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The Journal of the Kansas Bar Association
October 2013 • Volume 82 • No. 9
Let your voice be heard!

2013-14
KBA Officers and Board of Governors

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2013 Special Session Notes
By Joseph N. Molina

Give a Hand Up to Those in Need

- Help is needed to provide pro bono legal services to low-income Kansans; ALL areas of practice are needed.
- No potential clients will be given your name without approval and all will be screened for financial eligibility through Kansas Legal Services.
- KLS may be able to help with extraordinary litigation expenses when the interests of justice require it.

For more information or to volunteer, contact the KBA at (785) 234-5696 or at info@ksbar.org.
“Not Exactly”

We can all think of events in our lives that turned out “not exactly” as we expected or were led to believe. The latest example of this is the process involved in selecting the 14th Court of Appeals judge. In selling the new method of selection, we were promised by its supporters that the new process would be far more transparent than the flawed, in their opinion, Merit Selection System that has been in use for more than 50 years for the Kansas Supreme Court and was also used for the Kansas Court of Appeals until this year. In practice, the new process turned out to be “not exactly” what we were promised by those who promoted and supported it.

Perhaps the single most unsettling development of the new process was the decision to abruptly end the 32-year precedent of releasing the names of all who applied for the position. For a process that was supposed to be more transparent than Merit Selection, the decision to not release the names of the applicants was a huge step backwards for the state of Kansas. No longer does a member of the public have the ability to review the names of the applicants and develop a personal opinion regarding the nominee. Fortunately, there was broad based consensus that the person nominated was, objectively, qualified for the position. Because of the secrecy, however, there developed a sense of distrust about the entire process. The elimination of one of the most important facets of transparency in the Merit Selection process was not what most were expecting when the new process was approved. Even some who supported the new selection method were taken aback by this shocking development. Did this decision support the claims of more transparency with the new process? “Not exactly.”

Now that we know the new process is “not exactly” what was promised, the next issue becomes the continued effort to have the new process applied to the Kansas Supreme Court. Based on what we have seen, the logical answer to that question is “not exactly.” The KBA will continue its efforts to preserve Merit Selection for the Kansas Supreme Court, as well as restore Merit Selection for the Kansas Court of Appeals. We need your help in this effort.

What steps can our members take to preserve Merit Selection? That answer is easy. Because there were not enough votes to pass the proposed constitutional amendment to change the Supreme Court selection method in the Kansas House in the 2013 regular session, there was never an actual vote like the one that passed by the required two-thirds majority in the Kansas Senate. There was, however, a vote in the Kansas House on HB 2019, which was the bill that brought the new selection method to the Kansas Court of Appeals. In the vote on HB 2019, the following representatives voted against changing the selection process:

John Alcala (D-Topeka)  Russ Jennings (R-Lakin)
Stephen Alford (R-Ulysses)  Jim Kelly (R-Independence)
Barbara Ballard (D-Lawrence)  Annie Kuether (D-Topeka)
Steven Becker (R-Buhler)  Harold Lane (D-Topeka)
Barbara Bollier (R-Mission Hills)  Nancy Lusk (D-Overland Park)
Carolyn Bridges (D-Wichita)  Melanie Meier (D-Leavenworth)
Tom Burroughs (D-Kansas City)  Julie Menghini (D-Pittsburg)
Sydney Carlin (D-Manhattan)  Tom Moxley (R-Council Grove)
Stephanie Clayton (R-Overland Park)  Jan Pauls (D-Hutchinson)
Sue Concannon (R-Beloit)  Emily Perry (R-Mission)
Paul Davis (D-Lawrence)  Mike Peterson (D-Kansas City)
Diana Dierks (R-Salina)  Tom Phillips (R-Manhattan)
Nile Dillmore (D-Wichita)  Melissa Rooker (R-Fairway)
John Doll (R-Garden City)  Louis Ruiz (D-Kansas City)
Blaine Finch (R-Ortowa)  Tom Sawyer (D-Wichita)
Gail Finney (D-Wichita)  Tom Sloan (R-Lawrence)
Stan Frownfelter (D-Kansas City)  Patricia Sloop (D-Wichita)
Bob Grant (D-Frontenac)  Annie Tietze (D-Topeka)
Dan Hawkins (R-Wichita)  Ed Trimmer (D-Winfield)
Broderick Henderson (D-Kansas City)  Ponka-We Victors (D-Wichita)
Jerry Henry (D-Atchison)  Jim Ward (D-Wichita)
Larry Hibbard (R-Toronto)  Virgil Weigel (D-Topeka)
Don Hill (R-Emporia)  Brandon Whipple (D-Wichita)
Dan Hineman (R-Dighton)  Valdemia Winn (D-Kansas City)
Roderick Houston (D-Wichita)  Kathy Wolfe Moore (D-Kansas City)

It is believed that Rep. John Wilson, who was absent for the vote on HB 2019, would have been a “no” vote had he been present.

All 125 members of the Kansas House will be up for election in 2014. The 51 people set out above are the reason we are not already scheduled to vote on a constitutional amendment changing the selection method for the Kansas Supreme Court. It is important that all legislators know where our membership stands on this issue, but it is critical that these 51 legislators know that the KBA membership supports their decision on the Merit Selection issue. Decisions are being or soon will be made to recruit candidates to run against these 51 legislators. Part of that decision-making process is to evaluate an incumbent’s campaign finance condition. Incumbents who have healthy campaign coffers are far less likely to draw a serious opponent than those with weak campaign finances. A critical reporting date for campaign finance is December 31, 2013. What a candidate has in his or her campaign account on that date could help determine whether that candidate will have a strong and well-financed opponent in 2014. If you support preserving Merit Selection for the Kansas Supreme Court and have the ability to financially support incumbents who
have supported Merit Selection, then please consider making a donation to those incumbents sooner rather than later, so that your support is received before the December 31 reporting deadline. Remember that you can financially support any candidate, regardless if you reside in that candidate’s district.

In addition to financial support, contact incumbents who you support, and offer to assist with the campaign next summer and fall. That may include yard signs, bumper stickers, making phone calls, writing personal notes, etc. Even if you are not in a financial position to help, your time can also be a valuable addition to a campaign. Whether you support a legislator financially or otherwise, be certain that he or she knows the reason for your support. It never hurts to ask your legislator about his or her position on Merit Selection, as the “not exactly” experience we have all just lived through may have changed some minds of those who have previously supported a change in the selection process.

Merit Selection is not going away in the 2014 legislative session. The battle for the Kansas Supreme Court will be in the Kansas House. That battle will continue in the 2014 House elections. The continued independence of the Kansas Supreme Court hangs in the balance. Your efforts are appreciated.

KBA President Dennis D. Depew may be reached by email at ddepew@ksbar.org or by phone at (620) 325-2626.
Save the Date for Plenty of Pro Bono, CLE, and Networking Opportunities

By Jeffrey W. Gettler, Emert Chubb & Gettler, Independence, jgettler@sehc-law.com

B y the time this issue of the Journal goes to print, another group of talented individuals will have been sworn in as Kansas attorneys. Congratulations to each of you! If you are a new, or nearly new attorney in Kansas, on behalf of the Young Lawyers Section (YLS) I welcome you to the profession!

If you are reading this, then you are likely already a Kansas Bar Association (KBA) member or are acquainted with someone who is a member. Whichever the case, you are in the know and doing something right. I would like to take this opportunity to tell you a little bit about the YLS and highlight some upcoming events.

As noted on the newly revamped KBA website (if you haven’t checked it out yet, you should definitely do so!), the YLS strives to spark the interest of young lawyers in the objectives of the KBA, and design and promote activities that will be of assistance to young lawyers in the practice of law. In other words, the YLS works to help you network with attorneys across the state, enhance and advance your practice with programming and activities designed especially for young lawyers, and keep you informed of issues affecting young lawyers in Kansas. Membership in the YLS is limited to those attorneys under 36 years of age or who have been admitted to the bar within the past five years. The YLS is the largest of the KBA sections!

This year’s YLS board recently had a phone conference to outline the year ahead. We have planned some exciting activities and opportunities that will allow you to network and meet other young lawyers as well give back to the community and have some fun! While you may not be able or want to attend every event, please take this opportunity to calendar some important dates.

- **October 19, 2013:** KU vs. Oklahoma Football Game/Law School Tailgate, Lawrence. For the past few years the YLS has partnered with the KU Student Bar Association to co-sponsor one of their several popular tailgates. This will be a great opportunity to meet other young lawyers, law students, and many Jayhawk football fans outside of the courtroom or office!
- **November 2013:** Young Lawyer Happy Hour, Wichita. The KBA YLS social chairs are coordinating with the Wichita YLS president to host a happy hour. I can assure you it is a can’t miss event that has been very well attended in the past.
- **January 2014:** The KBA YLS will be launching the ABA Young Lawyers Division service project, “Bullyproof: Young Lawyers Educating & Empowering to End Bullying.”
- **January 25, 2014:** Topeka Roadrunners vs. Lone Star Brahmas Hockey Social, Topeka. This is the 3rd annual hockey social and has sold out the last two years, so be sure to sign up fast once tickets become available.
- **March 1, 2014:** Regional Mock Trial Tournaments, Wichita and Olathe. The KBA YLS has been the primary organizer of the mock trial tournament since 1997. The program is designed to provide high school students with an operational understanding of substantive and procedural issues and the judicial process. Consider donating some of your time to volunteer as a judge for one of the regional tournaments.
- **March 29, 2014:** State Mock Trial Tournament, Topeka. Top teams from the regional tournaments compete to determine which high school team will represent Kansas at the national mock trial tournament. If you enjoyed judging the regional tournaments, you definitely don’t want to miss the state tournament!
- **March 2014:** Young Lawyer Happy Hour, Hays. If you are in Western Kansas, don’t think we have forgotten about you! The YLS hosted two socials this past Spring and plans are underway for another.
- **May 2014:** Young Lawyer Happy Hour, Kansas City. Planning is in the early stages, but this is certain to be a popular event for young lawyers in the Kansas City area.
- **June 2014:** KBA Annual Meeting. The format of the meeting may change next year, but a young lawyer gathering will not. When the date and location of the annual meeting are known, planning will commence for a young lawyers social.

These events are just a sample of what the YLS has in store for you this upcoming year. In addition, the YLS board is working diligently to bring you plenty of pro bono, CLE, and other networking opportunities. I hope you find something that interests you and you can attend. Further details on these events will be provided via email, Facebook, and the YLS Forum.

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.
Don't forget to join the Kansas Bar Foundation, encourage a colleague to do so, “improve” your status, honor a friend or family member, or add to your commitment with a planned giving initiative. I have served on numerous committees of multiple bar associations and have found reward in everything I've done. However, I don't think I have ever enjoyed positions on any as much as I have the ones on the Kansas Bar Foundation. Why? Because this is the organization that lets us, as lawyers, dispel the lawyer jokes and provide countless opportunities and support for those outside our organization.

I am overwhelmed and honored to follow in the footsteps of such esteemed colleagues who have gone before me and given this organization such a strong foundation. My mission is to take what they have provided and build on that as much as possible in the few short months I have. I am propelled by excellent members of the board and an increased need for funds for our grant and scholarship recipients.

Why should you give? By supporting and partnering with the KBF, you are helping improve the quality of life of others. The foundation has provided more than $3 million for public services, including:

- Legal services for the elderly, poor, and victims of domestic violence
- Mediation services for the poor in discrimination cases
- Financial support for pro bono and low fee programs
- Development of law-related programs for youth
- Scholarships
- CASA support
- Financial support for Kansas Advocates for Better Care
- National Institute for Trial Advocacy
- SAFEHOME
- Topeka Youth Project
- Law Day

Every year we are doing more. I have served on the scholarship committee for several years and have been humbled by the gratitude of the recipients. In 2012, we were able to award more scholarships than ever before in our history. I want to keep adding to that statistic by encouraging colleagues to endow scholarship funds to honor and memorialize family and friends.

WHILE WE’RE AT IT—WE NEED YOU! It’s easy to join. For as little as $100 a year, you can become a fellow pledge. Our staff makes it easy to join and keep up payments. You can also make individual gifts to the KBF. Just log in to the KBA website and click on the KBF link—lots of people will be glad you did!

About the Author

Kathy Kirk has been involved in bar and foundation activities for many years. Prior to being in small firm practice focusing on ADR, personal injury, professional negligence, and family law, she served as the first ADR coordinator for the Kansas Supreme Court. Kirk is currently president of the Kansas Bar Foundation; treasurer of the Kansas Association for Justice; served on the recent Ethics 20/20 Commission; and has served on the ADR, Access to Justice, Ethics Advisory, Fee Dispute, and CLE committees. She is also an active member of the Kansas Women Attorneys Association and the Douglas County Bar Association.
Chief Justice Appoints Court Budget Advisory Council

By Judge Karen Arnold-Burger, Kansas Court of Appeals, Topeka

In an effort to get a broad spectrum of input into the impact of proposed cuts to the Judicial Branch budget for FY 2015 (which begins July 1, 2014), Chief Justice Lawton Nuss has established the Court Budget Advisory Council. Chief Justice Nuss advised that the purpose of the Council is to provide recommendations regarding the cuts currently proposed by the Legislature. “We have submitted a base budget that is necessary to maintain current court operations. If the Legislature does not fund court operations at the requested level, cuts will be necessary. The Council will recommend and prioritize those cuts with an eye to the public safety and economic impacts of suggested cuts, as well as the impact on access to justice of our residents and businesses.” The Court Order, dated September 10, 2013, lists the duties of the Council as follows:

1. Study the consequences in the event the Legislature does not appropriate the full FY 2015 (year beginning July 1, 2014) Judicial Branch budget request submitted by the Judicial Branch in September 2013.
2. Develop recommendations—operational, structural, or both—for the Supreme Court’s consideration if the 2014 Legislature does not appropriate the FY 2015 Judicial Branch base budget request. These recommendations may include, but not be limited, to a multi-million dollar reduction of expenditures.
3. Prioritize its recommendations.
4. Communicate at least biweekly with the Chief Justice in person via the Council chair.
5. Appoint Council Advisors both from inside and outside of the Judicial Branch.
6. Allow persons who are not Council members or advisors the opportunity to provide/present information to the Council.
7. Report its findings and recommendations in writing to the Supreme Court by December 13, 2013.
8. Take other actions the Council deems appropriate.

The members of the Council are:

• Sheriff Don Ash, Wyandotte County
• Bruce Buchanan, President, Harris Enterprises Inc., Hutchinson
• Rep. Pete DeGraaf, Kansas House of Representatives, District 81, Mulvane
• Magistrate Judge Ann Dixson, 16th Judicial District, Kiowa County
• Marc Elkins, Vice President and Associate General Counsel, Cerner Corp., Kansas City, Mo.
• Jim Minnix, Scott County Commissioner
• John Vanier, Chief Executive Officer, Western Star Agriculture Inc., Salina
• John P. Wheeler, Retired Finney County Attorney

In addition, I have been appointed chair of the Council and Chief Judge Meryl Wilson, 21st Judicial District, Clay, and Riley counties, has been appointed vice chair.

I am also pleased to announce several advisors who have agreed to assist the Council. We are very fortunate to have the following volunteers share their vast knowledge and perspectives with the Council.

• Donna Hoener-Queal, Chief Court Services Officer, 30th Judicial District, Medicine Lodge
• Angie Callahan, District Court Clerk of the 3rd Judicial District, Shawnee County
• Dr. Nancy McCarthy Snyder, Hugo Wall School of Urban and Public Affairs, Wichita State University
• Blake Schreck, President, Lenexa Chamber of Commerce
• Duane A. Goossen, Vice President, Fiscal and Health Policy, Kansas Health Institute
• Dr. Keith Chauvin, University of Kansas School of Business

As indicated, the Court’s order requires a final report to be presented by December 13, 2013. This is an aggressive schedule. Nevertheless, its timely presentation should allow sufficient time for the Judicial Branch to assess future actions, as well as advise the Legislature of the most likely programs or personnel to be cut in the absence of sufficient funding to maintain current operations. Chief Judge Wilson and I hope to encourage creative thinking and perhaps even new approaches to the efficient use of severely limited court resources in the event that court funding is inadequate. We look forward to the challenge.

About the Author

Judge Karen Arnold-Burger became a member of the Kansas Court of Appeals in February 2011 after serving 20 years as the presiding judge of the Overland Park Municipal Court. She previously served as assistant city attorney for Overland Park and assistant U.S. attorney for the District of Kansas. Judge Arnold-Burger has taught extensively at the National Judicial College for the last 15 years and has served on its Faculty Council. She received her undergraduate and law degrees from the University of Kansas.
Log In ...

By Meg Wickham, member & market services director, Kansas Bar Association, Topeka, mwickham@ksbar.org

KBA Membership and Sections ... Getting the Most Out of Your Membership

Have you logged into the KBA’s website launched July 1, 2013? The KBA is rewarding existing and new paying members for enrolling online with an hour of On-Demand CLE. Don’t know how to log in?

Renewing your KBA membership or joining for the first time?

KBA Added Four Affinity Partners in 2013

1. ADP is a full service payroll and tax compliance service including; direct deposit options, employer tools HR solution, workers compensation insurance, and more. KBA members will receive a discount on ADP services. Our members already know the great savings they receive on KBA CLEs with top notch speakers and timely topics. New KBA handbooks are coming out every year providing the latest information from the most regarded attorneys in the specific areas of practice.

2. Clio (http://landing.goclio.com/ksbar) is a web-based practice management solution allowing KBA members to manage all critical aspects of your practice.

3. Law Pay is a credit card processing service discounted and offered to KBA members.

4. TBG (Telecommunications Buying Group LLC) is a conferencing suite of services for teleconferencing and web conferencing.

A new KBA member benefit is the launch of the Law Office Management Assistance Program (LOMAP). LOMAP was created to help Kansas attorneys better organize and operate their practices. Law Practice Services Director, Danielle M. Hall, J.D., provides no-cost and confidential assistance with practice management issues for attorneys and soon to be attorneys. The KBA provides information about starting and running a law firm, closing a law firm, marketing, client relationships and communication, technology, and more. For more information contact Danielle Hall at dhall@ksbar.org or visit http://www.ksbar.org/?lomap_services.

One of the greatest benefits of being a KBA member is the opportunity to join a Section. The KBA has 25 Sections with specific practice area focus. Belonging to a Section keeps you connected with other attorneys in the field through e-communication, newsletters, and the opportunity to be listed in our public KBA attorney search on our website, www.ksbar.org. If you were admitted to the bar before 2009, you can choose one Section at no additional fee. Other Sections are available to you as well for a nominal fee. Belonging to more than one section will help you enhance your practice.

Section membership also gives you access to an online community within our website once you are logged in. You can share documents, directly communicate with other Section members, and much more. You have to be logged in to take advantage of all the Section online community.

Participation in your Section gives you the opportunity to write articles for the KBA Journal, author KBA law books, provide KBA CLEs, speak for the attorneys with similar practice interests at the state level of the KBA, and establish your authority as an expert in your field and a leader in the bar.

For a complete list of Sections, go to http://bit.ly/KBASections.
By adopting Supreme Court Rule 204 in 1978, the Kansas Supreme Court created the Kansas Board for Discipline of Attorneys (KBDA). Originally, 11 practicing Kansas attorneys were appointed by the Court to the KBDA. Later, the Court expanded the KBDA to include 20 members. All KBDA members are active Kansas attorneys, and the KBDA performs functions essential to the attorney discipline process and the self-regulation of Kansas lawyers.

The Kansas Supreme Court appoints one member of the KBDA as the chair and another as the vice chair (SCR 204(d)). On July 1, 2013, the Court appointed Patricia Dengler, of Wichita, as chair and John Gatz, of Colby, as vice chair of the KBDA. Those two attorneys, along with Robert Guenthner, of Wichita, currently comprise the Review Committee of the KBDA.

The Review Committee is responsible for reviewing all docketed complaints following an investigation. Annually, the disciplinary administrator receives approximately 900 complaints filed against lawyers. Of those, approximately 300 are docketed for investigation. The vast majority of the complaints are investigated by volunteer lawyers who serve on ethics and grievance committees throughout the state.

After reviewing a docketed case, the Review Committee may dismiss a complaint, refer an attorney to the attorney diversion program, direct that the disciplinary administrator informally admonish the attorney, or direct that the disciplinary administrator institute formal charges against the attorney. Before the Review Committee can direct that the disciplinary administrator informally admonish an attorney or institute formal charges against an attorney, it must find probable cause that the attorney violated the rules of professional conduct.

Hearings in disciplinary cases are conducted by panels of three attorneys, two of whom must be members of the KBDA and one at-large member. (SCR 211). The hearings can occur any place in the state. The chair appoints the panel and selects one member of the panel to serve as the presiding officer. (SCR 211(a)). The presiding officer rules on motions and objections. At the hearing, the disciplinary administrator bears the burden of proving rule violations by clear and convincing evidence. Following the hearing, the panel members prepare a report containing the findings of fact, conclusions of law, and a recommendation for discipline, should there be a finding of misconduct on the part of the attorney.

Members of the KBDA are also appointed to panels to consider reinstatement of suspended and disbarred attorneys. If an attorney has been suspended or disbarred, the attorney must file a petition for reinstatement and appear before a panel. At hearing, the attorney must prove by clear and convincing evidence that the attorney has been rehabilitated, is fit to practice, and should be reinstated. After hearing the evidence, the panel makes a recommendation to the Court as to the suitability of the attorney to resume the practice of law in Kansas.

The investigation of complaints, the review of the investigations by the Review Committee, and panel hearings are the core of the disciplinary process. The vast majority of work done during this process is done by attorney volunteers who are appointed by the Kansas Supreme Court and reflect a cross-section of the Kansas Bar.

On July 1, 2013, the Kansas Supreme Court adopted term limits for the KBDA. Each term is four years, and no member may be appointed to an additional term after a member completes 12 years of service. (SCR 204(c)). As a result of the term limits, the service of eight members ended on July 1, 2013. Those members and year of appointment to the KBDA are as follows:

- Anne Baker, 1996
- Sara Beezley, 1998, chair from 2006-2013
- Jo Ann Butaud, 1997
- Ruth Graham, 1998
- Robert Guenthner, 1979, vice chair until 2013
- Debra James, 1996
- Warren McCamish, 1998
- Andrew Ramirez, 1996

The following 12 members of the KBDA remain. They are:

- Nick Badgerow, 2003
- John Conderman, 1996
- Dennis Depew, 1999
- Patricia Dengler, 2004
- John Gatz, 2009
- Randy Grisell, 2003
- Cal Karlin, 2003
- Jack McInteer, 2003
- Art Palmer, 1987
- Phil Ridenour, 1996
- Rex Sharp, 1996
- Lee Smithyman, 2010

On July 1, 2013, the Kansas Supreme Court appointed eight new members to the KBDA. They are:

- Kimberly Bonifas, Wichita
- Jennifer Brunetti, Frontenac
- Jeffrey Chubb, Independence
- Shaye Downing, Lawrence
- John Duma, Kansas City
- Kathryn Marsh, Olathe
- Mira Mdivani, Overland Park
- Darcy Williamson, Topeka
On behalf of the staff of the Disciplinary Administrator’s Office, I would like to thank all of the volunteer attorneys for their time, effort, and dedication to the disciplinary process in Kansas.

About the Author

Stanton A. Hazlett, of Topeka, received his Bachelor of General Studies from the University of Kansas and his Juris Doctor from Washburn University School of Law. From 1977 through 1986 he was engaged in private practice in Lawrence. He has been with the Disciplinary Administrator’s Office since 1986. In September 1997, he was appointed disciplinary administrator.

A message from your KBA Awards Committee Chair, Sara Beezley

Begin thinking about those champions in the legal profession who ought to be recognized and commended for their steadfast efforts.

Please stay tuned as the KBA Awards Nomination form will be printed in the January and February Journals.

We eagerly await and encourage numerous submissions for our 2014 award selection process.

Sincerely,

Sara

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Quintairos, Prieto, Wood & Boyer, P.A.
Attorneys At Law

A multi-office national law firm is seeking ATTORNEYS in the Kansas City, Lawrence, Topeka or Wichita area. Must have experience in civil trial and/or insurance defense litigation. Portable book of business is a plus.

E-mail resume to resume@qpwblaw.com
Celebrate Pro Bono During October

Celebration is the goal during the ABA’s Celebrate Pro Bono week – October 20-26. ABA Immediate Past President Laurel Bellows issued the challenge this way: “It is essential that the entire legal community engage in conversation and action that results in equal access to justice for all. The energy generated by the National Pro Bono Celebration is a powerful force that helps us build a just legal system.”

With only four years of history, Celebrate Pro Bono has grown and become a week dedicated to recognizing the work of pro bono attorneys and creating awareness of the continued need for equal access to justice.

As Kansans take up the chorus and celebrate, just what is there to celebrate?

Some facts:

- 150 Kansas attorneys will volunteer more than 3,500 hours to meet the legal needs of 749 low-income Kansans in 2013.
- Challenging them for biggest contributor honors, 3,300 hours will be donated by law students and other volunteers.
- In family law, the area of highest need, 170 cases were handled by volunteer attorneys.
- The Kansas Supreme Court modified court rules to allow retired and inactive lawyers to volunteer through programs like Kansas Legal Services and law school clinics.
- Many Kansas lawyers supplement volunteer efforts by making a donation to Kansas Legal Services or the Kansas Bar Foundation, designated to KLS.
- The Kansas Elder Law Hotline, matching attorneys with senior citizens in need of legal advice or information, has operated continuously since 1996. KBA members who provide legal services for the hotline are given free membership to the KBA Lawyer Referral Service for their first volunteer year.

Here is just a sample of some of the events that will take place to put a spotlight on pro bono.

- KLS has document preparation clinics planned across the state. For example, Kansas City will be hosting three clinics.
- October 17, Leavenworth Council on Aging
- October 22, Wilhemina Gill Multipurpose Center to provide outreach to the homeless, at-risk, and community service participants.
- October 25, Heartland Habitat for Humanity
- KBA representatives will address attendees at the Kansas Sheriff Association (KSA) fall conference in Hutchinson in November. The session is designed to provide first responders with information on the importance of having advanced directives in place and to provide information about resources for estate planning. This will also take place at the SAMS (Sheriffs Administrative Management School) conference in Topeka in January.
- Washburn law students have volunteered to help coordinate a Jeans for Justice Day to raise money for pro bono services. Participants in the event will be able to make an online donation through the Kansas Bar Foundation and proceeds will be distributed to programs that support pro bono services.

Encouraging law students to get involved …

“The Pro Bono Program at Washburn University School of Law plans to Celebrate Pro Bono with several events. During a panel discussion, attorneys will share their experiences providing pro bono service and discuss how those experiences have helped shape their careers. In addition, several students plan to participate in community document assembly events planned in conjunction with Celebrate Pro Bono Week, and the student Pro Bono Society will assist the KBA in recognizing pro bono efforts by individual attorneys. The events are organized under the auspices of the Washburn Law Pro Bono Program, of which one key component is the Pro Bono Honors Program. Students at the University of Kansas School of Law will also have an opportunity to attend a panel discussion this fall. The major subject will be whether pro bono should be mandatory both for law students and lawyers.

“As our economy struggles to regain traction, I am proud that our students are providing access to justice to the many underserved individuals in our community,” said Margann Bennett, director of professional development and pro bono at Washburn University School of Law. “In addition to Kansas Legal Services, some of the organizations that benefited from our students’ efforts include VITA, CASA, Colorado Legal Services, Shawnee County Corrections, Washburn Law Clinic (interpreting), Legal Services of the Virgin Islands, and the Kansas Judicial Counsel.”

Students in the Washburn Law Pro Bono Program Class of 2013 contributed more than 1,400 hours of pro bono service. The program pairs students with legal providers to improve access to justice and rewards those students at graduation for their contributions. Students who complete at least 50 hours are awarded Pro Bono Honors and those who complete at least 100 hours are awarded Distinguished Pro Bono Honors. Additionally, many students work on service activities either through the Washburn Law Clinic or as part of an academic certificate program. Through traditional pro bono service, the clinic, and certificate requirements, Washburn Law students make a significant contribution to the community.

Why are volunteers needed?

With no constitutional guarantee of counsel, those with civil legal problems are at the mercy of the resources available to meet their needs. Those needs far outstrip the services available from staff at KLS, despite the efficiency and best efforts of that program. Volunteer attorneys can extend those resources, drawing on KLS staff to screen clients and to provide pleadings and other technical assistance. Interested volunteers can be involved in special projects, including community document assembly events or by taking calls from their office on the Elder Law Hotline. Monthly online newsletters publicize cases that are waiting to be matched with a volunteer. You can learn more and get the volunteer application on the pro bono page of the KLS website at www.kansaslegalservices.org.
Diversity Committee Happenings

By Eunice C. Peters, Kansas Office of Revisor of Statutes, Topeka, Eunice.Peters@rs.ks.gov

This year, Christi L. Bright and Eunice C. Peters will be serving as co-chairs of the KBA Diversity Committee. The Diversity Committee is comprised of practicing and non-practicing attorneys throughout the state of Kansas who are members of the KBA. Our mission is to help the KBA foster an inclusive, diverse bar association, promote understanding and respect for different points of view, and support the advancement of diversity within the Kansas legal profession and justice system.

In supporting the KBA this year, we are excited to host the following events planned by our committee.

First, our committee members author “The Diversity Corner,” which is a monthly column in the KBA Journal. It is through this medium that we are given the opportunity to voice our perspectives on diversity issues in the Kansas legal community. Past articles have covered topics, such as the meaning behind diversity and inclusion, “diversity fatigue,” the economics of diversity, race and the attorney-client relationship, disability as a diversity classification, and many other diversity-related issues.

Second, due to our success in 2013, our committee will host the second annual “Career Crossroads” in April 2014 in Wichita. This speed networking event matches seasoned attorneys with those who have two to five years’ experience on a one-on-one basis with the goal of assisting newer attorneys with developing their legal careers. Last year, we paired twenty seasoned attorneys with twenty newer attorneys. If you would like to attend this event, please contact either of the chairs. Space will be limited.

Please also let us know if you would like to sponsor or collaborate with our committee on this event. We would be happy to work with you so we can provide this worthwhile experience to our legal community!

Third, members from our committee will present a diversity-related CLE at the 2014 KBA annual meeting. Those attending will receive ethics and professionalism credit under the professionalism umbrella. As a reminder, professionalism includes the “promotion of diversity and inclusion of minorities in the legal profession, including but not limited to race, religion, color, sex, disability, national origin or ancestry, familial status, sexual orientation, and gender identity” for the general goal of creating “a forum in which lawyers, judges and legal educators can explore and reflect upon the meaning and goals of professionalism in contemporary legal practice.” (https://www.kscle.org/pdf/GuidelinesForEthicsAndProfessionalism.pdf)

Past CLEs have covered subjects, such as the building diversity in the legal profession, identifying cultural bias and awareness in court, women of color in the law, inclusion practices, and other ethics and professionalism-related issues.

Fourth, our committee members try to attend diversity-related functions hosted by other organizations in Kansas. By working together, we can make the legal profession fully reflect the communities we serve. In the past year, our members have attended the Legal Diversity Picnic, the Asian American Bar Association of Kansas City’s Seventh Annual Dinner, KWAA’s Annual Lindborg Conference, the KU Law Diversity Banquet, and various other events. Please let us know of any upcoming diversity-related events in the area, and we will try to be there to support your organization.

Last, our committee will be proposing definitions for the terms of “diverse” and “inclusive” to the KBA Board of Governors for their approval. Once approved, we will include those definitions on the website and other relevant materials.

We are excited to have so many energetic members on our committee this year! If you are interested in becoming a member of the Diversity Committee, please contact either chair for more information. The Diversity Committee generally meets every first Wednesday of the month by conference call and occasionally in person.

About the Author

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

Celebrate Pro Bono During October

Each year, the KBA recognizes an attorney with the Pro Bono Award. That award recognizes a lawyer or law firm for the delivery of direct legal services, free of charge, to the poor or, in appropriate instances, to charitable organizations whose primary purpose is to provide other services to the poor. This year’s award was presented to Joni J. Franklin. In addition to the Pro Bono Award, the KBA awards a number of Pro Bono Certificates of Appreciation. Visit http://www.ksbar.org/?probono to read more about Pro Bono awards.

“From the young lawyer who spends a couple hours on the phone to the senior attorney who volunteers every week, once people have tried pro bono work, they usually return,” said Marilyn Harp, KLS executive director. “Why? It can be rewarding and stimulating. Just ask the many volunteers who we celebrate during pro bono week. While you are at it, tell them thanks for making justice a reality.”

At whatever stage of a legal career, you can be a part of the celebration as a pro bono volunteer.

For more information, contact Anne Woods, awoods@ksbar.org.
It has been one of those weeks. Heavy rains combined with a bad gutter turned a finished basement into a pond. Twice. Right after that was all cleaned up, a root-choked sewer drain backed into the now unfinished basement. In the middle of all that fun the air conditioning unit blew a capacitor sending indoor temperatures climbing. There was some good news; I was home during each mini-disaster able to address the issues with wet-vac, carpet knife, and air blower fans immediately. Things could have gotten much more interesting had I been away as I was the week before.

Twine Micro-Controller

Twine (supermechanical.com) is a new device and service that may be just the ticket to more robust contingency planning and peace of mind. Twine is a small gadget that monitors a variety of sensors and sends out an email, text, or tweet when something goes awry. It stands guard over home or office while you are away.

Many lawyers with persnickety clients might already have an array of sensors in their server rooms. These sensors monitor moisture, temperature, access, and a variety of other variables crying “Help!” when something is triggered. These tools can be pricey and complicated. However, Twine lowers the price of such sensors and simplifies their use.

The basic control unit is a small green box (about 3” x 3”) powered via micro USB (a generic cell phone charger) or readily available AAA batteries for backup in case of a power outage. This box connects to your wifi network and syncs to a web app. The web app uses natural language programming to simplify setting conditions (i.e., WHEN the moisture sensor gets wet, THEN text “The basement is flooding!”). Communication from the web app to the Twine unit is real-time and automatic. Because it is controlled via a web app, the system can be tweaked remotely as well.

Environmental Sensors

The basic Twine control unit ($125) includes a temperature, vibration, and orientation sensor. The temperature sensor can warn of pipes near freezing or an AC unit that has failed. Vibration could advise when someone knocks on a door or opens a file cabinet while the orientation sensor could mount to a garage door to notify when it is opened. Additional sensors available include moisture sensors and magnetic switches (monitor doors or windows).

There are also piggy-back control boards available that allow interfaces with user-customizable sensors or other controllers including the Arduino, a popular hobbyist microcontroller. This opens the door to just about any sensor imaginable including light, sound, humidity, soil moisture, flow, and pressure. However, those types of interfaces start departing from the straightforward, simple control of basic, common sensors that Twine excels at. Support at the web app is minimal.

Pretty Cheap

One of the criticisms of Twine is that it is awfully high priced considering the cost of its components. That is a somewhat legitimate criticism. Virtually all of its capabilities could be duplicated for a fraction of the cost using inexpensive micro-controllers and sensors. Drop in at a RadioShack even and you can now find the components to put together something comparable for as little as $50. You would also be looking at a few hours of soldering, a little bit of computer coding, and some debugging time.

Twine is not aimed at hobbyists with soldering irons. Twine is an appliance like a toaster oven. It is for users who want to monitor environmental conditions of their home or office while away but who want something simple to install and even easier to program. Plug it in, go to a website, point, and click a few times and walk away – a five-minute setup. Refurbished units shave $30 off too.

Part of Planning

Some client audits of law firms are already enhancing their queries about law firm contingency planning by asking about or requiring environmental monitoring of building and server areas. Twine actually presents a quick and easy way to dip the toes in that level of contingency planning. At the very least, it offers a relatively inexpensive prototyping or temporary monitoring tool where the benefits and uses for environmental monitoring could be tested and experimented with so that a more robust, commercial system could be ordered, tested, and installed down the line.

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.
The novel “Paper Chase,” by Harvard Law graduate John Osborne, examined the life of a law student and, in doing so, placed law school into the center of cultural conversation. When Osborne’s book became a popular movie, and then TV series, it brought to an even larger audience the varied and sometimes quirky personalities of the law professor. And the movie’s depiction of contract law Professor Charles W. Kingsfield was Hollywood magic. For instance, Kingsfield’s declaration to the students in his contracts class that “you come in here with a skull full of mush ... and you leave thinking like a lawyer” set the tone for the important role of the Socratic method of instruction. It was not simply a mode of teaching, it was also an old-school, untouchable, unapproachable, “my way or the train tracks” approach to teaching.

But any doubt whether Kingsfield was a creation of screenwriters was secured in the scene in which the professor instructs his student, Hart, to leave class. Hart declares in front of everyone—“You are a son of a bitch, Kingsfield,” to which Kingsfield replies, “Mr. Hart! That is the most intelligent thing you’ve said all day. You may take your seat.”

When “Paper Chase” came out in 1973, I was starting high school and had my sights set on law school. As a youth, I spent a lot of time around my dad’s lawyer friends and was always curious for war stories about law school. I recall one of his peers, Bob Peter, of Ellinwood, if memory serves me correct, telling me about the announcement on his first day at Washburn Law School: “Look to your classmate to the right, and your classmate to your left—one of you will be gone at year end.”

The notion that law school would be defined by its faculty was true long before John Osborne’s novel. I can say with certainty that Ray Goetz at KU was a not-too-distant relative of Kingsfield. Both respected and feared, his contracts class was a lesson in controlling multiple body functions while thinking and thinking harder. But before Goetz, and long before the public came to know the name Kingsfield, there was J.B. Smith. James Barclay Smith. And if his name, and his manner is foreign to you, that is about to change.

From 1935 to 1966, Smith was a professor of constitutional and administrative law at KU. When Smith died in the spring of 1978, he was eulogized by Professor Charles H. Oldfather, who commented on Smith’s penchant for civility and, at times, formality, but also “the brilliance of his mind.” Similarly, Professor Paul Wilson noted him to be a “great gentleman—courteously, considerate, meticulous as to proprieties, he gave a dimension of civility and gentleness to his environment.” Smith’s legacy remains today with a chair named after him, held by Richard Levy.

“Professor Smith was always the consummate gentleman, never without a coat and tie—never,” Gene Balloun told me. “When the wife of a law student had a baby (we had only a couple of women in the class), as did my wife, J.B. would appear at the door with a dozen roses to celebrate the occasion.”

I asked Salina attorney C. Stanley Nelson for his reflections on Smith. His reflections were more to the point: “He had no humor. None.”

These observations come from the academic elite. As for the slackers in the back row, well, that’s where my dad comes in. Larry had shared stories with us about J.B. early on, but it’s what happened recently that brought it to life. You see, last August I went to Great Bend and did a dumpster dive in Larry’s basement—the home where I grew up on 17th Street. And there I found Larry’s transcript from his law school days. And the story of J.B., initially told to the five Keenan kids over some family dinner but long since forgotten, came back to life. And so I asked dad to retell it, one more time. And it goes like this:

“In the Summer of 1952, Con Law was a 5-credit hour course, two hours a day, five days a week, for eight weeks. It was held in the old Green Hall, with no air conditioning, and the windows wide open. I think class started at 10 and ran until noon, with a 10-minute break between the two hours.

“Although brilliant, J.B. was a pretty dry lecturer. It was hot that summer and humid (as Lawrence often was) and J.B. had two white wool suits. He wore starched, white, long-sleeved shirts, with the cuff buttons unbuttoned, and a loosely fitting tie. He had two white suits, and you could tell this because one was a little bit more cream-colored than the other. He wore one suit one week, and the other suit the next week. There were about 20 students in the class. The classroom was on the west side of Green Hall with the windows to our backs.

(Continued on next page)
On one of the hot days, the class had sat down, and a hummingbird was flying around the ceiling, around, around, around, and around. J.B. Smith came in to lecture, and lectured for 55 minutes and took a 10-minute break. He came back and he lectured for another 55 minutes. The hummingbird kept flying for those two hours. Although the windows were open, the hummingbird did not find them because they were lower than the ceiling where it was flying.

The notable part, and the reason for the story, is that not once during those two hours did Dr. Smith ever acknowledge the existence of the hummingbird. As you might imagine, between note taking on Marbury v. Madison or watching a diminutive bird look for nectar in a 100 degree classroom—this was no contest. Everyone’s eyes went round and round.

It wasn’t that he didn’t know that the hummingbird was in there, because it was impossible to miss. He just elected to totally ignore it.

As I recall, I got a C in Constitutional Law.”

Yes, Larry you did. You most certainly did.

About the Author

Matthew Keenan has practiced with Shook, Hardy & Bacon since 1985. He may be reached at mkeenan@shb.com.
The reality today is that law schools, and later those who employ their graduates, are faced with the task of trying to undo or compensate for the writing-skills instruction young lawyers received before they entered law school. The discrepancy between the writing skills expected of new and graduating law students and the actual skills exhibited has its source earlier in the educational experiences of our students. Studies show that much of the focus in secondary education is on topic and idea development rather than word choice, clarity, sentence structure, and punctuation. In other words, ideas, rather than how those ideas are expressed, are the focus of writing classes.

A failure to focus on the mechanics of writing well results, in part, from the outcome of debates that have been waged regarding how to teach children to read, write, and learn spelling, punctuation, and grammar. These debates have been termed the “grammar wars” and the “punctuation wars.” On one side are educators who advocate the traditional methods of teaching writing skills via specific instruction in grammar, punctuation, and spelling. On the other side are those who believe that these subjects are best taught in the context of reading and writing. Both sides can find support for their positions in the research.

Although one can probably agree with the premise that reading and writing can lead to a greater appreciation for the subtleties of the English language and enhance writing skills, studies also show that students are doing less of both at the elementary and secondary school levels. Moreover, technology-aided teaching of grammar rather than English language arts instruction does not typically focus on written expression. See The National Commission on Writing for America’s Families, Schools, and Colleges, Writing and School Reform 13-14 (May 2006), available at http://www.collegeboard.org/prod_downloads/writingcom/writing-school-reform-natl-comm-writing.pdf (last visited August 24, 2013); ACT, Aligning Postsecondary Expectations and High School Practice: the Gap Defined, 2, 3 (2007) (reporting ACT’s 2005-2006 curriculum survey).

For more information, see Aïda M. Alaka, The Grammar Wars Come to Law School, 59 J. LEGAL EDUC. 343 (2010). The official position of the National Council of Teachers of English aligns with the latter position: “NCTE urges[s] the discontinuance of testing practices that encourage the teaching of grammar rather than English language arts instruction.” NCTE Position Statement Resolution on Grammar Exercises to Teach Speaking and Writing, http://www.ncte.org/positions/statements/grammarexercises (last visited on August 5, 2013).


For more information, see Aïda M. Alaka, The Grammar Wars Come to Law School, 59 J. LEGAL EDUC. 343 (2010). The official position of the National Council of Teachers of English aligns with the latter position: “NCTE urges[s] the discontinuance of testing practices that encourage the teaching of grammar rather than English language arts instruction.” NCTE Position Statement Resolution on Grammar Exercises to Teach Speaking and Writing, http://www.ncte.org/positions/statements/grammarexercises (last visited on August 5, 2013).


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Eats, Shoots & Leaves: You Don’t Mean That!

(Continued from Page 19)

composition may have a negative effect on students’ mastery of the basics of grammar and punctuation.9 Individuals who habitually ignore grammar and punctuation conventions in their tweets, text messages, and email might have difficulty identifying the differences between “eats, shoots, and leaves,” “eats shoots, and leaves,” and “eats shoots and leaves” and be unable to determine which construction best expresses their meaning.

My experience as a legal writing teacher is that many students are highly motivated to improve their writing skills; they recognize the importance of writing well and recognize their own weaknesses. Other students may believe themselves to be good writers, even though they know that they have weak grammar and punctuation skills.10 In my view, these students have been cheated. They have not been held to standards that link writing well to technical expertise and have an erroneous sense of what it means to write well. When they enter law practice, they may well be unprepared for a reality in which lack of technical writing expertise can result in failure – for themselves and for their clients.

Although many lawyers would not consider themselves to be grammar or punctuation mavens, it is incumbent on all of us to facilitate the continuing education of those we mentor – not just in particular practice areas, but in the one subject area that is equally relevant across all practice areas – written communication. Relying on “grammar check” alone will not resolve the “eats, shoots & leaves” ambiguity. We must help them say what they mean.11 ■

About the Author

Aïda M. Alaka received her juris doctorate from Loyola University Chicago, where she was editor-in-chief of the Loyola University Chicago Law Journal. Before teaching, she practiced employment law at Winston & Strawn LLP in Chicago. She taught on a part-time basis at the University of Kansas before joining the faculty at Washburn University School of Law in 2005. Her teaching interests include Employment Law and Legal Analysis, Research and Writing. She currently serves as the associate dean for Academic Affairs.

9. See generally Rush to Write. But see http://press.collegeboard.org/releases/2010/report-spotlights-revolutionary-use-technology-teaching-writing, which reports on the innovative use of technology to develop writing skills. Stanford University is currently engaged in a five-year study of their students’ writing development, including how blogging, texting, and other social writing affect writing skills. See Josh Keller, Studies Explore Whether the Internet Makes Students Better Writers, CHRON. OF HIGHER EDUC. (June 15, 2009).

10. For information regarding the views of some first-year law students regarding the relationship between good writing and technical writing skills, see Aïda M. Alaka, The Phenomenology of Error in Legal Writing, 28 QUINNIPAC L. REV. 1 (2009).

11. An increasing number of good legal writing texts exist, many of which focus on style and usage. Because some new lawyers might not have developed the “gut instinct” that signals that something is not quite right, mentors can encourage them to consult such texts, rather than simply edit their work.

NOTICE OF AMENDMENT OF THE LOCAL RULES OF PRACTICE AND PROCEDURE OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF KANSAS

The United States Bankruptcy Court for the District of Kansas gives notice of Proposed Local Rules of Practice and Procedure.

The Proposed Local Rules amend the present Local Rules as recommended by the Bench and Bar Committee of the United States Bankruptcy Court for the District of Kansas with the approval of the Court.

Interested persons, whether or not members of the bar, may submit comments on the Proposed Local Rules addressed to the Clerk of the United States Bankruptcy Court for the District of Kansas at 401 N. Market, Room 167, Wichita, KS 67202. All comments must be in writing and must be received by the Clerk no later than December 17, 2013, to receive consideration by the Court.

Copies of the Proposed Local Rules will be available for review by the bar and the public from November 15, 2013, through December 17, 2013, at:

Wichita Clerk’s Office 167 U.S. Courthouse 401 N. Market Wichita, KS 67202

Topeka Clerk’s Office 240 U.S. Courthouse 444 SE Quincy Topeka, KS 66683

Kansas City Clerk’s Office 161 U.S. Courthouse 500 State Ave. Kansas City, KS 66101


Copies of the Bench and Bar Committee Minutes, at which most of the proposed changes were discussed, are also available at www.ksb.uscourts.gov.
When I was in the first grade my teachers determined that I had dyslexia. In my writing assignments, sentences were written right to left and letters, as well as words were written backwards—nearly a mirror image. These manifestations ceased by the time I completed my undergraduate education; however, dyslexia is a lifelong disability.

Law school is a crucible that will challenge even the most capable student. When I entered Washburn University School of Law I had all but forgotten about my dyslexia. The volume of reading was considerable, but I managed. Decoding new words and phrases was cumbersome, but I managed. Note taking was never my strong suit, but I managed. Despite those challenges I was optimistic that I would do well in law school, until the first practice exam for Torts class. Under simulated final exam conditions, my compensatory strategies crumbled. In a response to one essay, every other sentence was written completely in reverse; the first sentence was written correctly, the next was right to left and the words were reversed and so on. Even when I reread my response to the question, I did not notice my mistakes. It was not until the exam was graded that the issue became apparent. I was stunned and immediately sought support from both the law school and education professionals.

Learning disabilities consistently present a challenge to educational systems, including law schools. According to the Department of Education, for nearly a decade the percentage of students ages 6 to 21 receiving educational support for a learning disability hovered around 13 percent. Similarly, the percentage of students requesting support in post-secondary education was more than 10 percent. In order to succeed in law school a student with a learning disability must recognize new challenges and develop compensatory strategies for those challenges.

Early diagnosis and intervention can provide students with the tools needed to succeed in school. Many people with a learning disability are highly intelligent but limited by a cognitive function that more typical students perform automatically. Dyslexia inhibits a reader’s ability to separate written words into phonetic parts, causing letters and words to appear jumbled or backwards. Additionally, dyslexia impacts an individual’s working memory and processing speed, often making it difficult to divide attention between competing tasks. This discrepancy between intelligence and production is a key element in identifying a person with a learning disability.

New challenges require new strategies for success. With the help of a special education professional, I developed new skills and strategies to manage my legal education. The first strategy was to break the work load into smaller parts. Essentially, I reduced the great ocean of a course like property to a bucket-sized component like future interests, and then to a cup-sized component like the Rule Against Perpetuities. When a course is reduced into its constituent parts, the reading, studying, and memorization was less daunting.

Students with dyslexia lack the automaticity of normal readers when it comes to decoding new words. As a result, a dyslexic student will rely on the context of words in order to decode the meaning. Decoding legal terminology in law school text books by the context of the sentence, paragraph or even the page is difficult and time consuming. My second strategy was to develop glossaries for specific bodies of law. Before each reading I would review the glossary then commence with the assignment. I found that the exercise reduced the time required to decode vaguely familiar terms and expedite the reading assignment.

Memorization and studying for exams required some technological assistance to produce the information audibly. Since reading poses a particular challenge, it was important to actually hear as well as read an assignment. Both Mac and PC computers contain accessibility tools that will reproduce the content of electronic textbooks and documents audibly, as do most e-readers, such as the Kindle. Combinations of these audible resources improved my ability to learn and retain the information from the assigned reading and my prepared outlines.

To manage the stress of exams, I found the use of the “Pomodoro” time management technique to be helpful. That strategy holds that people are most effective if they work diligently for 25 minutes and then review the work for five minutes. I adapted this strategy to law exams and experienced a reduction in my anxiety and an increase in my performance.

Ultimately, to succeed in law school with a learning disability a student must be willing to develop compensatory strategies to face new challenges. It is important to recognize your weakness and play to your strengths, maintain a positive attitude, and not be afraid to ask for help.

Resources:
• The National Center for Learning Disabilities, http://www.ncld.org

About the Author
Robert Young is a 2014 Washburn University School of Law candidate. He is the vice president of the Washburn Student Bar Association and student co-manager of the school’s Structured Study Group Program. Young is an intern at the Kansas Bankers Association. He is grateful to his wife, Mary, for her patience and understanding, as well as his family for always being supportive. Young can be contacted at byoungkc@gmail.com.
Members in the News

**Changing Positions**

**Christopher C. Barnds** has joined Copley, Roth & Wilson LLC, Overland Park.

**Jordan W. Bergkamp** has joined Hinkle Law Firm LLC, Wichita.

**Nikki L. Copp** has joined Carrier Logistics LLC, Shawnee Mission.

**Dana M. Edwards**, **Jennifer L Hagg**, and **Mary A. Winter** have joined the Johnson County District Court Trustee Office, Olathe.

**Tessa M. French** has joined Miller Law Firm LLC, Liberal.

**Scott T. Hall** has joined the Greater Kansas City Chamber of Commerce, Kansas City, Mo., as vice president of strategic initiative.

**Patrick J. Henderson** has joined Polsinelli P.C., Kansas City, Mo., as a shareholder.

**Kevin B. Johnson** has been named general counsel for Emporia State University, Emporia.

**Joel I. Krieger** has joined Douthit Frets Rouse Gentile Rhodes LLC, Leawood.

**Uzo Nwonwu** has joined Littler Mendelson P.C., Kansas City, Mo.

**Bradley J. Raple** has joined Wallace, Saunders, Austin, Brown & Enochs Cht'd., Wichita.

**Joseph D. Serrano** has joined Kutak Rock LLP, Kansas City, Mo.

**Mark N. Skoglund** has joined Sanders Warren & Russell LLP, Overland Park.

**Lyndsay Spiking** has joined Abbott Davidson & Southard, Kansas City, Mo.

**Changing Places**

**Gregory D. Bangs** has started his own practice, Gregory D. Bangs Law Office, 4745 W. 136th St., Ste. 43, Leawood, KS 66224.

**Stephen J. Blaylock** has moved to 245 N. Ward, Ste. 260, Wichita, KS 67201.

**Keith E. Drill** has started his own firm, Drill Law Firm LLC, 5115 Roe Blvd., Ste. 100, Roeland Park, KS 66205.

**Friend & Associates LLC** has moved to 4200 Somerset Dr., Ste. 208, Prairie Village, KS 66208.

**Michelle M. Masoner** has moved to 1200 Main St., Ste. 3500, Kansas City, MO 64105.

**Randy S. Stalcup** has started his own practice, Law Office of Randy S. Stalcup, 520 W. Douglas Court, PO Box 516, Andover, KS 67002.

**Timothy R. West** has moved to 2600 Grand Blvd., Ste. 1200, Kansas City, MO 64108.

**Catherine A. Zigtema** has started her own practice, Law Office of Kate Zigtema, 8700 Monrovia, Ste. 310, Lenexa, KS 66215.

**Miscellaneous**

**Clapp Ochs Law Firm** has changed its name to Ochs Law Firm, Casper, Wyo.

**Friend Cooper LLC** has changed its name to Friend & Associates LLC, Prairie Village.

**Maughan & Maughan L.C., Wichita**, has changed to Maughan Law Group L.C.

**Chief Justice Lawton R. Nuss**, Topeka, has been appointed to the Conference of Chief Justices’ board of directors at the Conference of Chief Justices’ and Conference of State Court Administrators Annual Meeting in Burlington, Vt.

**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.
Edwin H. Bideau III

Edwin H. Bideau III, 62, of Chanute, died September 5 in Chanute. He was born on October 1, 1950, in Chanute, the son of Edwin H. Bideau Sr. and Beverly Semon Bideau. A fifth-generation Kansan, his family came to the Chanute area as early day pioneers. Bideau was raised in Chanute, and after graduating from Chanute High School and Neosho County Community College, he attended Washburn University where he received his bachelor's degree in business and his juris doctorate.

Bideau served as assistant Neosho County attorney and in 1976 he was elected county attorney, a position he served for eight years. In 1984 he was elected to the Kansas House of Representatives and served two terms, where he served as chair of the House Reappointment Committee and chaired a subcommittee that produced the first Division of Assets bill to help protect the elderly. Over the next 25 years he served on various boards, such as the Eastern Kansas Oil and Gas Association. In 2012, Bideau was elected to the Kansas House of Representatives and served on various committees, including the Judiciary Committee.

He is survived by his wife, Margaret, of the home; son, Scott Bideau; daughters, Sarah Cott and Jennifer Bideau; aunt, Betty Bideau; brothers, David Bideau and Brian Bideau; and four grandchildren.

Glenn Opie

Glenn Opie, 87, of Great Bend, died August 11 in Olathe after a brief hospitalization. He was born April 11, 1926, to Edward and Olive Agnes (White) Opie and was a graduate of Great Bend High School. He went on to serve in World War II as a radio operator aboard the USS Meade DD 602. Opie received his undergraduate degree from Northwestern University and his law degree from the University of Kansas School of Law in 1954.

He was a member and past president of the Barton County Bar Association, where he served 19 years on the Public Information Committee with 11 years as chair. Opie served on the school board for USD 428 for 14 years and the Great Bend City Council for two years. Throughout the years he served as executive director of the Argonne Rebels Drum and Bugle Corps and served as chair of the Jack Kilby Memorial Plaza.

Opie’s investments in his community resulted in the form of several awards, including the Great Bend Jaycees Distinguished Service Award for community service, the Kiwanis Club’s Make Great Bend Greater Award, a member of the GBHS Hall of Fame, and the Great Bend Chamber of Commerce Community Award of Honor for Outstanding Service.

Opie is survived by his wife of 53 years, Sandra; sons, Harlan, of Olathe, and Robin, of Lafayette, Colo.; and two grandchildren. He was preceded in death by his sister, Helen Conner.
For the 22nd time in Kansas History, the Legislature has been called into Special Session. Gov. Sam Brownback took that historic step in response to a request from Attorney General Derek Schmidt.

The attorney general formally requested the special session on July 24, 2013, for the purpose of repairing Kansas’ “Hard 50” sentence following the June 17, 2013, decision of the U.S. Supreme Court in *Alleyne v. United States*. Legal experts in the field agree that the *Alleyne* decision renders the current Kansas “Hard 50” law unconstitutional because the sentencing decision is made by a judge and not a jury.

The Legislature, stakeholders, and legislative staff pored over several proposals and drafts before introducing HB 2002. That bill amends the procedure for imposing a life sentence with a mandatory minimum term of imprisonment of 50 years (the Hard 50 sentence), rather than 25 years, when a defendant is convicted of premeditated first-degree murder. The bill adds provisions setting forth the procedure to be followed for premeditated murders committed on or after the effective date of the bill. The bill also amends the existing procedure for premeditated murders committed prior to the effective date of the bill. The procedures in each situation are similar.

While HB 2002 was a heavily vetted piece of legislation, there was a serious concern that the “retroactivity” provision in the bill would fail the constitutionality test. The retroactivity provision states:

The amendments to subsection (c) by this act: (1) Establish a procedural rule for sentencing proceedings, and as such shall be construed and applied retroactively to all crimes committed prior to the effective date of this act, except as provided further in this subsection; (2) shall not apply to cases in which the defendant’s conviction and sentence were final prior to June 17, 2013, unless the conviction or sentence has been vacated in a collateral proceeding, including, but not limited to, K.S.A. 22-3504 or 60-1507, and amendments thereto; and (3) shall apply only in sentencing proceedings otherwise authorized by law.

Proponents argued that a procedural change can be applied retroactively so long as it does not alter the substantive language of the statute. By merely providing for a new sentencing process, which is in line with the U.S. Supreme Court ruling in *Alleyne*, can HB 2002 apply to defendants who are subject to the Hard 50 sentence?

Opponents of HB 2002 argued that creating a new process for sentencing is a substantive change since the U.S. Supreme Court found the old rule unconstitutional, thereby voiding that statute. By passing HB 2002, opponents argued, the Legislature has re-created the Hard 50 policy that is a substantive change to the criminal code.

How the courts interpret this change will take some time but revisiting the Hard 50 policy is not out of the realm of possibilities.

For more Hard 50 news, please see:


The stated reason for the Special Session was to amend the Hard 50 rule, however, the confirmation hearing for Caleb Stegall did attract a serious number of interested parties. Brownback made Stegall his very first appointment under the newly adopted selection process. This new process allows the governor to nominate an individual and the senate to confirm the nomination. It is often called the federal model but this process lacks the lifetime appointment provision that provides a great deal of independence to the federal system.
The governor argued for a change to the selection process for the Kansas Court of Appeals with the aid of his chief counsel Stegall.

Stegall, along with 18 other individuals, applied for the vacant 14th Court of Appeals position. The governor formally nominated Stegall on August 22. The Senate held Stegall’s confirmation hearing on September 3 and the full Senate confirmed him on September 4. The final vote was along party lines 32-8.

Stegall had a majority of individuals willing to support his nominations but Democrats decried the process by which he was nominated. Democrats argued that the new process was secretive and less open than the merit selection process. Brownback refused to release the names of the 18 applicants. It had been tradition for the Supreme Court Nominating Commission to make public this information, along with holding open interviews and allowing resumes to be viewed. See Irony swirls around Brownback’s cloak of judicial secrecy, Topeka Capital-Journal, http://bit.ly/19Hy51Q.

In addition, several Kansas lawyers, two who wrote letters of recommendation for Stegall, found the new process unappealing. One even stated that the new process weakened Kansans’ confidence in their judges. See Notable Kansans weighing in against new appellate court selection process, LJWorld.com, http://bit.ly/18UrCrK.

Nevertheless Stegall was easily confirmed. However, it appears likely that Democrats will push to alter the selection process by making the application process more open. Sen. Anthony Hensley has pre-filed a bill for the 2014 session that would require the governor to release the names of any applicants. How this is received in January may shape the entire session.

Reaction to the Stegall nomination:

- Senate easily confirms Stegall to appellate court, CJOnline.com, http://bit.ly/1c2h9lf

About the Author

Joseph N. Molina III is the director of governmental and legal affairs for the Kansas Bar Association. Prior to joining the KBA, he was chief legal counsel for the Topeka Metropolitan Transit Authority, where his practice involved insurance subrogation, and labor and employment law. He also previously served as an assistant attorney general, acting as the chief of the Kansas No-Call Act. Molina holds a Bachelor of Arts in political science, philosophy, and economics from Eastern Oregon University and a juris doctorate from the Washburn University School of Law.
E-Discovery 2.0
By Lumen "Lou" Mulligan and Joy Isaacs
I. Introduction

Today, the majority of documents requested for production in civil litigation are in electronic form—commonly referred to as electronically stored information (ESI). It is no secret that, with the explosion in volume of ESI, collecting and producing this data is often difficult, time consuming, and expensive. This runs contrary to the goals embedded in the Rules of Civil Procedure that civil litigation should be “just, speedy, and inexpensive.” Predictive coding, a new process for producing ESI that employs advances in computer science, offers great promise to remedy this sorry state of affairs. In this article, we introduce predictive coding and discuss how it may affect practice in Kansas.

The virtual world continues to grow at a breathtaking pace, which increasingly becomes unmanageable for litigators employing traditional methods of e-discovery, such as Boolean search terms or “conceptual” searches. According to a 2012 study by International Data Corp., from 2005 to 2020 the digital universe will grow exponentially from 130 exabytes to more than 40,000 exabytes, doubling in size every two years. For some context, consider the following chart. In just seven more stages, notification is sent to custodians of data, advising them of the legal hold notification and acknowledgement. During this stage, notification is sent to custodians of data, advising them of their obligation to preserve potentially relevant information.

<table>
<thead>
<tr>
<th>Bit (0 or 1)</th>
<th>smallest unit of storage in a computer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Byte (8 bits)</td>
<td>one character, for example, the letter “a”</td>
</tr>
<tr>
<td>Kilobyte (1,024 bytes)</td>
<td>a joke or very short story; 1/2 a typewritten page</td>
</tr>
<tr>
<td>Megabyte (1,048,576 bytes)</td>
<td>a small novel</td>
</tr>
<tr>
<td>Gigabyte (1,073,741,824 bytes)</td>
<td>paper filling the bed of a pickup truck; a broadcast quality movie</td>
</tr>
<tr>
<td>Terabyte (1,099,511,627,776 bytes)</td>
<td>printed collection of the U.S. Library of Congress</td>
</tr>
<tr>
<td>Petabyte (1,125,899,906,842,624 bytes)</td>
<td>all printed material worldwide</td>
</tr>
<tr>
<td>Exabyte (1 quintillion bytes)</td>
<td>all words ever spoken by human beings could be stored in 5 exabytes</td>
</tr>
</tbody>
</table>

The volume of ESI produced during typical civil litigation mirrors this growth. Email, one of the most commonly requested forms of ESI, is a major culprit. In 2010, for instance, emailers sent more than 107 trillion emails—about 294 billion email messages per day. That traffic translates directly to exponential growth in e-discovery volume. For example, one e-discovery vendor reports that its average case size in 2007 of 16 gigabytes of ESI has grown to an average of more than 120 gigabytes per case in 2011. Assuming an industry standard of 10,000 documents per gigabyte of ESI and assuming that a reviewer of ESI can get through 50 documents per hour, it would take one attorney approximately 24,000 hours to review the documents in an average case in which e-discovery vendors are deployed. Even at $100 per hour, this document review comes in at a cool $2.4 million. Other estimates place traditional e-discovery costs at $30,000 per gigabyte, which comes in at $3.6 million for our 120 gigabyte case. No wonder clients are screaming.

Predictive coding may aid in reversing this trend. The process, based upon relatively new advances in technology that combine human interaction with sophisticated algorithms, functionally “learns” which documents a litigator is looking for in the discovery process. And it does so at a fraction of the time and cumulative cost imposed by traditional search and manual review processes.

In Part II we first provide a brief overview of the e-discovery process. Next, we illustrate the traditional methods of e-discovery and the problems that have arisen with them. In Part III a discussion follows of what predictive coding is, how it works, and the types of cases where it would be appropriate. We end with a discussion of the courts’ treatment of predictive coding and the potential impact this new technology may have for Kansas practitioners.

II. Overview of the E-Discovery Process

Before examining both the traditional and potential future methods of e-discovery, we first need a general understanding of how the e-discovery process works. For practitioners who are not familiar with the process, electronic discovery typically proceeds in the following chronological steps:

1. Legal Hold. The initial step in the e-discovery process is the legal hold notification and acknowledgement. During this stage, notification is sent to custodians of data, advising them of their obligation to preserve potentially relevant information.

2. Identify ESI. The next stage requires custodians of data to identify potential sources of ESI and traditional documents that may be relevant to the suit. The scope of relevant documents can be quite vast, given that a party may obtain discovery regarding any nonprivileged matter that is relevant to a party’s claim or defense. More specifically, K.S.A. 60-234 provides that “[a]ny designated documents or ESI, including writings, drawings, graphs, charts, photographs, sound recordings, images and other data or data compilations, stored in any medium from which information can be obtained” are discoverable. Additionally, this vast virtual treasure trove of ESI often is stored across numerous server types (e.g., file servers, collaboration servers, email servers), interrelated data management systems (e.g., document management systems, financial systems, back-up systems), and devices that users have employed to utilize the data (e.g., desktop computers, photocopiers, calendars, instant messaging (IM), text, PDAs and cell phones, smart phones, and memory cards). The rapid pace at which both government and business entities are moving their data to cloud environments further complicates this storage-location issue. Following the identification of potentially discoverable ESI, under the federal rules a party must, without awaiting a discovery request, disclose to other parties a copy or a description by category and location – of all documents, ESI, and tangible things that the disclosing party has ... [that it] may use to support its claims or defenses.” The Kansas rules, however, do not impose such a non-requested disclosure regime.
| Legal Article: E-Discovery 2.0 |

### III. Traditional Methods of E-Discovery Collection and Review

While all of e-discovery is expensive, the collection and review/analysis stages tend to create the lion’s share of costs. Prior to predictive coding, lawyers relied on two basic approaches to cull through this volume of ESI: (1) the linguistic approach and (2) the concept approach. We turn now to a brief discussion of the strengths and weaknesses of both approaches as a prologue to our examination of predictive coding methodology.

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#### E-Discovery Process

<table>
<thead>
<tr>
<th>Legal Hold</th>
<th>Identify ESI</th>
<th>Preserve ESI</th>
<th>Collect ESI</th>
<th>Review ESI</th>
<th>Process ESI</th>
<th>Produce ESI</th>
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**Legal Hold**
- **Identify ESI**
- **Preserve ESI**
- **Collect ESI**
- **Review ESI**
- **Process ESI**
- **Produce ESI**

(3) **Preservation.** The preservation step mandates that custodians preserve ESI in a reasonable and efficient manner that mitigates risk of destruction. Both active and inactive data may need to be preserved. In the preservation phase, it may also be necessary to suspend normal processes that automatically delete or change ESI. While neither the Kansas nor the Federal Rules demand perfection in preservation of ESI, the duty is not to be undertaken lightly. Thus, a custodian of data must be especially careful in this phase since a failure to preserve potentially relevant information, absent accidents resulting from good-faith operation of IT systems, could result in outcome-determinative sanctions.

(4) **Collection.** The collection phase involves the acquisition of potentially relevant ESI and its metadata, as defined in the identification stage. Generally before collection begins, the parties will hold a conference to discuss what ESI must be collected and the form in which it must be collected and produced. To reach an agreement on ESI collection, counsel must understand the types of ESI that can be produced and know in what form to request production. Both the Federal and Kansas Rules require ESI to be produced “in a form or forms in which it is ordinarily maintained,” or in a “reasonably usable form.”

During this phase, producing parties may object to the scope of discovery requests. Under both the federal and Kansas rules, a court may limit the frequency or extent of discovery if it determines that the discovery is unreasonably cumulative, if the party seeking discovery has had ample opportunity to obtain the information by discovery, or if the burden or expense of proposed discovery outweighs its likely benefit. Moreover, K.S.A. 60-226(b)(2)(iii)(B) provides that a “party need not provide discovery of ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost.” After these decisions have been made, or objections adjudicated, a custodian of data should consider different approaches to collection of ESI, which might include collection by employees, by IT personnel, or by an outside service provider.

(5) **ESI Processing.** After collection, the data must be processed. The processing stage involves formatting ESI so that it can easily be searched and read. This often requires extracting files from folders, such as .zip and other compressed formats, separating attachments, extracting text and metadata, and de-duplicating identical files.

(6) **Document Review by Producing Party.** Document review is the procedure through which responsive documents are separated from documents that will be withheld pursuant to privileges, work-product doctrine, or the like. While different strategies can be implemented when reviewing documents in preparation for production, “the common thread is the need (a) to understand the scope of the review, (b) to put in place supervision and procedures for managing the reviewers, and (c) to select the appropriate vendor, tools and platform for the review.” Of course, inadvertent disclosure of protected or privileged ESI is an ever-present risk, which while beyond the scope of this article, is a matter that should be addressed at this stage and in claw-back agreements made during the discovery and scheduling conferences. This process typically involves “manual review” (i.e., document-by-document reading of ESI by attorneys) for some substantial portion of the ESI, which in turn generates significant costs.

(7) **Analysis by Producing Party.** Analysis, though listed here after the review stage, should in practicality be employed throughout the entire e-discovery process. It is imperative to analyze the content of ESI to determine relevant information like specific topics, pertinent vocabulary, and key players. This type of analysis allows for increased productivity and can be crucial in helping to develop a litigation strategy early on. Analysis should also be done regarding the scope of data at issue, with the goal being to predict how much data must be preserved, collected, and processed; how much a full discovery effort might cost; and what the benefits and risks of discovery might entail.

(8) **Production.** The final stage in the e-discovery process is that of production. Negotiation by the parties about the form in which documents are to be produced will have occurred before the documents are prepared.

Bearing in mind the volume of ESI often involved, it should be readily apparent why costs quickly mount in the traditional production of ESI. Additionally, the varying characteristics of several types of ESI from email threads, to attachments, to metadata, to embedded data can sometimes create obstacles in reviewing the ESI. In the remainder of this article, we primarily focus on the collection and review/analysis stages. It is within these functions that predictive coding presents the most promise as a cost saving tool.
A. The Linguistic Approach to E-Discovery

The linguistic approach to collection and review uses variations of keywords in order to find and sort relevant documents. Those methods often include keyword, Boolean, synonym, related words, and grouping searches, which may be employed as stand-alone tools or coupled together in an effort to increase the filtering of data. The tools, while at times acceptable for low volumes of ESI, quickly lose cost-effective utility when parties deal in multiple gigabytes of data.

Linguistic tools deploy several related methodologies to sort through ESI. First, one may use keywords to restrict the number of relevant documents, which may be either inclusionary or exclusionary in nature. If a search is inclusionary, ESI containing specified keywords is separated into a database for lawyers to manually review. Conversely, an exclusionary keyword search excludes documents that are likely not relevant, leaving the remainder for manual review.

Similarly, parties may search a data set using both keywords and synonyms for those keywords. Often this is done in an iterative fashion, where the requesting party repeats searches after viewing the commonly used synonyms. For example, in a product liability case, an opponent may refer to admitted design or construction defects as “mistakes,” “errors,” “flaws,” “goofs,” or “flubs.” Once those keywords are identified, a synonym search can quickly produce other ESI that is relevant.

Closely related to the keyword search is the Boolean search, which uses logic operators like “AND,” “OR,” and “NOT” between keywords that indicate a relationship between them. The Boolean connectors permit more complex searches than a keyword search, which in turn can reduce false positives by increasing the filtering criteria on the document selection process. Boolean searches, thus, use a syntax similar to mathematical operators and are like keyword searches in that they can be helpful in reducing a large volume of ESI into a more manageable size. Further subsets of this strategy include searching using related words and grouping. A related word search allows the searcher to specify words that are related to an original word. Grouping searches use keywords to specify the precise order of evaluation of Boolean search instructions. To search using a grouping technique, the syntax that would be employed in a Boolean search would be: (A OR B) AND (B OR C). Grouping by parentheses allows individual expressions to be evaluated per the parentheses.

These linguistic approaches, while valuable in some contexts, have come under fire. Critics suggest that the primary deficiencies include: inability to detect the use of slang, ambiguity in word meaning, inability to recognize typos and misspellings, failure of the imagination of searchers, and the potential for under-inclusivity. This is to say nothing about the extensive manual review component that follows hundreds of billable hours—inherent in linguistic searches.

Likewise, courts have been quick to criticize the use of linguistic approaches. One federal court recently noted that “simple keyword searching is often not enough,” and it characterized the way lawyers choose keywords as the “equivalent of the child’s game of ‘Go Fish.’” Similarly, a federal judge recently opined that “[g]iven th[e] complexity, for lawyers and judges to dare opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread.”

B. The Concept Approach to E-Discovery

The other widely used approach for sorting ESI is concept searching. In contrast to a linguistic approach, a concept search attempts to locate ESI that relates to a targeted concept without the presence of a particular word or phrase. For example, a concept search will recognize that documents mentioning polar bears and igloos may be related to Alaska, even though the documents do not specifically reference Alaska. Within the overarching umbrella of concept searching there are a number of sub-methodologies.

One such approach relies on taxonomies and ontologies to sort documents that are conceptually related to the targeted topic. A taxonomy is a hierarchical list of categories that measures relatedness to a targeted concept. For example, when searching for the target “cars,” a concept search applying taxonomy could move up or down the hierarchy to find documents that talk about “vehicles,” “SUVs,” “pickups,” “my wheels,” etc. An ontology concept search can also find things that are related to one another, but it is dissimilar to a taxonomy search in that the concepts are not required to be hierarchically ranked. For example, documents containing the terminology of “case,” “matter,” “lawyer,” and “judge” could be conceptually related to one another and would likely appear in a concept search that exercises ontology.

Sophisticated searches can deploy both the ontology and taxonomy methods and rely on information collected from the lawyers and witnesses about the key factual issues in the case—the people, organization, and key concepts relating to the business as well as the idiosyncratic communications that might be lurking in documents, files, and emails.

Another form of concept searching utilizes mathematical probabilities to demonstrate that text in a particular document is associated with a conceptual category. This technology functions by selecting a small number of responsive documents and classifying them by category. Technology using this approach then has the ability to recognize other responsive documents in the larger collection and place them in corresponding categories. This can be extraordinarily helpful in finding ESI that is in code language or that uses neologisms, especially when the searcher is not sure what these codes might be. For example, a labor attorney searching for evidence that management was targeting younger workers in a union might not know to search for the term “n00b” as a neologism for “newbie,” but nevertheless the process will select those documents as relevant.

Concept searches, while powerful, come with significant downsides. The two main complaints are its over-inclusivity and the problem of polysemy. Although concept searches can help with the under-inclusivity problem that pesters keyword searches, they often dramatically shift the results to the opposite end of the spectrum and become over-inclusive. For example, if an employment attorney administers a concept search to find documents relating to employees who have been “terminated,” technology would automatically look for conceptually related terms like “fire” and “dismiss.” Thus, the search would find more relevant documents related to the
Computer assisted analysis has been generically entitled “predictive coding.” Predictive coding, thus, takes a sociological approach to e-discovery by adding an inferential layer of analysis that mimics human deductive powers of reasoning by using “sophisticated algorithms … [that] enable the computer to determine relevance, based on interaction with a human reviewer.” To provide context from which to understand the potential game-changing effect that predictive coding could have, we first provide an overview of how predictive coding works and cases in which it can be properly deployed.

We then turn to a discussion of the cost of implementing the technology and the judicial treatment of predictive-coding approaches to e-discovery in other jurisdictions.

A. How It Works

The predictive coding approach begins with a team of litigators reviewing and coding a small group of data, called a seed set, which can be derived or grouped in any number of ways (e.g., through keyword or concept searching). Using the seed set, the reviewers make coding determinations as to what is or is not relevant to a particular topic. The computer then identifies the properties specific to the seed set of documents and uses it to code other documents. The attorney reviewers, in an iterative process, then read and score a small sample of these results. As the reviewers continue to code more sample documents, the computer “learns” to predict the reviewer’s coding, “continually moving increasingly responsive documents to the top of the review pile, winnowing the number of documents it deems responsive and that humans must review.”

Typically, the reviewing attorneys will only need to review a few thousand documents, out of 120 gigabytes of ESI, to train the computer to identify the ESI that is most relevant. When the “system’s predictions and the reviewer’s coding sufficiently coincide, the system has learned enough to make confident predictions for the remaining documents.”

Lawyers then do a manual review to statistically sample the responsive and nonresponsive results to determine whether the computer’s codification meets a predetermined acceptable level of confidence. Depending on the particular e-discovery vendor’s technology, “some systems produce a simple yes/no as to relevance, while others give a relevance score (say, on a 0 to 100 basis) that counsel can use to prioritize review.”

Implementing predictive coding in e-discovery does not change the general e-discovery process. Rather, it modifies the collection and review stages, making them substantially less reliant upon manual review by attorneys. Instead of the stages being completed in a linear fashion, as illustrated by the graphic above, they become cyclical, as is illustrated by the graphic below.

An example is helpful to illustrate what predictive coding is and how it differs from traditional search methods. If, for instance, one of the issues in your case was finding ESI addressing the opposing party’s analysis of market share in the coffee industry, the computer in the predictive coding model would learn from documents previously scored as relevant that documents about “getting a Starbucks coffee” are not relevant. As predictive coding is an iterative process, future rounds in the process where the computer suggests likely relevant documents will contain fewer and fewer false positives. As such, the computer will suggest more ESI about what we care about (i.e., coffee market share) and fewer false positive documents (i.e., emails about office coffee breaks). By contrast, a keyword or conceptual search approach cannot “learn” which ESI the human reviewer finds relevant. Keyword and conceptual search approaches, as such, do not improve over time. Rather, with keywords or conceptual searches, a human document reviewer must manually look at all documents referring to Starbucks coffee, or the like, in order to eliminate the false positives. With predictive coding, on the other hand, fewer of those false positives will appear as relevant as the review process progresses.

In addition to understanding what predictive coding is, it is crucial to understand what predictive coding is not. Predictive coding is not “auto-coding.” Auto-coding, which is also known as automatic concept indexing, “occurs when a software program extracts terms contained within text and maps them to a standard list of concepts contained in a nomenclature.” In auto-coding, the computer essentially makes a judgment on which category a document belongs in, for example, whether a document is privileged, responsive, etc. The human interaction component is missing in auto-coding to assess whether the determinations made by the computer are correct. Moreover, predictive coding does not claim to be a panacea to all the challenges that plague traditional methods of e-discovery. Rather, when used best, it serves as a supplement to other approaches that can help improve efficiency and thereby reduce costs.

B. When to Use Predictive Coding

Predictive coding can effectively be used in e-discovery in two ways: (1) to search and find information and (2) to speed
up review of documents prior to production. In the culling out phase, predictive coding can be especially helpful in identifying key ESI, an initial set of keywords, or clearly non-responsive data. Although a valuable tool, predictive coding is not a perfect fit in every case. Specifically, it would not be appropriate in cases when there are small document sets, document sets containing non-standard document types, and document sets with a high percentage of paper documents or image files with text generated by optical character recognition software. Either manual review or one of the more traditional methods of e-discovery would be better suited for these types of situations. Conversely, cases that are a good fit for the use of predictive coding include those with large volumes of documents, especially documents that lend themselves to the use of linguistics as opposed to documents containing graphics, blueprints, or the like.

C. Efficacy of Predictive Coding

Of course, counsel will only feel comfortable with predictive coding if it is effective. That is to say, most practitioners will opt for predictive coding only if they can “demonstrate to opposing parties, courts, and government agencies that [their] chosen method and tool accurately captured a reasonably sufficient number of the relevant, nonprivileged ESI in existence, and that the remaining unreviewed and unproduced ESI is irrelevant.” At least for now, studies are finding that predictive coding passes this test. The leading evidence on this score appears in a 2011 article that challenges the assumption that manual document review is the gold standard in document review. The results of this relatively extensive study found that manual review unearthed an average of 60 percent of the relevant documents out of an ESI data set, while predictive coding was able to identify an average of 77 percent of the relevant documents. That is to say, predictive coding produces substantially higher quality results than manual review in large data sets, and as compared with keyword or conceptual searches, the qualitative advantages grow even more.

D. Cost of Predictive Coding Technology

The costs associated with the civil discovery of ESI can often become crippling in complex cases. As one widely cited study found, it is the process of manually reviewing documents during large e-discovery suits that accounted for 73 percent of document production costs. Rubbing salt in this wound, under current practices only “.0074% of the documents produced actually [make] their way onto the trial exhibit list—less than one document in ten thousand.” Predictive coding—which promises to substantially lessen the need for manual review and produce a higher quality return of relevant documents—may change this cost analysis radically in large ESI cases.

Illustrating this point, one study used predictive coding to search an Enron database containing nearly 700,000 documents. In the study, a predictive coding search took only nine days to complete, requiring only 52 hours of work by the human document reviewer to train the computer system. Thus, using predictive coding, the computer was able to sort through an average of 13,444 documents per hour. Using older methods to review this same Enron dataset exponentially increases time and costs. First, manual review just cannot come close to the predictive coding rate of 13,444 documents per hour. The average human document reviewer can process an average rate of just 50 documents per hour. Given this, relatively speaking, slow rate of review, large ESI cases employing older e-discovery methods must engage entire teams of document reviewers to process all the ESI produced. In order to review all documents in the Enron database at the average rate of 50 documents per hour, it would take a document review team approximately 14,000 hours cumulatively to complete the task. This means that if this document review team had seven members it would take a year (assuming each member billed 2,000 hours a year) to complete the review of the entire Enron data set. Contrast this with the nine-day time line for the predictive coding approach.

This increase in time directly affects costs. Assuming that a team of contract attorneys would bill out at a low rate of $50 an hour, at 14,000 hours this project would still generate a fee of $700,000. Thus, even with a low-cost review team, this comes to about a $1 a document to review. In a world of terabytes, this $1 per document rate quickly explodes budgets. To make matters worse, a $1 per document rate is hopelessly optimistic. For example, looking at costs for a similarly sized database using a keyword search, DOJ lawyers in the case of In re Fannie Mae Securities Litigation reviewed 660,000 electronic documents. They racked up a bill of $6 million, which averages out to just more than $6.09 per document.

Switching back to the predictive coding approach and the Enron dataset—where the reviewing attorney only billed 52 hours to process the entire Enron dataset—we see the cost savings in dramatic fashion. Even if we assume that the human reviewer in that scenario was a partner in a Wall Street firm who billed out at $1,000 per hour, the human review costs would top out at $52,000. The savings in cost and time in the predictive coding process is self-evident. Of course, effective use of linguistic and conceptual searches would decrease the time and costs of the non-predictive coding approaches. (Our figures above assumed a manual review of all 700,000 documents in the Enron dataset.) Even if they decreased the number of documents left for manual review by three quarters, the point remains that these older tools would leave heaps of documents for manual review, increasing time and costs substantially.

These examples are admittedly skewed because costs such as vendor costs, transaction costs, carrying costs, motion costs, etc. are not part of the predictive coding calculation. However, this omission is due in large part to the fact that “there simply are not many data points to use when comparing this process with the way litigants currently conduct review of electronic documents.” Even when factoring these costs in under real world conditions, predictive coding in large ESI matters may well save both a lot of time and money.

So how much does predictive coding really cost? We wanted to know that too. For business reasons, e-discovery vendors that provide predictive coding services are hesitant to openly discuss costs in the abstract. Drew Lewis, e-discovery counsel at Recommind, a predictive coding vendor, was willing to discuss with us the options that a practitioner wishing to implement predictive coding would have.

There are three main predictive coding options that practitioners can choose from: (1) a hosted solution; (2) a subscrip-
Landow Aviation,82 and cases, the courts are embracing predictive coding as well. Three it is an option. “is an acceptable way to search for relevant ESI in appropriate studies that illustrated predictive coding to be at least as accu-
oscillating platforms.80 This option, Mr. Lewis noted, is probably not outright and directly incorporate it into their own technol-
ject. The second option, the subscription model, allows a firm to buy tiers of data. Mr. Lewis explained that under this cost structure, firms buy subscriptions for unlimited data, which allows them to use predictive coding, as well as a vendor’s other analytic tools, as much as they want during the period of the subscription. Or firms could choose to buy a terabyte per year or a certain number of gigabytes per year. The advantage of this model is cost predictability.79

The final option allows a firm to buy a vendor’s technology outright and directly incorporate it into their own technology platforms.80 This option, Mr. Lewis noted, is probably not feasible for many firms given the high cost; but nevertheless, it is an option.

E. Judicial Adoption of Predictive Coding

Given the promise of both reduced cost and higher quality, the courts are embracing predictive coding as well. Three cases, Da Silva Moore v. Publicis Groupe,81 Global Aerospace v. Landow Aviation,82 and EORHB Inc. v. HOA Holdings LLC,83 made headlines in 2012 as the first to garner judicial approval of predictive coding. Given the successes in those cases, practitioners should expect, in appropriate cases, that Kansas judges on the state and federal benches will soon come to expect counsel to adopt predictive coding methodology as well.

In Da Silva Moore, five female plaintiffs brought suit against Publicis Groupe, an advertising conglomerate, for gender discrimination claims in federal court.84 There were more than 3 million electronic documents in the defendant’s possession to be culled through.85 The defendant stated its intention to use predictive coding to comply with plaintiffs’ discovery requests, which garnered an objection. The plaintiffs did not object to the defendant’s use of predictive coding per se; rather their objection hinged on reliability. The plaintiffs asserted that the defendant’s proposed use of predictive coding “lack[ed] the necessary standards for assessing whether its results are accurate; in other words, there is no way to be certain if [the defendant’s] method is reliable.”86 Citing two recent studies that illustrated predictive coding to be at least as accurate as human review, the court found that predictive coding “is an acceptable way to search for relevant ESI in appropriate cases.”87 The court grounded its holding on five criteria that will likely be useful touchstones in future Kansas cases and in other jurisdictions that model their discovery systems upon the federal rules.88 First, the court noted that the parties had already agreed to use computer-assisted review. Second, the court found that the volume of ESI in the case was substantial. Third, the court concluded that given this expansive data set, predictive coding was qualitatively superior to available alternatives. Fourth, the court concluded that predictive coding in the case would satisfy the need for cost effectiveness and proportionality under Federal Rule of Civil Procedure 26(b). Finally, the court ruled that the transparency of the proposed review process presented by the defendant was significant to its approving the methodology.

Similarly, in Global Aerospace v. Landow Aviation,89 the defendant filed a motion seeking judicial approval of the use of predictive coding when the parties could not agree on how to review the 250 gigabytes of ESI.90 The plaintiffs argued that predictive coding was not as effective as traditional keyword searches coupled with manual review, but the Virginia state court approved the defendant’s use of predictive coding.91

One court has even ordered the use of predictive coding sua sponte. In EORHB Inc. v. HOA Holdings LLC, a complex commercial indemnity suit arising out of the sale of a national restaurant chain, a Delaware chancery court announced that the parties had to use predictive coding unless they could show cause why predictive coding would not be appropriate.92 Although neither of the courts in Global Aerospace or EORHB Inc. clearly articulated specific reasoning as to why the use of predictive coding was approved, we surmise that, similar to Da Silva Moore, the volume of ESI in Global Aerospace and EORHB Inc., combined with the need for cost efficiency,93 outweighed the objections to using traditional methods of review.

In addition to these orders, several courts have urged parties to consider the use of predictive coding.94 For example, in the United States District Court for the Southern District of New York, the judge urged the parties to consider whether predictive coding could reduce the burden and cost of complying with a subpoena for documents.95 Another federal court found that, due to the advent of predictive coding, a defendant was not subject to an overwhelming burden by having to produce 45,000 pages of documents.96 Given that Kansas e-discovery closely mimics federal practice, there is no reason why Kansas courts should not follow those courts—in particular the thoughtful opinion in Da Silva Moore—and order the use of predictive coding in appropriate cases. Technological advances, such as the use of keyword searching and de-duplication, have already been wholeheartedly embraced by our courts as acceptable tools to reduce the volume of documents that must be manually reviewed. Predictive coding is simply another method of reducing the volume of documents that humans must review prior to production. Moreover, courts in other jurisdictions recognize that the use of technology to improve the quality of document review is defensible as long as the “party selecting the methodology [is] prepared to explain the rationale for the method chosen to the court, demonstrate that it is appropriate for the task, and show that it was properly implemented.”97

Further, counsel should re-think stock discovery requests in light of this new technology. The traditional Rule 34 request to produce documents, for example, is undergoing a change in light of these advances in technology. A traditional request to produce email might look like this:

Produce any and all information related to email, including but not limited to current, backed-up and
According Mr. Lewis, due to the exponential increase in ESI, in most cases it is no longer possible to produce “any” and “all” email in a particular case.98 Requests for production are beginning to look much more sophisticated, as negotiations between counsel for production of ESI is starting much earlier during the Rule 16 conferences99 in federal courts and under Rule 26 initial disclosures.100 But, of course, this is just the tip of the iceberg of changes that predictive coding is likely to bring.

V. Conclusion

Predictive coding is becoming a game changer. In cases involving a high volume of electronically stored data that is conducive to linguistic searches, predictive coding promises a more “just, speedy, and inexpensive determination” when used appropriately.101 Given that predictive coding technology, at least in the studies to date, is more effective than traditional methods of e-discovery and conforms closely with the spirit of Rule 1, we expect that Kansas courts will not just allow the use of predictive coding in the near future, but in fact will likely order it when discovery disputes arise. Moreover, this new era in e-discovery promises to disrupt now-familiar business models. As a result, smaller firms that previously did not have sufficient people-power to take on high-data-volume cases now will be able to compete for that business. This could well accelerate the process of “in-sourcing” complex cases from the mega-law firms in huge cities (which come with huge costs for clients) to medium and small firms in locales with lower cost structures. In this regard, Kansas practitioners may well be the most well placed to take full business advantage of predictive coding.

ENDNOTES

3. Although a 2011 survey of more than 2,000 enterprises worldwide found that the most requested form of ESI is document files and databases, e-mail is still requested more than 58 percent of the time during legal and regulatory processes. Evan Koblenz, Symantec: Files, Databases Overtake E-mail in E-Discovery, L. TECH News (Sept. 19, 2011), http://www.law.com/jsip/lawtechnologynews/NewsArticleLTN.jsp?id=1202514713022&Symantec_Files_Databases_Overtake_EMail_in_EDiscovery=&et=editorial&bus=LTN&cn=LTN_20110919&src=EMG-Email&tp=Law%20Technology%20News&kw=Symantec%3A%20Files%2C%20Databases%20Overtake%E2%80%8C%23%20Return=2013031281145.
8. This assumes the industry standard of 10,000 documents in a gigabyte, divided by fifty documents reviewed per hour, times the average of 120 gigabytes of documents in a case.
9. Experts estimate that conducting electronic discovery can cost in excess of $30,000 per gigabyte. Degnan, supra note 6, at 151 (citing Herbert L. Roitblat, Search & Information Retrieval Science, 8 SEDONA CONF. J. 192, 192 (Fall 2007)).
10. These steps are adapted from the Electronic Discovery Reference Model Project (EDRM), which was created in 2005 to address the lack of standards in the e-discovery market. The Project is composed of 900+ vendors, e-discovery experts, and end-users from more than 250 organizations, all sharing the core objective of seeking to improve the electronic discovery process by establishing guidelines, setting standards, and delivering resources. ELECTRONIC DISCOVERY REFERENCE MODEL PROJECT, http://www.edrm.net/joining-edrm/frequently-asked-questions#faq_1 (Aug. 4, 2013).
12. K.S.A. 60-234(a)(1)(A); Fed. R. Civ. P. 34(a)(1)(A) (emphasis added). ESI is not specifically defined; however, an advisory committee note to the 2006 amendments to the Federal Rules asserts that the “wide variety of computer systems currently in use, and the rapidity of

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14. A 2011 survey by IBM illustrates the "growing adoption of cloud computing among midsize firms, with two-thirds either planning or currently deploying cloud-based technologies to improve IT systems management while lowering costs." IBM Study: Midsize Businesses Increasing IT Budgets; Investing in Analytics and Cloud Computing, IBM (Jan. 14, 2011), http://www-03.ibm.com/press/us/en/pressrelease/33390.wss. This paradigm shift in data storage and management is significant because it affects the level of control that agencies and businesses will have over the information stored. In turn, this can impact the capability to search, preserve, collect, and produce data when necessary. See Chris May, Seeing Into the Cloud: How to Mitigate Potential Ethical and Security Issues, A.B.A. Fed. Law., Vol. 60, Issue 3, at 71, 74 (Apr. 2013).


16. Active data is that accessed frequently or continuously as part of a business process and is likely to be modified. Active Data, Bus. Directory, http://www.businessdictionary.com/definition/active-data.html (Aug. 4, 2013). As such, it is usually more readily accessible. In contrast, inactive, archived, residual, or legacy data is accessed less frequently and is often more difficult to identify and preserve. See E-Discovery Basics: The E-Discovery Life Cycle, Gibson Dunn (May 23, 2011), http://www.gibson dunn.com/publications/pages/E-DiscoveryBasics-E-DiscoveryLifeCycle.aspx.

17. The advisory committee note to the 2006 amendment also proffers that "[g]ood faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation." Fed. R. Civ. P. 37 Advisory Committee Notes, 2006 Amendment.

18. K.S.A. 60-237(3); Fed. R. Civ. P. 37(e). Pursuant to 60-237(e), a court cannot impose sanctions for failure to provide ESI "lost as a result of the routine, good-faith operation of an electronic information system." The advisory committee note to the 2006 federal amendment of Rule 37 conveys that the good faith requirement means that a "party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve." Fed. R. Civ. P. 37 Advisory Committee Notes, 2006 Amendment.

19. Courts have imposed various sanctions for spoliation of ESI resulting from a party's failure to ensure that a preservation order is followed. See, e.g., Plasse v. Tyco Elecs. Corp., 448 F. Supp. 2d 302 (D. Mass. 2006) (dismissing a case when plaintiff failed to preserve and produce electronic documents after he was on notice of the contents were at issue in the litigation); Northington v. Hed&M Intl, No. 08-CV-6297, 2011 U.S. Dist. LEXIS 14366 (N.D. Ill. Jan. 12, 2011) (awarding costs and fees for sanction motions and gave a jury instruction that defendant had a duty to preserve ESI and failed to meet that duty when defendant did not take steps to preserve relevant electronic evidence until 15 months after plaintiff filed complaint); Leon v. IDX Sys. Corp., No. 03-1158P 2004 WL 5571412 (W.D. Wash. Sept. 30, 2004), aff’d, 464 F.3d 951 (9th Cir. 2006) (upholding sanction of dismissal when party intentionally deleted files and wrote a program to try to write over deleted documents on a laptop after ample notice of litigation given).

20. Metadata is data about data. "It is information that describes electronically archived data about something: the date it was created, a short description, title." What is Metadata?, ACCESS INNOVATIONS, http://www.accessinn.com/library/questions/what_is_metadata.html (Aug. 4, 2013). For example, when saving a digital photo to your computer, there is already metadata attached to it: the date the picture was taken, the lens aperture, resolution, flash mode, and time of day. Id.; see also Williams v. SprintUnited Mgmt. Co., 230 E.R.D. 640, 647 (D. Kan. 2005) (citing Appendix E to The Sedona Guidelines) (holding that employer failed to show cause why it should not produce electronic spread-sheets in the manner in which they were maintained, which would include the files’ metadata). “Certain metadata is critical in information management and for ensuring effective retrieval and accountability in record-keeping. Metadata can assist in proving the authenticity of the content of electronic documents, as well as establish the context of the content. Metadata can also identify and exploit the structural relationships that exist between and within electronic documents, such as versions and drafts ... “ Id.

21. Under the Federal Rules, parties are required to meet and confer as soon as practicable, or at least 21 days before a scheduling conference is held. Fed. R. Civ. P. 26(f)(1). At that time, parties are required to develop a proposed discovery plan, which includes "issues about disclosure or discovery of ESI, including the form or forms in which it should be produced." Fed. R. Civ. P. 26(f)(3)(C). The discovery plan should also include (1) the parties’ computer systems (identifying e-mail server, network environment, workstations, peripheral devices, etc.); (2) the identity of individuals with special knowledge of the systems; (3) subject matter and timetral frame of records; and (4) source and accessibility. The Kansas Rules of Civil Procedure do not include this so-called “meet and confer” requirement. Instead of the parties developing a discovery plan, 60-216(b) allows a court to determine “issues relating to disclosure or discovery of ESI, including the form or forms in which it should be produced,” K.S.A. 60-216(b)(1)(E), at the case management conference. K.S.A. 60-216(b).

22. The federal court in the District of Kansas mandates in its Guidelines for Discovery of ESI that “counsel should become knowledgeable about their clients’ information management systems and their operation, including how information is stored and retrieved.” Guidelines for Discovery of ESI, Kansas District Court, Guideline 1, http://www.ksd.uscourts.gov/guidelines-for-esi/. There are two main types of ESI: (1) custodian-based, wherein the user controls the creation, storage, and disposition of data (e.g., spreadsheets, music, graphics, email, calendars, instant messaging); and (2) enterprise-based, wherein the user creates the data that is then automatically stored (e.g., company-wide databases, accounting programs, supply chain programs, intranet systems).

23. Consider, for example, a situation in which spreadsheets are produced to a party in image format. The party makes a determination that the image format does not provide the information needed to analyze the spreadsheets (e.g., it might be missing metadata), and thus files a motion with the court to compel production of the spreadsheets in their native format. If so ordered, the producing party must now re-review and re-produce the spreadsheets, which adds cost and wastes time for all parties to the suit.


27. E-Discovery Basics, supra note 16.


30. E-Discovery Basics, supra note 16.


32. See supra note 21 and accompanying text.


34. Id.


36. Although outside the scope of this article, it is worth noting that at least one federal court has found a search inadequate when a searcher does not use the synonyms for keywords. See Summers v. U.S. Dep’t of Justice, 934 F. Supp. 458, 461 (D.D.C. 1996) (holding that, in a FOIA request, a search using “commitment” but not “appointment” or “diary,”
because those terms are used frequently by the agency, was evidence of an inadequate search).


38. Seggebruch, supra note 33, at 7.


40. One word can have many meanings. Conversely, two or more words can share the same meaning. These contexts are “referential vari- ants’ or variation. If one and only one word or expression is found in one and only one context, it would present no ambiguity and no variation. A search for that term would retrieve all of the documents in which the term appeared, and all of the documents would be relevant .... [H]uman language is highly ambiguous and full of variation.” The Sedona Confer- ence Best Practices Commentary on the Use of Search and Information Re- trieval Methods in E-Discovery, 8 Sedona Conf. J. 189 (2007).

41. If a party is ‘searching word documents and emails and has invent- ed a perfect list of keywords, that perfect list may leave out common mis- spellings,” Rebecca Shwayri, 3 Drawbacks to Keyword Searches for Finding Electronic Evidence (Oct. 22, 2012), http://i-sight.com/investigation/3- drawbacks-to-keyword-searches-for-finding-electronic-evidence/.

42. It can be “difficult to conjure up every conceivable synonym to describe a keyword in the litigation.” Id.

43. There are two key performance measures for information retrieval: recall and precision. Recall measures “how well a system retrieves all the relevant documents,” whereas precision is defined as “how well the system retrieves only the relevant documents.” David C. Blair & M.E., An Evaluation of Retrieval Effectiveness for a Full-text Document- Retrieval System, 28 Com. A.C.M. 289, 290 (1985). For example, attorneys and paralegals involved in a subway accident case used keyword methodology to search a 350,000-page (40,000-document) database. The litigation team believed they had located 75 percent of the relevant documents, while a separate manual review of the documents found that they had identified only 20 percent of the relevant documents. Id.

44. Da Silva Moore v. Publicis Groupe, No. 11 Civ. 1279 (ALC) (AJ), 2012 U.S. Dist. LEXIS 23350, at *31 (S.D.N.Y. Feb. 24, 2012), see also Nat’l Day Laborer Org. Network v. U.S. Immigration & Customs Enforce- ment Agency, No. 10 Civ. 3488 (SAS), 2012 U.S. Dist. LEXIS 97863, at *47 (S.D.N.Y. July 13, 2012) (citing Maura R. Grossman & Terry Sweeney, What Lawyers Need to Know About Search Tools: The Alternati- ves to Keyword Searching Include Linguistic and Mathematical Models for Concept Searching, Nat. L.J. (Aug. 23, 2010) (which in turn cites three studies showing that Boolean keyword searches identify between 20 and 25 percent of relevant documents)) (There is increasingly strong evidence that “[k]eyword search[ing] is not nearly as effective at identi- fying relevant information as many lawyers would like to believe.”); Victor Stanley Inc. v. Creative Pipe Inc., 250 F.R.D. 251, 260 (D. Md. 2008) (“While keyword searches have long been recognized as appro- priate and helpful for ESI search and retrieval, there are well-known limitations and risks associated with them ...”).); In re Segue Prod’s. Liab. Litig., 244 F.R.D. 650, 660 n.6, 662 (M.D. Fla. 2007) (criticiz- ing defendant’s use of keyword search in selecting ESI for production, noting the failure of the defendant to provide information “as to how it organized its search for relevant material, [or] what steps it took to assure reasonable completeness and quality control” and observing that “while key word searching is a recognized method to winnow relevant documents from large repositories ... [c]ommon sense dictates that sam- pling and other quality assurance techniques must be employed to meet requirements of completeness”).

45. U.S. v. O’Keefe, 537 F. Supp. 2d 14, 24 (D.D.C. 2008). Judge Facciola goes on to state that keyword searches of ESI is a topic “clearly beyond the ken of a layman.” Id.; see also Equity Analytics LLC v. Lundin, 248 F.R.D. 331, 333 (D.D.C. 2008) (“Determining whether a particular search methodology, such as keywords, will or will not be effective cer- tainly requires knowledge beyond the ken of a lay person ...”).


47. Id.


49. Id.


52. The Sedona Conference Best Practices, supra note 40.


55. The process described has been called a variety of things, including: computer-assisted review, technology assisted review, automated docu- ment review, adaptive coding, predictive priority, meaning-based coding, and many more. For purposes of this article it will be referred to as predic- tive coding, simply because the e-discovery firm Recommind was the first vendor with the technology and that is what they called it. See Sharon D. Nelson & John W. Simek, Predictive Coding: A Rose by Any Other Name, Sensei Enterprises (2012), http://www.senseient.com/storage/articles/Predictive_Coding.pdf.


58. Peck, supra note 56.


60. Peck, supra note 56.

61. Fuchs & Wolinsky, supra note 59. For example, counsel could de- cide that documents receiving a score below 15 have a high possibility of being irrelevant and as such deem further human review unnecessary.

62. Peck, supra note 56. For example, a score above 50 may “produce 97 percent of the relevant documents, but constitute [...] only 20% of the entire document set.” Id.

63. This example is taken from Seggebruch, supra note 33, at 13.


67. See Interview with Drew Lewis, eDiscovery counsel at Recommind (Apr. 12, 2013) (on file with authors).


70. Nicholas M. Pace & Laura Zakaras, Where the Money Goes: Un- derstanding Litigant Expenditures for Producing Electronic Discovery,
Legal Article: E-Discovery 2.0


74. Id.

75. 552 F.3d 814 (D.C. Cir. 2009).

76. Pace & Zakaras, supra note 70, at 66.

77. See Interview, supra note 67.

78. Id.

79. Id.

80. Id.

81. 287 F.R.D. 182 (S.D.N.Y. Feb. 24, 2012). In a gender discrimination case, the court acknowledged that “computer-assisted review is an acceptable way to search for relevant ESI in appropriate cases.” Id. at 183.


84. 287 F.R.D. at 183.

85. Id. at 184.

86. Id. at 189.

87. Id. at 183.

88. Id. at 192.

89. 2012 WL 1431215.

90. Id.

91. Id.


93. For example, there were more than 2 million documents that Global Aerospace had produced that needed to be reviewed, at an estimated manual review time of 20,000 hours. 2012 WL 1419842, Memorandum in Support of Motion for Protective Order Approving the Use of Predictive Coding (Apr. 9, 2012).


98. See Interview, supra note 67.

99. See supra note 21 and accompanying text.

100. Id.

CIVIL

HISTORICAL PRESERVATION ACT AND FEASIBLE AND PRUDENT ALTERNATIVES

FRIENDS OF BETHANY PLACE INC. V. CITY OF TOPEKA ET AL.

SHAWNEE DISTRICT COURT – AFFIRMED IN PART AND REVERSED IN PART, AND CASE IS REMANDED WITH INSTRUCTIONS

COURT OF APPEALS – AFFIRMED IN PART AND REVERSED IN PART

NO. 100,997 – AUGUST 23, 2013

FACTS: The Topeka City Council granted Grace Episcopal Cathedral and The Episcopal Diocese of Kansas Inc. (the Church) a building permit for a parking lot on Bethany Place, a registered state historic site owned by the Church, despite complaints that the construction would adversely impact that historic site. District court determined who is obligated under the Historic Preservation Act, K.S.A. 75-2715 et seq., to establish that (1) there are no feasible and prudent alternatives to the project and (2) the project program includes all possible planning to minimize harm to the historic property as required by K.S.A. 2012 Supp. 75-2724(a)(1). The Friends of Bethany Place (FOB) challenged the permit. The district court found that FOB had standing to appeal the decision to issue the permit. The district court set aside the permit and also held that the record was insufficient to support the council’s findings that there were no feasible and prudent alternatives and planning had been taken to minimize the harm. The Court of Appeals agreed that the FOB had standing, but reversed the district court and held there were no feasible and prudent alternatives and planning had been taken to minimize the harm.

ISSUES: (1) Historical Preservation Act and (2) feasible and prudent alternatives

HELD: Court agreed that the FOB had standing. However, Court held that the governing body—in this case the council—must make the determinations of feasible and prudent alternatives, and that it failed in its statutory responsibility to obtain the information necessary to discharge its duties. Court also held that the council did not take what the case law characterizes as a “hard look” at all relevant factors that must be reviewed before authorizing a project that encroaches upon, damages, or destroys historic property. And because the proceedings below did not follow this rubric, Court reversed and remanded for a rehearing after the council makes the proper inquiries. Court also rejected and overruled the Court of Appeals’ analysis in Allen Realty Inc. v. City of Lawrence, 14 Kan. App. 2d 361, 790 P.2d 948 (1990), which purported to place the burden of proof in these matters on the project’s proponent.

DISSENT: Judge Lahey (District Judge, assigned) dissented and would find that the majority’s substantive analysis is contrary to the plain language of the Historic Preservation Act which is to foster and promote the conservation and use of historic property for the education, inspiration, pleasure and enrichment of the citizens of Kansas.

STATUTES: K.S.A. 2-2478(c); K.S.A. 2-2511(e); K.S.A. 2-3317(d); K.S.A. 3-709(1); K.S.A. 8-2410(e); K.S.A. 2012 Supp. 8-2605(d); K.S.A. 9-1111(c)(8); K.S.A. 2012 Supp. 9-1804(e); K.S.A. 12-520(c); K.S.A. 2012 Supp. 12-521(f); K.S.A. 12-532(f); K.S.A. 12-760(a); K.S.A. 15-126(a); K.S.A. 16a-6-108(4); K.S.A. 2012 Supp. 17-2221a(b)(3); K.S.A. 19-223; K.S.A. 19-270(b); K.S.A. 25-4185; K.S.A. 25-4331; K.S.A. 31-159(c); K.S.A. 2012 Supp. 32-1114(f); K.S.A. 36-515(b); K.S.A. 39-7,139(c); K.S.A. 39-7,150(k); K.S.A. 40-205d; K.S.A. 44-1021(a); K.S.A. 46-292; K.S.A. 47-624(d); K.S.A. 2012 Supp. 47-1809(j); K.S.A. 55-443(f); K.S.A. 55-606(b); K.S.A. 58-3058; K.S.A. 58-4211(f); K.S.A. 60-2101; K.S.A. 65-6a56(d); K.S.A. 65-4211; K.S.A. 74-2438; K.S.A. 74-7028; K.S.A. 75-2715, -2716, -2720, -2724, -2727; K.S.A. 77-631(a); K.S.A. 2012 Supp. 82a-302(a); K.S.A. 2012 Supp. 82a-737(f); K.S.A. 82a-1216(d); and K.S.A. 83-502(e)

CRIMINAL

STATE V. BRIDGES

WYANDOTTE DISTRICT COURT – AFFIRMED

COURT OF APPEALS – AFFIRMED

NO. 101,222 – AUGUST 9, 2013

FACTS: Bridges’ fiancée was killed when the house she and Bridges were living in exploded because the valve on an uncapped gasline on the water heater had been left on. The house exploded when Bridges’ fiancée lit a cigarette. Bridges was at work. A jury convicted Bridges of unintentional reckless second-degree murder. The Court of Appeals affirmed Bridges’ conviction.

ISSUES: (1) Expert testimony, (2) motion to suppress, (3) witness comment on Bridges’ credibility, (4) prosecutorial misconduct, (5) cumulative error, (6) identical offense sentencing doctrine, and (7) BIDS application fee

HELD: Court held the district court did not err in granting the state’s motion in limine to exclude evidence related to Bridges’ depression and also evidence of possible insurance proceeds. Court held the evidence of depression was not probative of whether he negligently installed the water heater and Court was unable to determine from Bridges’ references to the record that he personally knew before the explosion that he would actually receive anything less than the full amount of the proceeds. Court held the district court correctly denied Bridges’ motion to suppress his three statements to investigators. Court stated that he was properly Mirandized on two of the occasions and the third statement was not during a cus-
Appellate Decisions

STATE V. CRUZ
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 104,847 – AUGUST 9, 2013

FACTS: The district court granted the state’s motion to consolidate two homicide cases against Cruz, one involving a murder in a nightclub parking lot in August 2008 and the other involving a murder in a strip club parking lot in March 2007. Following the consolidated jury trial, the jury convicted Cruz of first-degree murder and criminal possession of a firearm for the 2008 incident but acquitted him of the first-degree murder, aggravated battery, and criminal possession of a firearm charges arising from the 2007 incident. The police were able to connect the two crimes based on evidence from a gang member that the same gun was used in both crimes.

ISSUES: (1) Motion to consolidate, (2) eyewitness identification evidence and jury instruction, (3) gang evidence, and (4) cumulative error

HELD: Court held Cruz did not meet his burden of establishing that the district court abused its discretion in consolidating the two cases for trial, after finding that the crimes were of the same or similar character. Court rejected Cruz’ argument that the district court violated his constitutional rights when it used an improper “drive-by” lineup to identify him as the perpetrator in the 2008 homicide. Court stated the identification bore indicia of reliability and did not create a substantial likelihood of irreparable misidentification and it was up to the jury to decide whether the evidence was believable. Cruz did not object to the eyewitness identification jury instruction and the court was not firmly convinced that, if the eyewitness identification cautionary instruction had not included the direction to consider degree of certainty in determining the reliability of the identification, the jury would have found him not guilty. The instruction was not clearly erroneous. Court found the gang evidence was relevant. Court stated the credibility of Hubbard’s (gang member) testimony that Cruz confessed to the crimes was a materially disputed fact in the case, and the gang affiliation evidence was relevant to the issue. Court found the errors in the case did not rise to a claim of cumulative error. Court held that under the totality of the circumstances Cruz was not denied a fair trial.

STATE V. FRIDAY
DOUGLAS DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 101,806 – AUGUST 9, 2013

FACTS: Friday was convicted of second-degree unintentional murder stemming from the beating death of Jerry Deshazer. Two other individuals, Jerod Buffalohead and Jarvis Jones, either witnessed or participated in the beating.

ISSUES: (1) Prosecutorial misconduct, (2) jury instructions, (3) exclusion of evidence of plea bargain, (4) cumulative error, (5) identical offense sentencing doctrine, and (6) criminal history

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Appellate Practice Reminders . . .

From the Appellate Court Clerk’s Office

Requesting Additional Transcripts

Typically, the appellant requests transcripts not later than 21 days after filing the notice of appeal in the district court. Not later than 14 days after service of appellant’s request for transcript, the appellee may request a transcript of the jury voir dire, opening statements, closing arguments, or any other hearing not requested by the appellant. See Rule 3.03(a) and (c) (2012 Kan. Ct. R. Annot. 21). Occasionally, a party will discover during briefing that an additional transcript should have been requested but was not. It is possible to request the transcript even though not specifically covered by the rule. The cautionary note is that requesting a new transcript out of time does not alter the current briefing schedule. It is possible to request extensions of time to file the brief while that transcript is being prepared, but the safer course of action would be to file a motion to stay the briefing schedule during preparation of the transcript. In the motion to stay, provide the appellate court an explanation of the late request as well as an estimated time for completion of the transcript.

Briefs or Records Filed Under Seal

Appellate briefs are seldom filed under seal; however, if that request needs to be made, file the motion to seal prior to filing the brief. Once a brief is filed, dissemination occurs immediately. The motion to seal should not use confidential material because the motion itself is a public document. If it is not possible to file a persuasive motion without including confidential material, offer to provide that material to the appellate court for in camera inspection.

If a record or part of a record was sealed in the district court, the parties should file a motion to seal the appellate record as soon as practicable. In any event, that motion should be filed before the appellate court orders the record from the district court which usually occurs at the time the case is set on an appellate docket.

Transfer of Record on Appeal from the District Court

The record on appeal ordinarily stays in the district court until briefing is completed and the case is set on an appellate docket. If, in the interim, a party responds to the appellate court on an order to show cause, reference should not be made to the record on appeal. Attach copies of relevant documents from the record on appeal. The appellate court is not aware of the content of the record on appeal until that record is ordered from the district court.

If you have questions about these rules or appellate procedure generally, contact Carol G. Green, Clerk of the Appellate Courts, at (785) 296-3229.
STATE V. HARRIS

FACTS: The state charged Harris with felony murder, alleging he and two others intentionally killed Phillip Martin in the perpetration, attempt to perpetrate, or flight from the inherently dangerous felony of aggravated robbery. Harris and the others took money and drugs from Martin. The jury convicted Harris of felony murder and aggravated robbery.

ISSUES: (1) Insufficient evidence, (2) prosecutorial misconduct, and (3) alternative means

HELD: Court held there was sufficient evidence that Martin's shooter(s) threatened him with bodily harm for a rational jury to find Harris guilty beyond a reasonable doubt of aggravated robbery as charged. Court held under the fact, the isolated comment by the prosecutor that defense counsel was lying when she objected to not knowing about any statements other than the one recorded by Harris did not constitute misconduct. Court stated it was within the wide latitude afforded to prosecutors. The district court did not abuse its discretion when it concluded that the comment did not constitute prejudicial misconduct. The comment did not cause a fundamental failure in Harris’ trial. The district court considered that the prosecutor did not utter the comment to attack defense counsel's character, but rather in response to defense counsel's objection. Court cited its prior cases that the felony-murder statute does not apply because involuntary manslaughter is a lesser included offense of reckless second-degree murder. Court rejected Friday's argument that her criminal history must be proven to a jury beyond a reasonable doubt.

STATUTES: K.S.A. 20-3018; K.S.A. 21-3107, -3205, -3211, -3402, -3403, -3404; K.S.A. 22-3414(3); and K.S.A. 60-261, -401

STATE V. KING
WYANDOTTE DISTRICT COURT – AFFIRMED IN PART AND REVERSED IN PART COURT OF APPEALS – AFFIRMED IN PART AND REVERSED IN PART NO. 99,479 – AUGUST 9, 2013

FACTS: King was convicted by a jury of one count of arson, three counts of criminal threat, one felony count of criminal damage to property, one misdemeanor count of criminal damage to property, one count of assault, one count of battery, and one count of domestic battery. King’s convictions resulted from a series of events involving the mother of King’s three children and several other individuals. King allegedly rammed a truck into several vehicles, engaged in several fights, and also engaged in domestic violence.

ISSUES: (1) Admission of prior crimes evidence, (2) defendant’s presence, (3) jury questions, (4) multiplicity, (5) unanimity instruction, (6) deadlocked jury instruction, (7) cumulative error, and (8) sentencing

HELD: Court reversed two of King’s convictions for criminal threat, rejecting the state’s theory that the unit of prosecution for a criminal threat is the number of victims who perceive and comprehend the threat. Instead, Court held there can only be one conviction for a single communicated threat, regardless of the number of victims who perceive and comprehend the threat. Court also reversed King’s conviction for felony criminal damage to property because the evidence established multiple acts, the trial court did not instruct the jury that it had to unanimously agree on the act that supported the conviction, and Court was not firmly convinced that the error did not affect the verdict. Court found two other errors but determined those errors were harmless when considered both individually and cumulatively. One of those errors was committed when the trial court failed to obtain a waiver of King’s right to be present in open court and then violated that right by answering a question posed by the jury during deliberations without King being present. The other error occurred when the trial court gave the jury an erroneous deadlocked jury instruction. Court rejected the other arguments advanced by King. One of those arguments was that K.S.A. 60-455 prohibited the admission of evidence of other crimes that were committed at the same time as the crimes for which King was on trial. The other is that it was unconstitutional for the sentencing court to consider King’s criminal history when that history had not been alleged in the complaint or proven to a jury.

STATUTES: K.S.A. 21-3110(2), -3419, -3720; K.S.A. 22-3405, -3414, -3420(3), -3423; and K.S.A. 60-455

STATE V. OCHS
DOUGLAS DISTRICT COURT – AFFIRMED NO. 104,710 – AUGUST 16, 2013

FACTS: A jury convicted Ochs of the rape of 11-year-old D.T. Because Ochs was older than 17 years, the crime was an off-grid person felony. The court sentenced Ochs to a hard 25 lifetime prison term.

ISSUES: (1) Prosecutorial misconduct and (2) cruel and unusual punishment

HELD: Court found the prosecutor’s comments in rebuttal argument were prosecutorial misconduct. The prosecutor said that D.T. had protection that night and that protection was the truth, the truth that Ochs had sexual intercourse with her. However, court stated that when it balanced the prejudice created by the prosecutor’s comments against the amount of this evidence and Ochs' changing stories, it concluded that the misconduct was harmless error. Court also held that none of the three steps of the Freeman analysis (nature of crime, other Kansas crimes, and penalties in other jurisdictions) favors a conclusion that the hard 25 life sentence Ochs received for raping D.T. is disproportional and unconstitutional.

STATUTES: K.S.A. 21-3402, -3502, -4643, -4716; K.S.A. 22-3405, -3601, -3717; and K.S.A. 60-261

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FACTS: Taylor is essentially wheelchair bound and requires assistance with most daily life activities, but is a world-class wheelchair tennis player. He receives Social Security disability and Medicaid benefits. KDHE operates the Working Healthy program for disabled individuals and has a subsidiary program known as the Work Opportunities Reward Kansans (WORK) for caregivers of disabled individuals. Taylor received a monthly payment of $5,350 for that purpose. However, KDHE decided to approve a no-overtime policy affecting Taylor and payments for his caregivers. Taylor requested and was granted specific exemptions from the no-overtime policy for tennis trips. Taylor later filed a written objection to the no-overtime policy, but was denied any relief. The district court ruled that Taylor suffered a constitutional injury when KDHE did not treat the no-overtime policy as a formal regulation under the Rules and Regulations Filing Act for caregivers of disabled individuals.

ISSUE: Administrative regulations

Held: Court stated its limited purpose was to determine whether if a state fails to properly apply its own procedures for adopting administrative regulations to an agency policy, does that failure create a constitutional process violation in favor of persons affected. The failure of the KDHE to treat the no-overtime policy as a formal regulation under the Rules and Regulations Filing Act does not rise to the level of a fundamental constitutional deprivation. Taylor could not base a § 1983 claim on the KDHE's presumed violation of the Act. Court stated that the decision does not mean Taylor was without a remedy in this case. He could have sought relief under the Kansas Judicial Review Act for a determination that the KDHE failed to adopt the policy as a regulation and could have requested an injunction to halt the policy's implementation for that reason. Court reversed the district court and remanded with directions to enter judgment for the defendants, to vacate an award of attorney fees and costs to Taylor, and to proceed in conformity with the opinion.

STATUTE: K.S.A. 77-415, -416, -421, -601, -621, -622

APPEALS – WILLS

IN RE BUTLER

WYANDOTTE DISTRICT COURT – APPEAL DISMISSED


FACTS: Severance pension benefits from Kenneth Butler's employment became subject of estate controversy. In 2007, administrator of Kenneth's estate asked court for guidance in choosing one of two severance options. District court held the option granting the estate $240,000 applied, but Kenneth's father (Leo) was entitled to $63,640.50 of that, the amount that would have gone to Leo under the second option. Nearly two months later, Leo filed a motion under K.S.A. 60-260(b) to set aside the allocation order. District court denied the motion. In 2012 the probate court entered an order of partial distribution. Leo filed a motion to appeal out of time from that and the 2007 allocation order. Court reversed the district court and remanded with directions to enter judgment for the defendants, to vacate an award of attorney fees and costs to Taylor, and to proceed in conformity with the opinion.

ISSUE: Appellate jurisdiction

Held: District court correctly held that Leo should have appealed the court's allocation order within 30 days of its entry, and cannot resurrect the issue four years later when the court ordered partial distribution. 2006 amendment of K.S.A. 59-2401 was discussed. In appeals from decedents' estates, the laundry list in K.S.A. 2012 Supp. 59-2401(a) of orders subject to appeal applies only to appeals from magistrate judges to district judges. Contrary language in In re Estate of Barfoot, No. 98,892, 2008 WL 4661911 (2008), was disapproved and distinguished. Here, the 2007 allocation order was a final order. Leo's appeal was controlled by K.S.A. 2012 Supp. 59-2401(b), which requires appeal as provided in Chapter 60 of Kansas statutes. The appeal was out of time and was dismissed for lack of jurisdiction.


DIVORCE AND ORAL PROPERTY

SETTLEMENT AGREEMENTS

IN RE ESTATE OF McLEISH

NESS DISTRICT COURT – REVERSED AND REMANDED

NO. 107,046 – AUGUST 16, 2013

FACTS: Ed and Lois McLeish were married in 1950, but divorced in 2006. They had two sons (Eddie and Bill). On the eve of

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the divorce trial, there was a phone conversation detailing an oral agreement that Ed would get the house and its 40 acres and Lois would have the right of first refusal, and all other land would go into a life estate for their children. The mineral interests were divided in half, however, by a subsequent journal entry. Conflict arose when Ed disinherited his two sons, left his estate to someone else (Michelle), and the parties challenged his will. The district court issued a memorandum decision and order concerning the pending claims of Eddie, Lois, Bill, and Michelle. The court concluded the oral property settlement agreement reached in Lois and Edwin’s divorce case was ambiguous as a matter of law. The court determined that Lois and Ed’s oral property settlement agreement created a joint life estate, as tenants in common, and included their interests in the oil, gas, and other minerals owned by them in their life estate, with the remainder equally to Eddie and Bill.

ISSUES: (1) Divorce and (2) oral property settlement agreements

HEL D: Court held that the written separation agreement, memorialized in the journal entry and decree of divorce, approved by the district court, and filed with the clerk constitutes the controlling agreement governing the disposition of the mineral rights at issue. Court also rejected all of the claims by Lois, Bill, and Eddie to obtain relief from the journal entry/judgment. Court upheld a 50/50 share of the mineral interests between Lois and Ed.

STATUTE: K.S.A. 60-258, -260, -1610(b)(3)

FAIR LABOR STANDARDS ACT, RETALIATORY DISCHARGE, AND KANSAS MINIMUM WAGE AND MAXIMUM HOURS LAW

LUMRY V. STATE OF KANSAS, KBI ET AL.

SHAWNEE DISTRICT COURT – AFFIRMED


FACTS: Keith Lumry, a former employee of the Kansas Bureau of Investigation (KBI), sued the KBI as well as three of his former supervisors in their individual capacities for violating his rights under the Fair Labor Standards Act (FLSA) and for retaliatory discharge in violation of the Kansas Minimum Wage and Maximum Hours Law (KMWML). Lumry’s claims involved payment for overtime and retaliatory discharge. But the KBI claimed that Lumry repeatedly filed false timesheets. The district court granted summary judgment to the KBI.

ISSUES: (1) Fair Labor Standards Act, (2) retaliatory discharge, (3) Kansas minimum wage and maximum hours law

HEL D: Court held that because the undisputed facts lead to the conclusion that two of the supervisors named in this action do not meet the definition of “employer” under the FLSA, Lumry’s claims against them necessarily fail. As to the remaining supervisor, who does fit the definition of employer under the FLSA, the undisputed facts fail to establish that Lumry made an unequivocal claim under the FLSA for which the supervisor may have retaliated. Finally, Lumry’s claim under the KMWMHL failed because the KMWMHL does not apply to any employer that is subject to the FLSA, and the KBI is subject to the FLSA.

CONCURRING IN PART/DISSENTING IN PART: Judge Standridge agreed with the majority that the two supervisors did not meet the definition of employer under the FLSA, but that the other supervisor did. Judge Standridge would reverse the district court’s decision to grant summary judgment on Lumry’s FLSA claim in favor of the third supervisor as well as the district court’s decision to grant summary judgment on Lumry’s common-law retaliatory discharge claim against the KBI and would remand both claims for a trial so the jury could resolve the issue of material fact in dispute: whether Lumry’s complaints would have provided a reasonable employer with fair notice that he was invoking rights under the FLSA.

STATUTES: K.S.A. 44-501, -506, -1201, -1202, -1204, -1210; K.S.A. 60-208; and K.S.A. 75-6101, -6103
**MUNICIPAL CORPORATIONS**  
**MILLING INC. V. CITY OF ATCHISON**  
**ATCHISON DISTRICT COURT – AFFIRMED**  
**NO. 108,481 – AUGUST 23, 2013**

FACTS: Bunge hired Midland Surveying to conduct a property boundary survey of Bunge’s land that adjoined the city of Atchison five years after Midland filed the boundary survey with county register of deeds, the city initiated unilateral annexation of Bunge’s property. The district court set aside the annexation, holding that the city lacked authority to unilaterally annex the property under K.S.A. 12-520(a)(1). Property not “platted by the owner” for purposes of unilateral annexation because there was no evidence to attribute Midland’s filing of the boundary survey to its principal. City appealed, claiming Midland acted as Bunge’s agent and Bunge never repudiated Midland’s filing of the survey.

ISSUE: Agency relationship – city annexation

HELD: A land surveyor is required to file a survey under K.A.R. 66-12-1(c)(j)(2006) and K.S.A. 74-7003(m), independent of any client’s direction. Such filing does not necessarily create an agency relationship between the surveyor and landowner. Under the facts of this case, Midland was not Bunge’s agent for purposes of filing the survey. Bunge’s property does not meet the definition of being “platted” under K.S.A. 12-519(e), thus the city did not have authority to unilaterally annex Bunge’s property under K.S.A. 12-520(a)(1).

STATUTES: K.S.A. 12-519(e), -520(a)(1); and K.S.A. 74-7003(m)

**SUBCONTRACTOR AND BOND**  
**DUN-PAR ENGINEERED FORM CO. V. VANUM**  
**CONSTRUCTION INC. ET AL.**  
**WYANDOTTE DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS**  
**NO. 108,841 – AUGUST 23, 2013**

FACTS: Fortis Construction Co. LLC hired Dun-Par as a subcontractor for a construction project in Fort Riley. The general contractor for the project was B&E&K Federal Services LLC. B&E&K hired Vanum to be a subcontractor. B&E&K and Vanum entered into a Subcontract Payment Bond through Hanover naming Vanum as the principal and B&E&K as the obligee. Under the bond, Vanum and Hanover agreed to “jointly and severally, bind themselves to [B&E&K] to pay for labor, materials and equipment furnished for use in the performance of the Subcontract ... ” Vanum then hired Fortis to be its sub-subcontractor, which in turn hired Dun-Par, making Dun-Par a subcontractor to Fortis and a sub-sub-subcontractor to B&E&K. Dun-Par admitted that it did not have a direct contract with Vanum. The district court granted Dun-Par’s claim to recover the unpaid balance due Dun-Par from the Subcontract Payment Bond bought from Hanover Insurance Co. by Vanum. Hanover challenges the district court’s interpretation of the definition of “Claimant” as set out in the bond.

ISSUES: (1) Subcontractor and (2) bond

HELD: Court held that under the facts of the present case, a claimant under the language of the bond had to be an entity having a direct contract with the principal, or an entity having valid lien rights which may be asserted in the jurisdiction where the project was located. Because the project was located within the Fort Riley Military Reservation, and because federal law prohibits mechanic’s lien rights for contractors and subcontractors who work on federal land or buildings, the sub-sub-subcontractor did not have valid lien rights and therefore could not meet the definition of a claimant under the clear language of the bond. Court held the language in the bond is clear and unambiguous. The second definition of a claimant requires that Dun-Par must have lien rights that may be asserted under federal law. Since there are no federal lien rights for Dun-Par to assert, Dun-Par does not qualify as a claimant. Since Dun-Par is not a claimant, the district court erred in granting Dun-Par summary judgment.

STATUTES: K.S.A. 27-102, -105; and K.S.A. 60-1111

**CRIMINAL**

**STATE V. ALTHAUS**  
**RENO DISTRICT COURT – REVERSED AND REMANDED**  
**NO. 106,813 – JULY 29, 2013**

FACTS: Althaus was convicted of drug related offenses after the district court denied Althaus’ motion to suppress evidence obtained with search warrant. District court held that the deputy’s affidavit in support of the warrant failed to present probable cause, but good-faith exception to the exclusionary rule applied because the deputy acted in good faith when a different judge nonetheless signed the warrant. Althaus appealed, claiming drug evidence should have been suppressed as a product of a search that violated the Fourth Amendment.

ISSUE: Exclusionary rule and good-faith exception

HELD: Historical review of legal principles related to probable cause, the exclusionary rule, and good-faith exception. Fact that another district judge signed the search warrant triggers a good faith analysis but does not decide it. Here, application for the search warrant was fundamentally deficient in establishing probable cause, and that good-faith exception to the exclusionary rule does not apply when the deputy’s reliance on the warrant was objectively and entirely unreasonable. District court’s determination that the good-faith exception applies is reversed. Case was remanded to vacate Althaus’ convictions and to grant motion to suppress.

STATUTES: K.S.A. 2010 Supp. 21-36a06, -36a09; and K.S.A. 22-2502(a)

**STATE V. MESSER**  
**JOHNSON DISTRICT COURT – AFFIRMED**  
**NO. 108,184 – AUGUST 23, 2013**

FACTS: In 2010, Messer failed field-sobriety tests after traffic stop, and then failed evidentiary breath test at police station. When Messer then asked for an independent blood test, he was told to get a blood test on his own after his release. Messer was released shortly thereafter, and did not get a blood test after his release. Messer filed the K.S.A. 8-1004 motion to exclude evidence of his failed breath test, claiming that the officer refused to permit additional testing. The district court denied the motion, and Messer was convicted of DUI and refusing a preliminary breath test. He also argued that the 2011 amendments to the DUI statute should apply retroactively such that his 2000 DUI diversion agreement would not count and his 2010 offense would become a second-time DUI. The district court rejected that argument, finding that the statutes in place at time of the 2010 offense applied. Messer appealed.

ISSUES: (1) Reasonable opportunity for independent test and (2) 2011 amendment to K.S.A. 8-1567(j)

HELD: Under the facts of this case, where Messer was released from custody within 42 minutes of asking for an independent test and less than two hours after initial the traffic stop, he was given a “reasonable opportunity” to obtain an independent test after being released from custody. The district court properly denied Messer’s motion to suppress evidence.

Messer was not entitled to be sentenced under the amended statute. The 2011 amendment to K.S.A. 8-1567(j), which shortens the “look-back” period for determining the number of previous DUI convictions to be taken into account for sentencing purposes, applies only to crimes committed on or after July 1, 2011, the effective date of the statutory amendment; it does not apply when sentencing defendants for crimes committed before July 1, 2011.

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