned in upholding the right of a citizen to have his claim determined by law as it is to prevent the contests of wills.”

Additionally, enforcing a no-contest provision may have the effect of shielding genuine wrongdoing. For example, enforcement of a no-contest clause against a beneficiary bringing a suit to overturn a will on the grounds of undue influence that actually occurred would permit and favor the wrongdoing. In *In re Foster’s Estate*, a beneficiary brought suit because a bequest in the decedent’s will violated the rule against perpetuities. The court refused to apply the terms of the no-contest provision contained in the will to the beneficiary. The effect of enforcing the no-contest provision would have been to prevent the enforcement of the law that prohibits such violation.

Nonetheless, Kansas courts have consistently held that no-contest clauses do not violate public policy, reasoning that a transferor is free to place restrictions on gifts and that public policy actually favors discouraging frivolous litigation. Moreover, Kansas courts avoid the concern about limiting access to the court system and favoring wrongdoing by refusing to enforce a no-contest clause when there is probable cause for the will contest. Thus, for example, Kansas courts would probably not enforce a no-contest clause against someone bringing a suit for breach of fiduciary duty, particularly if doing so would have the effect of insulating the fiduciary from accountability to the beneficiaries.

Kansas actually allows and enforces broader no-contest clauses. In *In re Estate of Koch*, for example, the testatrix used an “anti-litigation” clause, expanding the scope of the prohibited conduct to include any litigation. Mrs. Koch’s will provided that “In the event any of my said sons is involved in litigation at the time of my death as a plaintiff against me or any of my other sons,” then that son would receive nothing from the estate unless such litigation was dismissed within six weeks of her death.

The contestants in *Koch* contended that the “anti-litigation” clause was void as contrary to public policy because it was a restraint against their access to judicial remedies. The court found: (1) the contestants were not restrained from their access to the courts, they simply had to make a choice as to how to proceed; (2) Mrs. Koch was fully legally entitled to disinherit any of her children; (3) a conditional gift or devise is not anti-public policy; and (4) a testator’s intent should control.

**Effect of a No-Contest Clause on the Marital Deduction**

A marital deduction from estate and gift tax is permitted for property passing from a decedent or transferred during lifetime to a spouse. However, if the interest is terminable, that is if upon “the occurrence of an event or contingency ... an interest passing to the spouse will terminate or fail,” a deduction is not permitted unless an interest in the property passes to any person other than the spouse and that person may possess or enjoy any part of such property after such termination or failure of the interest passing to the spouse. For example, a non-deductible terminable interest is created when a decedent leaves property in trust for a surviving spouse but the spouse’s interest in the trust terminates upon his or her remarriage.

Although authority is somewhat underdeveloped, it appears unlikely that the inclusion of a no-contest clause in a will would disqualify a bequest passing to a spouse for the marital deduction. The terminable interest rule does not apply when the spouse makes an election to take a non-terminable interest. For example, a marital deduction is permitted when a spouse elects to take against a decedent’s will. A marital deduction is also permitted when a spouse elects to take a cash bequest instead of an income interest under the provisions of a decedent’s will. The same logic can be applied to a spouse choosing to accept...
a non-terminable interest under a will containing a no-contest clause. However, it seems clear that no marital deduction would be available in the event that the will was contested and the bequest forfeited by operation of the no-contest clause.

Drafting Considerations

No-contest clauses can be as simple as the example described at the beginning of this article, but they can also be more complicated. The scope can be expanded to cover a variety of issues of concern to the client. For example, the clause can be directed at a particular class of beneficiaries, the type of litigation prohibited can be expanded beyond will contests (see Koch, for example), and the contest does not have to be limited to wills (or trusts).

One essential drafting consideration is the use of the no-contest clause as a deterrent. Clients should think carefully about whether they want to totally disinherit a person they fear may bring a will contest. If the disappointed beneficiary receives nothing under the will, he or she may not be dissuaded from litigation because there is nothing to lose. A no-contest clause is most effective at discouraging litigation when the contestant has something at stake if such a contest is brought. If a client is fearful of a will contest by a beneficiary he or she wishes to disinherit, it may be worthwhile to leave something of real value to the beneficiary and include a no-contest clause in the estate plan, including a provision for what happens to any forfeited bequest.

Kansas has no cases directly on point as to whether a gift-over of forfeited property is required to enforce a no-contest clause, but it seems clear that the disposition of the property upon forfeiture must be addressed in the instrument. Kansas courts have upheld clauses containing a direction that if a beneficiary initiates a will contest, the terms of the will are to be applied as though such beneficiary had predeceased the testator. However, if the will fails to dispose of the forfeited property, the contestant may not be prohibited from taking such property under intestacy.

The fiduciary serving under the donative instrument has a duty to administer the terms of the instrument, which means that, unless the document provides otherwise, the fiduciary is required to petition for the enforcement of the clause in the event a “contest” is brought. If the fiduciary fails to do so, the fiduciary may be breaching its duty to the beneficiaries who would benefit by the enforcement of the clause. Consider adding language to the clause that would provide discretion in the enforcement of the no-contest clause to allow the fiduciary flexibility.

No-contest clauses can be drafted to apply to someone other than the person taking the prohibited action. The situation frequently arises where a testator may wish to disinherit, not just a contestant-beneficiary, but also his or her descendants. Frequently, though, a testator will not want to “punish” the lower generation for the actions of the upper one. If this is the case, consider generation skipping transfer tax issues in the event the clause is enforced and the bequest passes to members of a lower generation. The testator can also disinherit a group of beneficiaries in the event the group colludes to appoint one member to “take the bullet” with an agreement to split the proceeds received by the other beneficiaries if the clause is enforced. Thus, no-contest clauses can be worded to include indirect contests or challenges (such as providing funding to finance a contest) as prohibited actions.

No-contest clauses in wills or trusts can also be drafted to prohibit challenges to collateral documents, such as an irrevocable trust, a voting trust, or a previously executed gift instrument. In fact, if the client is executing separate documents (e.g., a will, a trust, etc.), it is advisable to include a no-contest clause that includes a prohibition against contesting all of the documents that the client wishes to cover and to exact the penalty in the document from which the bequest to the beneficiary will be distributed. Given Koch’s public policy findings, such clauses would likely be enforced in Kansas.

No-contest clauses can also address issues such as penalties for challenging the appointment of a fiduciary, filing a creditor’s claim, litigation over a fiduciary’s administration of estate or trust (other than gross mismanagement), or litigation over the fiduciary’s exercise of discretion in making distributions (unless there is a breach of fiduciary duty).

Conclusion

There does not appear to be any downside to including a no-contest clause in a will, unless the client believes that one of his or her disappointed beneficiaries will see the presence of a no-contest clause as a red flag to a bull. By far the best outcome of using a no-contest clause is as a deterrent to litigation, rather than as a clause enforced against a beneficiary in litigation.

About the Author

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ENDNOTES

1. K.S.A. 59-506 (2012). Under intestacy, one-half of the probate estate passes to the surviving spouse and one-half of the estate passes to issue, with the property to be divided into shares for each living child and each deceased child who has living issue. If there is no issue but there is a surviving spouse, all property passes to the surviving spouse. If there is no surviving spouse, but there is issue, all property passes to issue, as described above.


3. Tim Arango & Ben Sisario, Despite a Will, Jackson Left a Tangled Estate, N.Y. Times, July 7, 2009, at A14, http://www.nytimes.com/2009/07/07/business/07finances.html?_r=0. Katherine Jackson’s challenge to the appointment of one of the named executors was couched as a challenge based on an alleged conflict of interest and not a challenge to the validity of the will.


8. K.S.A. 59-6a,201 to 6a,217.
9. “Undue influence, to avoid a will, must be an influence exercised by coercion, imposition, or fraud; not merely such as arises from the influence of gratitude, affection, or esteem. It must be an ascendency of another will over that of the testator, and it must be proven.” Mooney v. Olsen, 22 Kan. 69, 70 (1879).
10. K.S.A.59-605. A testator possesses testamentary capacity if, on the date he or she executes an instrument that determines the manner in which his or her property will be disposed after death, the testator knows and understands the nature of the claims and extent of that property, has intelligent understanding concerning its disposition, realizes who are natural objects of his or her bounty, and comprehends the nature of claims of those whom testator desires to include and exclude in and from participation in his or her estate.
11. K.S.A. 59-501 to 59-514. When a person dies without a will, his or her property passes under intestacy, that is, by the laws of the state of the decedent’s residence at death.
15. 196 P. 246 (Kan. 1921).
16. Id. at 248 (citing Henry B. Chew’s Appeal, 45 Pa. 228, 233, (1863)).
17. Id. at 246.
19. Restatement (Second) of Torts § 774B (1979). The intentional interference with inheritance or gift claim addressed by this section extends the principle found in the liability for intentional interference with prospective contracts to donative transfers. It does not cover a breach of a duty to use reasonable care that an alleged bad actor owes to the donee as well as the donor.
20. Id.
21. Kansas courts have held that if a successful action for damages for intentional interference would render nugatory the rights of the defendant under a will and would nullify the apparent effect of a will, then the remedy is not in an action for damages but in an action to contest the will. See Axe v. Wilson, 96 P.2d 880, 888 (Kan. 1939).
22. See T. Jack Challis & Howard M. Zaritsky, State Laws: No-Contest Clauses, The American College of Trust and Estate Counsel (March 24, 2012), http://www.actec.org/public/Documents/Studies/State_Laws_No_Contest_Clauses_-_Chart.pdf. Of the states where no-contest clauses are or may be enforceable in varying degrees, Vermont has no law on the subject and Alabama has yet to rule in favor of enforcement. Id. Seventeen states (Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, South Carolina, South Dakota, and Utah) have adopted the Uniform Probate Code (and with it, sections 2-517 and 3-905, see note 23, infra). Five states (Iowa, Kansas, Maryland, Pennsylvania, and Wisconsin) have not adopted the Uniform Probate Code but have adopted a similar rule. Id. Fourteen states (Washington, D.C., Kentucky, Louisiana, Missouri, New Hampshire, New York, Ohio, Rhode Island, Virginia, Washington, and Wyoming) enforce no-contest clauses without regard to probable cause. Id. Arkansas and Illinois enforce no-contest clauses unless the contest is brought in good faith. Seven states (Connecticut, Iowa, Nevada, North Carolina, Oklahoma, Tennessee, and West Virginia) enforce no-contest clauses unless the contest is brought in good faith and for just cause. Id. Two states (Georgia and Mississippi) enforce no-contest clauses only if there is a gift-over of the property. Id. Four states (California, Delaware, New York, and Oregon) do not enforce no-contest clauses with respect to certain types of actions. Oregon does not enforce a no-contest clause unless there is probable cause to believe the trust is a fraud or that the trust has been revoked (Oregon Stat. Ann. § 130.235(2)). Id. Delaware enforces no-contest clauses unless the contest is successful. Id.
24. See Rosi v. Davis, 133 S.W.2d 363 (Mo. 1939); see also Commerce Trust Co. v. Weed, 318 S.W.2d 289 (Mo. 1958). The Rossi court rejected the probable cause exception, finding that “if ... it is in fact the [testator’s] will, then it would seem the will must stand not in part, but in toto.” Rossi, 133 S.W.2d at 372. “One cannot claim under a will and against it at the same time,” and “... to engratify upon the condition thus distinctly expressed by the maker an exception [for probable cause] not expressed nor reasonably implacable from the language of the instrument is to nullify the will of the maker, if in fact, it be his will.” Id. The Rossi court also found that such a position did not violate public policy as it did not restrict access to the courts. Id. at 378 (“[If the contest is successful, the clause falls with the rest of the will.”).
25. In re Foster’s Estate, 376 P.2d 784 (Kan. 1962) (adopting the rule in Restatement (First) of Property § 429 (1944)).
29. Id.
30. Id.
31. Campbell, 876 P.2d at 216.
34. Id. at *10.
35. Interestingly, the court in Barfoot (decided after Tusin) did not analyze the role of counsel in determining whether probable cause existed. Compare Barfoot, 2008 WL 4661911, with Tusin, 2005 WL 2254487.
37. Foster’s Estate, supra note 25, at 786.
38. These types of clauses are more generally treated as exculpation clauses rather than no-contest clauses. See Restatement (Third) of Property § 8.5 (2003).
40. The Koch court determined that, “[u]nder Kansas law, Mary could have disinherited outright any of her sons and any son so disinherited would have received nothing from her estate. Mary instead clearly conditioned all of her sons’ rights to inherit by use of the anti-litigation or forfeiture clause.” Id. at 991-92
41. See Internal Revenue Code §§ 2056 & 2523.
42. Treas. Reg. § 20.2056(c)-2(d).
43. Estate of Neugass v. Commr of Internal Revenue, 555 F.2d 322 (2d Cir. 1977).
44. PLR 9244020 (July 31, 1992). Private Letter Rulings are only binding for the requesting taxpayer but may give an indication of the IRS position on a matter. Rulings from the IRS are binding on every tax payer when they are issued as Revenue Rulings.
45. Treas. Reg. § 20.2056(c)-2(d).
46. See, e.g., Barfoot, supra note 18.
48. K.S.A. 58a-801 and 802(a) (2012).
49. Restatement (Third) of Property § 8.5 cmt. g. (2003).
50. Restatement (Second) of Property § 9.1 cmt. h. (1983).
51. Restatement (Third) of Property § 8.5 cmt. e. (2003).
52. Kansas has no case determining whether a no-contest clause in one document can be applied to another document without specific reference in the clause. However, other states do. For example, in Clymer v. Mayo, the trustees of a trust argued for the application of a no-contest clause contained in a pour-over will to a contest against the trust. The trustees argued that the pour-over will and trust should be read as an integrated estate plan. The court held that the defendants’ challenge was directed to the will not the separate trust, therefore the no-contest clause only applied to the will and could not be applied to the trust. Clymer v. Mayo, 393 Mass. 754, 766 (1985).

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ADOPTION, CHILD-CUSTODY, AND JURISDICTION IN RE ADOPTION OF H.C.H.
SALINE DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
COURT OF APPEALS – REVERSED
NO. 107,383 – JULY 5, 2013

FACTS: A district court ruled that Kansas courts do not have jurisdiction over a stepparent-adoption because a Mississippi court had entered a child-custody order involving the child approximately 12 years earlier and had not relinquished jurisdiction. The district court also determined that a Mississippi court is a more appropriate forum to hear the adoption. The stepfather appealed, arguing that the district court failed to apply K.S.A. 59-2127, which is the jurisdiction provision of the Kansas Adoption and Relinquishment Act (KARA). He asserted that under that provision a Kansas court could and should determine that the Mississippi court does not have continuing jurisdiction over the child’s custody and does not have jurisdiction over this adoption proceeding. The Court of Appeals rejected those arguments and affirmed, holding that K.S.A. 59-2127 conflicts with provisions of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and that the UCCJEA controls the conflicting KARA jurisdictional provision. Under the UCCJEA provision only a Mississippi court can determine it no longer has continuing jurisdiction to modify the child-custody order.

ISSUES: (1) Adoption, (2) child custody, and (3) jurisdiction
HELD: Court held that the more specific adoption jurisdiction provision in the KARA, K.S.A. 59-2127, controls the determination of whether a Kansas court has jurisdiction over an adoption, and the UCCJEA applies to the determination only to the extent K.S.A. 59-2127 incorporates its provisions. Under K.S.A. 59-2127, a Kansas court can and should determine if the Mississippi court has continuing jurisdiction over the child-custody order or decree or, alternatively, if it has jurisdiction over the adoption. Court also concluded the district court erred in failing to apply K.S.A. 59-2127 and in determining that Mississippi is a more convenient forum for the adoption proceeding. Since the errors could not be declared harmless, Court reversed and remanded, directing the district court to make the findings required by K.S.A. 59-2127.

STATUTES: K.S.A. 20-3018(b); K.S.A. 50-634, -626, -627; K.S.A. 60-2101(b); and K.S.A. 84-1-103(b)

ECONOMIC LOSS DOCTRINE
RINEHART ET AL. V. MORTON BUILDINGS INC.
OSAGE DISTRICT COURT – AFFIRMED AND CASE REMANDED TO THE COURT OF APPEALS WITH DIRECTIONS
COURT OF APPEALS – AFFIRMED IN PART AND REVERSED IN PART
NO. 101,940 – JULY 26, 2013

FACTS: Kenneth and Beverly Rinehart contracted with Morton for a pre-engineered building to serve as their personal residence and business location for their cellophane slitting company, Midwest Slitting LLC. Midwest was not a party to the contracts. Disputes arose during construction over the structure’s quality. The clashes matured into litigation when the Rineharts refused payment because of dissatisfaction with Morton’s attempts at repair, which caused Morton to file a mechanic’s lien. The Rineharts and Midwest Slitting sued first, advancing various legal theories. Morton counterclaimed against the Rineharts to foreclose its mechanic’s lien and recover the remaining balance on the contract. A jury returned a verdict for the Rineharts on their breach of contract and warranty claims, awarding them $108,017.13 in damages. On the Kansas Consumer Protection Act claims, the jury found unconscionable acts and awarded $45,000 in attorney fees. For negligence misrepresentation, the jury awarded $149,824.65 in damages. The Court of Appeals held the economic loss doctrine did not bar Midwest’s claims because the company did not have a contract with Morton, i.e., no contractual privity. The Court of Appeals granted appellate attorney fees to the Rineharts in the amount of $15,593.94.

ISSUES: Economic loss doctrine
HELD: Court rejected Morton’s claims that the economic loss doctrine, which originated with product liability litigation to prohibit tort claims when the only damages were to the product itself, should extend to bar the negligent misrepresentation claim in this case. Court held the economic loss doctrine does not bar negligent misrepresentation claims because the duty at issue arises by operation of law and the doctrine’s purposes would not be furthered by extending it to such claims. Court reversed and remanded the attorney fee award for reconsideration by the Court of Appeals because it could not determine from the record whether the panel limited the time and expenses to just the consumer protection issue. For the same reasons, Court denied on present showing the application for attorney fees for the work performed before the appellate court.

STATUTES: K.S.A. 20-3018(b); K.S.A. 50-634, -626, -627; K.S.A. 60-2101(b); and K.S.A. 84-1-103(b)
**ESTATES, SUBSTITUTION OF PARTIES, AND PREJUDICE**

**GRAHAM ET AL. V. HERRING**

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

**COURT OF APPEALS – AFFIRMED**

**NO. 102,789 – JULY 12, 2013**

FACTS: When she died, Elizabeth Jones was pursuing various counterclaims against Rick and Lisa Graham, including allegations of breach of fiduciary duty, breach of contract, fraud, and conversion. The administratrix of her estate, Angela Herring, sought to be substituted for Jones in the Graham lawsuit. Ultimately, the district court dismissed the action based upon its determination that substitution had been untimely under K.S.A. 60-225(a)(1). The district court based its ruling in part on the seven-month gap between the filing of the motion for substitution and the hearing on that motion, and in part upon its belief that it was not required to consider prejudice before dismissing an action under K.S.A. 60-225. The Court of Appeals reversed the district court, finding that a determination of whether a motion for substitution has been made within a “reasonable time” requires consideration of the circumstances of each case, including, (1) the diligence of the party seeking substitution; (2) whether any other party would be prejudiced by any delay; and (3) whether the party to be substituted has shown that the action or defense has merit.

ISSUES: (1) Estates, (2) substitution of parties, and (3) prejudice

HELD: Court said that it granted the Grahams’ petition for review in part to address an apparent split of authority in the Court of Appeals regarding whether prejudice has any role in the determination of whether substitution under K.S.A. 2012 Supp. 60-225(a)(1) was made within a reasonable time so as to avoid dismissal of the action. Court concluded that the relevant time period for determining the reasonableness of a delay in substituting a party begins with the statement noting the death and ends with the filing of the motion for substitution. Further, the standard for determining whether a substitution motion has been made within a reasonable time is to consider the totality of the circumstances, which can include the fact of whether another party will be prejudiced by the substitution. Here, the district court applied the incorrect legal standards, both in the time period analyzed and in identifying the facts that could be considered in the analysis. Therefore, the district court abused its discretion, and the Court indicated that it could not be confident that such errors did not affect the decision to void the prior substitution order and dismiss the case. Court affirmed the Court of Appeals’ reversal of the district court’s judgment, but remanded with directions for the district court to consider the totality of the circumstances to determine whether the motion for substitution was filed within a reasonable time of the suggestion of death on the record.

STATUTE: K.S.A. 60-217, -225, -260

**GUN SHOP, NEGLIGENCE, AND NEGLIGENT ENTRUSTMENT**

**SHIRLEY V. GLASS ET AL.**

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

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

**NO. 102,570 – JULY 19, 2013**

FACTS: This appeal addresses a civil proceeding following the tragic murder of a child by his father and the father’s subsequent suicide. The child’s mother brought an action in negligence against the father’s grandmother/child’s great-grandmother (Glass), Baxter Springs Gun & Pawn, and Joe and Patsy George, the parties who provided the father with the murder weapon, a shotgun that they claimed was a gift for children. The district court granted summary judgment to the pawn shop and the Georges. Shirley dismissed Glass to obtain finality of the judgment. The Court of Appeals affirmed the district court’s rejection of the negligence per se claim, but reversed the district court’s rejection of the negligent entrustment claim.

ISSUES: (1) Gun shop, (2) negligence, and (3) negligent entrustment

HELD: Court stated that it would not back away from or limit previous holdings that those in possession of firearms should exercise the highest standard of care in deterring the possession of those firearms by those who are at special risk to misuse the weapons. The legislature has determined that certain convicted felons fall within that special-risk group, and a firearms dealer must exercise the highest standard.

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**From the Appellate Court Clerk’s Office**

**Update on Electronic Filing in Kansas Appellate and District Courts**

Pilot e-filing projects are underway in both the appellate and district courts. The appellate courts currently have pilot projects with the Appellate Defender’s Office and district attorneys’ offices in Sedgwick, Johnson, and Shawnee counties. The Kansas Attorney General’s Office will be added in the near future. The first electronically filed appeal came from Sedgwick County in December 2012, and there have now been more than 125 criminal appeals initiated from Sedgwick County. Building on the success of the Sedgwick County project, other counties will quickly work through communication issues and compilation of an electronic record for use by parties and the appellate courts.

Once a case is initiated electronically, all documents must be submitted electronically. The immediate feedback to parties has been a popular feature of the e-filing projects. The appellate clerk’s office continues to explore ways to make the system more user-friendly and to provide greater services to the users.

The first three district court pilot projects were in Leavenworth, Douglas, and Sedgwick counties beginning in January 2013. Those projects have focused on civil cases in progress, filed by selected local practitioners. Shawnee County has since been added, and discussion to coordinate with the Justice Information Management System (JIMS) in Johnson County is underway. With additional grant funding recently announced by Chief Justice Lawton Nuss, Wyandotte, Butler, Reno, Saline, Finney, and Geary counties will be added to the district court pilot projects.

Any electronic filing update quickly becomes outdated because progress is made each day in both the appellate and district courts. It is a challenging and exciting time to work for the Kansas Judicial Branch.

If you have questions about these projects or appellate procedure generally, contact Carol G. Green, Clerk of the Appellate Courts, at (785) 296-3229.
of care in order to avoid selling guns to such felons. Court held the portion of the Court of Appeals’ decision allowing Shirley to proceed with a negligent entrustment action is affirmed, subject to their holding that she may invoke statutory obligations in order to advance her arguments that the defendants owed her a duty of care and breached that duty. The portion of the Court of Appeals’ decision holding that the defendants are not held to the highest standard of reasonable care in exercising control over firearms is reversed. The case is remanded to the district court for further proceedings.

STATUTES: K.S.A. 21-4203, 6303; and K.S.A. 60-2102(c)

KANSAS TORT CLAIMS ACT, NOTICE, AND SUBSTANTIAL COMPLIANCE
CONTINENTAL WESTERN INSURANCE V. SHULTZ ET AL.
BARTON DISTRICT COURT – AFFIRMED COURT OF APPEALS – AFFIRMED ON THE ISSUE SUBJECT TO OUR REVIEW
NO. 103,776 – JULY 5, 2013

FACTS: In March 2005, Layne Steinert was injured in a car accident with Christopher Shultz, a Great Bend police officer. Both were in the course of their employment when the accident occurred. Steinert obtained workers compensation benefits but did not bring a tort action to recover his damages from the accident, assigning that right to Continental Western Insurance Company, his employer’s workers compensation carrier. On March 27, 2007, Continental gave notice to the city of Great Bend that it was pursuing a claim against the city for damages resulting from Shultz’ negligence in the March 2005 accident. The notice set out various details regarding the accident, including a request for money damages in the amount of $19,590.07 for medical bills and indemnity. That same day, Continental prematurely filed suit in district court, but that suit was dismissed. Continental filed a second petition on September 6, 2007, demanding judgment in the amount of $19,590.07 and naming as defendants Shultz, the city of Great Bend, and the Great Bend Police Department (collectively defendants). But several months after suit was filed, the alleged damages rose to $228,088.25. The municipality objected, arguing that the notice did not adhere to the statute’s disclosure requirements in light of the 11-fold increase in damages. A sharply divided Court of Appeals panel held that the notice substantially complied with the statute.

ISSUES: (1) Kansas Tort Claims Act, (2) notice, (3) substantial compliance

HELD: Court held Continental’s notice substantially complied with K.S.A. 2012 Supp. 12-105b(d). The notice contained all the information required by the statute. It provided sufficient information to advise the defendants about the extent of injuries; it afforded the municipality an opportunity to fully investigate the merits of the negligence claim; and the purpose of facilitating early and easy claim resolution was not disturbed. Accordingly, the controversy was properly before the district court when the petition accurately reflected the content of the notice. Court further held that when a notice conforms with K.S.A. 2012 Supp. 12-105b(d) and the petition in the district court accurately reflects the notice’s contents, subsequent amendments to the pleadings are controlled by K.S.A. 60-215—absent a showing of a claimant’s bad faith or misleading conduct in its initial submission of the claim notice. The availability of an inquiry into a claimant’s possible bad faith or misleading conduct, if appropriately asserted by the municipality, protects against the possibility that a claimant may attempt to invoke an amendment to the pleadings as a matter of right under K.S.A. 60-215(a)(1), instead of the district court’s discretionary authority under subsection (a)(2).

STATUTES: K.S.A. 2012 Supp. 12-105b(d); K.S.A. 20-3018(b); K.S.A. 44-504(c), 532(a); K.S.A. 60-215; and K.S.A. 75-6101

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**ISSUES:** (1) Standing and (2) motion to intervene

**HELD:** Court stated that the intervenors essentially intervened as plaintiffs: they sought to compel Ternes to proceed with his litigation against Galichia, even though the intervenors suffered no harm from the actions of that defendant. Court found that Cline and Accident Recovery Team have no standing in this matter and should not have been allowed to intervene. Court held it was without jurisdiction to reach the issue of whether the medical malpractice action was time-barred.

**STATUTE:** K.S.A. 60-224(a)(2), -3502

**CRIMINAL**

**STATE V. BROOKS**

**CRAWFORD DISTRICT COURT – REVERSED AND REMANDED**

**COURT OF APPEALS – REVERSED**

**NO. 103,774 – JULY 26, 2013**

**FACTS:** Brooks was convicted of rape and aggravated criminal sodomy. Victim testified before jury that Brooks had scar on his penis. Brooks had asked defense counsel to pursue evidence in support of fact that Brooks had no scar, but counsel failed to do so. Prior to sentencing Brooks filed motion for new trial, submitting medical evidence that he had no scar, and alleging ineffective assistance of trial counsel. District court denied the motion. Court of Appeals affirmed in unpublished opinion, finding trial counsel was deficient for failing to impeach victim’s credibility, but finding no reasonable probability that failure to impeach victim’s testimony regarding the scar would have changed the outcome of Brooks’ trial. Brooks’ petition for review granted.

**ISSUE:** Prejudice from ineffective assistance of counsel

**HELD:** Trial counsel’s deficient performance denied Brooks the opportunity to impeach victim’s credibility by rebutting testimony about the alleged penile scar, and permitted state to bolster credibility of its complaining witness. That deficient performance prejudiced the defense, denied Brooks a fair trial, and created reasonable probability that but for counsel’s unprofessional errors the result of his trial would have been different. Court of Appeals improperly usurped role of jury by considering the weight jury the would have given to Brooks’ testimony regarding the scar would have changed the outcome of Brooks’ trial. Brooks’ petition for review granted.

**STATUTES:** K.S.A. 59-2239; and K.S.A. 60-511, -513

**STATE V. SAWYER**

**WYANDOTTE DISTRICT COURT – REVERSED**

**COURT OF APPEALS – REVERSED**

**NO. 101,624 – JULY 26, 2013**

**FACTS:** While in prison, Sawyer was convicted of making a criminal threat to a prison worker. Sawyer sought recusal of the district court judge who had previously presided over Sawyer’s previous cases including one in which judge recused where Sawyer had waived jury trial. District court denied the motion to recuse, noting that the instant case involved a jury determination of guilt or innocence. Sawyer appealed, claiming in part that the judge was required to recuse and failed to do so, and the jury was inappropriately pro-
vided a permissive inference instruction on intent. Court of Appeals affirmed, and agreed with district court’s reliance on difference between trial judge’s role in a bench trial versus jury trial. 45 Kan. App. 2d 156 (2011). Petition for review granted.

ISSUES: (1) Recusal of district judge and (2) instruction on permissive inference of intent

HELD: There are three possible substantive bases on which a Kansas litigant may argue that a judge’s recusal is required: statutory factors listed in K.S.A. 20-311d(c)(1)-(5); Kansas Code of Judicial Conduct, Canon 2, Rule 2.11; and the Due Process Clause of the federal Constitution as set forth in Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009). The Court discussed each, noting that previous cases have obscured analytical distinctions and overlap between claims depending on one or more of the three bases. Here, Sawyer’s affidavit was legally insufficient under K.S.A. 20-311d(d), and case does not deal with any of the four situations in Caperton. But district judge had previously chosen to recuse in Sawyer’s assault and battery bench trial, judge’s intemperate demeanor in Sawyer’s intervening jury trial for lewd and lascivious behavior drew a stern admonition from Court of Appeals; and judge’s mere observation that this case involved a jury trial rather than a bench trial did nothing to ameliorate any earlier need for recusal. On facts of case, district judge had a duty to recuse, and refusal to do so made the probability of actual bias too high to be constitutionally tolerable. Sawyer was entitled to reversal of conviction and remand to district court for further proceeding.

Propriety of challenged jury instruction is reviewed to provide guidance on remand. Under facts of case, judge did not err in giving the permissive inference instruction when there was a reasonable inference that Sawyer intended to place victim in fear by yelling at her and calling her names.

DISSENT (Moritz, J.) (joined by Biles, J.): Agrees that district court gave a proper permissive inference instruction, and that Sawyer failed to prove the district judge had a duty to recuse under K.S.A. 20-311d. Applauds majority’s effort to clarify the court’s “muddled” case law on recusals and its delineation of the three independent bases for judicial recusal, but diverges from the majority when it continues the unsound practice of equating circumstances that raise concern under judge’s ethical or statutory obligation to recuse with a judge’s compulsion under Due Process Clause to recuse. Would find that this case does not present the rare and extraordinary case in which the Due Process Clause requires reversal.

STATUTES: K.S.A. 2012 Supp. 22-3414(3); K.S.A. 20-311d, -311d(a), -311d(b), -311d(c)(1)-(5), -311d(d), -311f; and K.S.A. 60-455

STATE V. SPEAR
RENO DISTRICT COURT – CONVICTIONS AFFIRMED IN PART AND REVERSED IN PART, AND SENTENCES AFFIRMED IN PART AND VACATED
NO. 104,206 – JULY 5, 2013

FACTS: Charged with 10 counts of aggravated indecent liberties with a child, Spear was convicted by jury of six counts and acquitted on four; six concurrent life sentences were imposed. On appeal he claimed trial court erred in admitting evidence of his prior acts of sexual misconduct for purpose of proving intent and absence of mistake or accident, and error was reversible under State v. Prine, 287 Kan. 713 (2008) (Prine I). Alternatively, state failed to present sufficient evidence to support four of his six convictions. Spear also claimed his life sentence with mandatory minimum sentence of 620-month prison term violated § 9 of Kansas Constitution Bill of Rights, and sentencing court erred in imposing lifetime post-release supervision rather than parole.

ISSUES: (1) Evidence of prior sexual misconduct, (2) sufficiency of the evidence, and (3) constitutionality and legality of sentence
STATE V. WEBER
SEDGWICK DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 104,658 – JULY 5, 2013

FACTS: Weber was convicted of rape and attempted rape, and sentenced to two life prison terms without parole as an aggravated habitual sex offender. On appeal he claimed: (1) convictions for rape and attempted rape are multiplicitous and unconstitutional; (2) his prior Michigan conviction does not qualify as a “sexually violent crime” for purposes of supporting the aggravated habitual sex offender finding; (3) insufficient evidence supported all charged alternative means of committing rape; (4) jury instruction for overt act element of attempted rape was too broad; and (5) K.S.A. 2009 Supp. 21-4642 provides for unconstitutional enhancement of statutory sentence based on fact not proved to a jury.

ISSUES: (1) Multiplicity, (2) prior conviction as sexually violent crime, (3) overbroad jury instruction, (4) alternative means – rape, and (5) sentencing.

HELD: Under facts in case, Weber’s convictions for rape and lesser included offense of attempted rape arose from unitary conduct. Conviction for attempted rape is multiplicitous and constitutionally invalid. Attempted rape conviction is reversed and sentence for that conviction is vacated.

Michigan sentencing order does not reflect any finding about Weber’s sexual motivation or intended sexual gratification. State’s argument for procedural bar or waiver fails because illegal sentence can be corrected at any time, and state’s reliance on defense counsel’s stipulation to fact of Michigan conviction is unavailing because that factual stipulation does not resolve legal effect of that prior conviction. Rape sentence is vacated and remanded to district court for resentencing after making all factual and legal determinations necessary to decide whether Weber is an aggravated habitual sex offender pursuant to K.S.A. 2009 Sup. 21-4642.

Challenge to attempted rape jury instruction is rendered moot by reversal of that conviction as multiplicitous.


No new grounds for reconsideration of earlier holdings that aggravated habitual sex offender provisions of K.S.A. 2009 Supp. 21-4642 are constitutional.


COURT OF APPEALS

CIVIL

DUI AND DRIVER UNDER 21 YEARS OF AGE
BIXENMAN V. KANSAS DEPARTMENT OF REVENUE
ELLIS DISTRICT COURT – REVERSED AND REMANDED
WITH DIRECTIONS
NO. 107,661 – MARCH 15, 2013 (MOTION TO PUBLISH)

FACTS: The Kansas Department of Revenue (KDR) appealed from the decision of the district court to set aside an administrative order suspending Bixenman’s driving privileges for 30 days and thereafter restricting his driving privileges for an additional 330 days. The district court concluded that police officers lacked probable cause to arrest Bixenman for driving under the influence of alcohol (DUI) and therefore did not have reasonable grounds to request an evidentiary breath test. Officers pulled Bixenman over for driving with one headlight. He had bloodshot eyes and an odor of alcohol, and admitted to consuming one beer. However, he didn’t have slurred speech and performed the field sobriety tests with little difficulty. Bixenman agreed to a PBT, yielding a BAC greater than 0.02 but less than 0.08. He was arrested, and the evidentiary breath test yielded a similar result. KDR suspended his license, but the district court set it aside.

ISSUES: (1) DUI and (2) driver under 21 years of age.

HELD: Under the facts of this case, court concluded that the arresting officers did have reasonable grounds to believe that Bixenman was under the age of 21 and was driving with alcohol in his system. Bixenman had bloodshot eyes, alcohol on his breath, and admitted to consuming alcohol. The evidence was sufficient to sup-
port placing Bixenman in custody, and reasonable grounds did exist to support the request for a breath test. The evidentiary breath test produced a result of 0.037. Accordingly, Bixenman violated K.S.A. 8-1567a, and the district court erred in setting aside the suspension and restriction of his driving privileges. Court ordered that the decision of the KDR be reinstated.

STATUTES: K.S.A. 8-259, -1001, -1567a, -2,128; K.S.A. 22-3202(4); and K.S.A. 77-601

LEGAL MALPRACTICE AND IN PARI DELICTO
ZIMMERMAN ET AL. V. BROWN ET AL.
BARTON DISTRICT COURT – REVERSED AND REMANDED
NO. 108,087 – JULY 12, 2013

FACTS: Daniel and Sara Zimmerman brought a legal malpractice claim against attorney Richard Brown and Richard’s law firm, Brown, Isern & Carpenter, related to the sale of the plaintiffs’ Quixtar (formerly Amway) business to Richard and his wife. Marlene Brown, Richard’s wife, was also originally named as a defendant but was later dismissed from the action. The defendants moved for summary judgment on grounds that the doctrines of in pari delicto and illegality prohibit the plaintiffs from recovering damages against the defendants for legal malpractice. Alternatively, the defendants argued that the plaintiffs failed to come forward with sufficient evidence to establish the essential elements of a legal malpractice cause of action. The district court granted summary judgment in favor of the defendants based on the defenses of in pari delicto and illegality. The court found it unnecessary to address whether the plaintiffs had come forward with sufficient evidence to establish legal malpractice.

ISSUES: (1) Legal malpractice and (2) in pari delicto

HELD: Court held that the record on summary judgment reveals several disputes of material fact that must be resolved by a jury before the court can determine whether the in pari delicto defense applies to prohibit the plaintiffs from recovering damages; thus, the district court erred in holding at the summary judgment stage of the proceedings, as a matter of law, that the doctrine prohibits the plaintiffs from recovering damages against the defendants for legal malpractice. Summary judgment in favor of the defendants based on illegality also was improper because there was insufficient evidence in the record to establish as a matter of law that the damages sustained by Richard’s alleged breach of fiduciary duty was a natural and probable consequence of the plaintiffs’ decision to sell their Quixtar business to Richard and his wife. As to the propriety of summary judgment on the merits of the plaintiffs’ underlying claim, court found that the plaintiffs have satisfied their burden to come forward with sufficient evidence to establish the essential elements of a legal malpractice cause of action; thus, they are entitled to go forward with their claim.

STATUTES: No statutes cited.

MINES AND MINERALS – OIL AND GAS LEASE
SIEKER V. STEPHENS TRUST
BARTON DISTRICT COURT – AFFIRMED

FACTS: In 2009, Faye M. Stephens Trust (Trust) became the majority working interest owner of lease on 160 acres now owned by Sieker, which contained a 10-acre producing well drilled in 1951. Sieker sought release of the undeveloped portion to pursue development. After her demands were unsuccessful, she filed action to cancel the lease on the 150 acres, claiming Trust breached the implied covenant to develop the lease as a reasonably prudent operator. Trust argued that development was not possible at this time because lessee on adjoining tracts refused to participate in 3D seismic testing required for development. District court cancelled the lease on the 150 acres, and denied Trust’s request for a conditional decree of cancellation if Trust failed to exercise reasonable efforts to explore
and develop the 150 acres within a reasonable time. Trust appealed.

ISSUES: (1) Implied covenant of reasonable expectation and development and (2) remedy of immediate or conditional cancellation

HELD: Kansas Deep Horizons Act, K.S.A. 55-223 et seq., codified a common-law principle that implies a covenant in oil and gas leases to develop the leased property. Here, Trust failed to pursue 3D seismic testing, which was being done throughout years on land surrounding this lease. Although the ability to develop the lease may now be out of Trust’s hands because it cannot find other parties willing to join in such testing, Trust cannot hold lease on the 150 acres indefinitely in hope to effect a 3D seismic study. On review of the limited record provided, Trust failed to demonstrate that district court’s ruling was not supported by substantial evidence.

Under unique facts in this case, a conditional cancellation would not be a practical or adequate remedy. Sieker sought cancellation of the lease, not an order requiring the Trust to develop the lease. Trust had notice that Sieker was seeking further development and exploration of the 150 acres, and Sieker came forward with evidence that another party is ready and willing to do so. District court had authority to impose remedy of lease cancellation, or forfeiture, under K.S.A. 55-226, and did not err in doing so.

STATUTE: K.S.A. 55-223, -226, -229

OIL AND GAS
FAWCETT V. OIL PRODUCERS INC. OF KANSAS
SEWARD DISTRICT COURT – AFFIRMED

FACTS: This interlocutory appeal under K.S.A. 60-2102(c) involved a class action brought by a royalty owner in Seward County, Kansas, on behalf of all royalty owners who were paid royalties from Oil Producers Inc. of Kansas (OPIK), which owned the working interest or which operated Kansas wells from January 1, 1996, to the present. The plaintiff, L. Ruth Fawcett Trust, with Les Spaulding as the Trustee (Fawcett) claimed that OPIK had underpaid royalties, and sought recovery of the underpayments. Plaintiff contended that the stipulated price adjustments contained in the gas purchase agreements between OPIK and certain gas purchasers were actually deductions of expenses that OPIK was not allowed to deduct from plaintiff’s royalty share. Both parties moved for summary judgment. OPIK argued that it had complied with the express requirement of the leases to pay royalties based on actual proceeds of sales of gas that it had sold at the well. OPIK maintained “that it would require a gross adulteration of the gas sales contracts to interpret the price adjustments to be improper ‘expense’ deductions.” The trial court granted partial summary judgment in favor of the plaintiff. On appeal, OPIK contended that the trial court erred when it held that OPIK impermissibly calculated the plaintiff’s royalty payments on the net proceeds OPIK received from certain gas purchasers instead of calculating plaintiff’s royalty payments on the gross proceeds of the gas purchase contracts.

ISSUE: Oil and gas

HELD: Court held that when the royalty clause of an oil and gas lease provides for a royalty of 1/8 or 3/16 of the proceeds from the sale of gas at the well, the term “proceeds” refers to the gross sale price in the contract between the gas purchaser and the lessee, producer, or seller, so long as the contractual rate per thousand cubic feet has been approved by the applicable regulatory authority. If the lessee, producer, or seller claims that it is entitled to compute and pay royalties based upon an amount less than the gross sale price, it must find the authority to do so somewhere other than in the lease’s royalty clause. For purposes of calculating royalty payments, the lessee, producer, or seller is not allowed to deduct the cost of the stipulated price adjustments contained in the gas purchase agreements from the gross sale price of the gas, even though the gas purchaser, according to the terms of its gas purchase agreement, or otherwise, withholds the price adjustments from its payment to the lessee, producer, or seller.

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CONCURRING: Judge McAnany concurred, further commenting on OPIK’s claims that if a product can be sold, it *ipso facto* is marketable.

STATUTE: K.S.A. 60-2101(c)

CRIMINAL

STATE V. BREWER

SALINE DISTRICT COURT – AFFIRMED
NO. 107,829 – JULY 12, 2013

FACTS: Officer observed excessive tinted windows and altered temporary license tag in car driven by Brewer. Officer followed Brewer and then confronted him after Brewer had parked car in driveway. After K-9 alerted during exterior sniff of vehicle, officer searched interior and found drugs. District court denied Brewer’s motion to suppress the evidence, finding traffic offenses provided reasonable suspicion to conduct traffic stop, and probable cause for warrantless search of vehicle was based on K-9 alert, information officer had from other officers that Brewer and vehicle might be involved in drug activity, and officer’s observations of Brewer’s nervous behavior. Brewer was convicted of multiple drug-related offenses, and a traffic offense. On appeal he claimed that the district court erred in denying his motion to suppress the evidence. Brewer also claimed error in the denial of his motion, made at end of state’s evidence, for different counsel.

ISSUES: (1) Motion to suppress and (2) motion for substitute counsel

HELD: Either apparent traffic violation provided an objectively valid reason for traffic stop, and probable cause existed for warrantless vehicle search. Each reason stated for probable cause was examined. Brewer’s challenge to K-9 reliability based on false positive rate in the field is specifically addressed. Although no Kansas court has explicitly addressed the issue, a majority of other courts have minimized or rejected real world deployment records as material evidence of K-9’s reliability. Here, district court properly relied on K-9 alert in finding that officer had probable cause to conduct warrantless search. Insufficient facts were presented to support a finding that officer had reasonably reliable information that Brewer and vehicle were involved in drug activity, thus district court erred in finding such information supported probable cause determination. District court’s finding that officer personally observed Brewer’s unusual and nervous behavior is supported by substantial competent evidence.

Under facts in case, Brewer failed to show justifiable dissatisfaction with trial counsel. District court did not err in denying motion for substitute counsel.

STATUTES: K.S.A. 2009 Supp. 8-142 Second; K.S.A. 8-1749a; and K.S.A. 22-2402(1)

STATE V. ALLEN

JEFFERSON DISTRICT COURT – REVERSED AND REMANDED

FACTS: Allen was in a two-car accident where other driver was killed. Allen entered not guilty plea to charge of vehicular homicide, K.S.A. 21-3405, a class A misdemeanor. He then filed motion to dismiss, arguing that state lacked any evidence of material deviation from standard of care. Following evidentiary hearing set to determine if state had enough evidence to proceed to trial, district court granted Allen’s motion, finding insufficient evidence of an aggravating factor independent of the traffic violation as required by *State v. Krovvidi*, 274 Kan. 1059 (2002), to sustain vehicular homicide conviction. State appealed, claiming: Allen had no right to a preliminary hearing on the motion to dismiss; state should not have been required to provide evidence of an aggravating factor independent of a traffic infraction; and state provided sufficient evidence that Allen committed vehicular homicide.

ISSUES: (1) Preliminary matters, (2) nature and propriety of the evidentiary hearing, and (3) motion to dismiss

HELD: Extensive discussion of preliminary matters were raised in Allen’s appellate brief. State’s failure to cite to record at the beginning of each issue in its brief, Rule 6.02(a)(5), does not warrant a finding that it abandoned issues on appeal because it was not a substantial failure to comply under Rule 5.05. Court has jurisdiction to hear the state’s claim because the notice of appeal properly identified all of the state’s issues.

The record in this case does not support a finding that evidentiary hearing held in this case was actually a preliminary hearing under K.S.A. 22-2902, which applies only to felony crimes. But district court erred by holding an evidentiary hearing on Allen’s pretrial motion to dismiss for lack of sufficient evidence because under facts of this case, motion presented a question of fact for jury to decide. *Krovvidi* was discussed. District court erred by requiring state to provide evidence of an aggravating factor *independent* of a traffic infraction instead of a material deviation under totality of circumstances. Reversed and remanded.


STATE V. JACKSON

RILEY DISTRICT COURT – AFFIRMED
NO. 107,848 – JULY 12, 2013

FACTS: Jury convicted Jackson of aggravated robbery, aggravated battery, and possession of drug paraphernalia. During voir dire, the prosecutor used an incomplete painting of George Washington as analogy for reasonable doubt. On appeal Jackson argued: (1) prosecutor’s analogy was reversible error under *State v. Crawford*, 46 Kan. App. 2d 401 (2011); (2) insufficient evidence supported all alternative means for committing aggravated robbery when jury was instructed that Jackson took property from person or presence of victims as either a principal or as aider or abettor; (3) it was reversible error for court to give written answers to jury’s questions after consulting with prosecutor and defense counsel outside of Jackson’s presence; and (4) insufficient evidence supported conviction for possession of drug paraphernalia.

ISSUES: (1) Painting analogy – reasonable doubt, (2) alternative means – aggravated robbery instruction, (3) defendant’s presence – answers to jury questions, and (4) sufficiency of the evidence

HELD: As used in this case, the George Washington analogy fell within wide latitude afforded prosecutors, and thus did not constitute prosecutorial misconduct. *Crawford* was distinguished. Case was more similar to *State v. Stevenson*, 297 Kan. ___ (2013). Even if there were error, the error was harmless. Prosecutor’s conduct was neither gross and flagrant nor motivated by ill will, and there was overwhelming evidence of Jackson’s guilt.

Aiding and abetting under K.S.A. 21-3205(1) does not set out material elements of the underlying crime. In aggravated robbery instruction and statute, the principal liability versus aiding and abetting, the phrase “aids or abets” in the aiding and abetting instruction, and the phrase “person or presence” do not constitute alternative means of committing the crime.

Record was silent as to whether Jackson was present during court’s review of jury’s questions, thus it is assumed he was not there and his rights were violated. Under facts of case, jury’s questions neither invoked legally significant explanatory answers nor were of a nature to require defense counsel to consult with Jackson on trial strategy. Jackson’s presence would not have changed any answer to any of the posed questions. Error in excluding Jackson from discussion about answers to jury’s questions was harmless.

Sufficient evidence supported convictions for drug paraphernalia.

STATUTES: K.S.A. 2010 Supp. 21-36109(b)(2); K.S.A. 21-3205, -3205(1); and K.S.A. 22-3405, -3420(3), -3421
APPOINTMENT OF NEW MAGISTRATE JUDGE. The Judicial Conference of the United States has authorized the appointment of a U.S. Magistrate Judge for the U.S. District Court, District of Kansas at Kansas City, Kan. The current annual salary of the position is $160,080. The term of office is eight years. Interested persons may obtain further information and application forms at www.uscourts.gov or by contacting the clerk of court at (913) 735-2220. Applications must be submitted by applicants only and not on behalf of another potential nominee and must be received no later than 4:30 p.m., September 16, 2013.

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