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Focus

Employees’ Misappropriation of Electronic Data: Federal and Kansas Computer Tampering Acts
By John Vering and Jeffrey L. Schultz

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The Greatest Generation of Kansas Lawyers

Did you read the March Journal dedicated to World War II veterans of the Kansas Bar? If you know a Kansas lawyer who served in WWII who is still alive, please send their contact information to Matt Keenan at mkeenan@shb.com for inclusion in a future issue.
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Coffelt Honored by the City of Hays for Vietnam War Veterans Database
Great Lawyers

One of the benefits of serving as a KBA officer is the opportunity to meet and get to know great lawyers. My service on the Board of Governors brought me in contact with some of the finest and most dedicated members of the Bar. These are lawyers that come from every part of the state and from every area of practice. They are committed to improving the judicial system and their profession and, as an added bonus, they know how to have a good time. For any of you that have thought of running for the Board of Governors, stop thinking and start doing. You will never regret it and it will be one of the highlights of your legal career.

At last year’s annual meeting dinner, I looked across a room full of great lawyers; past presidents of the association, state and federal judges, committee and section chairs, plaintiff and defense lawyers, legal service attorneys, solo practitioners, and partners in large law firms. Several attorneys from my part of the state attended. Western Kansas is blessed with wonderful attorneys and it is a shame that they cannot all be mentioned by name. I am proud to be one of them and to call them friends.

Particular mention of some past presidents that serve as ABA delegates is in order. Linda Parks continues to take a leadership role in the KBA on many issues important to practitioners. Sara Beezley and Judge Crystal Marquardt help guide the board on national and state problems. If you ever have the opportunity to attend a national ABA meeting, you will see how they are recognized and admired by lawyers from around the country. (Word of warning, never walk with Judge Marquardt, it takes forever to get anywhere as she is always being stopped, hugged and engaged in conversation.) Their advice and counsel is sought and valued and we are all better off as a result of their efforts. I owe them a debt of gratitude for their help and encouragement during this past year. By the way, if you see Tom Hamill, extend a hand of congratulations for their help and encouragement during this past year. By the way, if you see Tom Hamill, extend a hand of congratulations as he was recently elected to the ABA Board of Governors, a high honor for our state.

I had the good fortune of growing up the son of a lawyer. Through my father, I spent many hours in the company of attorneys listening to the stories of their cases and clients. Lawyers like Ray Spring, Jim Myers, Marvin Appling, Charlie Lay, Judge Bert Vance, Harrison Smith, and others too numerous to mention in this limited space.

There were attorneys I met throughout my childhood that I later got to work with. Bob Tilton, known as “Big Daddy,” and his wife, Carol, were close friends of my parents; we often visited them while in Topeka. As I entered law school, Bob, and his partners, Wilburn Dillon and Terry Beck, offered me a job as a law clerk. Wilburn had a keen legal mind and taught me how to analyze the facts and apply the law. Terry was always supportive and helped ease the anxiety of law school. Bob had a heart as big as his physique. He never hesitated to offer help to anyone who asked whether it was a past client, law student, neighbor, or fellow lawyer. He possessed the gift of compassion and demonstrated its importance in the practice of law.

After graduation, my first job was with Bob Glassman. John Bird was an associate and took me under his wing taking me everywhere, showing me how to practice law. Bob was like a second father to both of us. A lawyer once asked me to describe Bob in one word. While I struggled for the answer, he looked at me and said, “integrity.” It was the perfect response. Bob embodied high values and principles and incorporated them into his law practice. He was a wonderful mentor, counselor, and friend. Not a day passes that he is not missed.

Finally, when discussing great lawyers, I cannot leave out my father, Lelyn. He is the reason I became a lawyer. In his mind, lawyers were the reason we had such a strong nation. They were the leaders and the protectors of liberty. He served on the Board of Governors for the KBA and encouraged me to run for a position because he said it was one of the best experiences an attorney could enjoy. He was right. But more than that, my dad loved being a lawyer and being around lawyers. He truly woke up every day thankful for the opportunity to practice our profession. He savored the joy of helping people in their time of need which brought him satisfaction and a sense of accomplishment. I remember him and my mother excitedly talking about going to the annual bar meeting and reconnecting with old friends. My mother fell in love with a job as a law clerk. Wilburn had a keen legal mind and taught me how to analyze the facts and apply the law. Terry was always supportive and helped ease the anxiety of law school. Bob, and his partners, Wilburn Dillon and Terry Beck, offered me a job as a law clerk. Wilburn had a keen legal mind and taught me how to analyze the facts and apply the law. Terry was always supportive and helped ease the anxiety of law school. Bob, and his partners, Wilburn Dillon and Terry Beck, offered me a job as a law clerk. Wilburn had a keen legal mind and taught me how to analyze the facts and apply the law. Terry was always supportive and helped ease the anxiety of law school. Bob, and his partners, Wilburn Dillon and Terry Beck, offered me a job as a law clerk. Wilburn had a keen legal mind and taught me how to analyze the facts and apply the law. Terry was always supportive and helped ease the anxiety of law school. Bob, and his partners, Wilburn Dillon and Terry Beck, offered me a job as a law clerk. Wilburn had a keen legal mind and taught me how to analyze the facts and apply the law. Terry was always supportive and helped ease the anxiety of law school.
I remember when I was growing up, my parents tried to instill in me some core values that they believed would be important not only in my younger years, but also as I grew into an adult. These included honesty, responsibility, and determination, among many others. One important thing that stuck in my head was how to treat others. Although my parents may not have said the exact words of the Golden Rule, “Do unto others as you would have them do unto you,” they provided me with the guiding principles and taught me how to handle difficult situations and difficult people.

Unfortunately, we all encounter difficult people in our everyday lives, whether it is in the practice of law or just life. The legal profession often pits us against each other in our endeavor to best represent our client. Although I have not had the opportunity through my work in the state to conduct depositions or work with opposing counsel, I have heard many war stories from my colleagues about such. I myself have had to work through hard situations with people who are negative, unhelpful, and angry, and I have often wondered if they go out of their way to make things complicated.

Through these trials and tribulations, I try to remind myself continually of the values my parents taught me, and I think it is something that we can all do to make our profession a better and stronger one. When I’m working with someone who is trying to put a roadblock in the way of the successful completion of a task at hand, I make sure to ask the individual what I can do to make their job easier. I look at it as a good exercise to show this individual that I am not trying to make his or her job more difficult, and that ultimately we should be working together to obtain the best outcome. I like to think that I treat others with respect, because, as the saying goes, that is how I would like for them to treat me.

I realize, of course, that a person may be acting negatively toward me because of something that stirred him or her up prior to our encounter that day. I may be having a bad day myself, and if the two of us happen to convene, conflict would seem inevitable. It is very important to remind yourself, in situations such as these, not to let a negative person turn you into the same. Don’t get me wrong, I am not claiming that I myself act perfectly in every situation – I can get impatient or irritated, which is part of being human.

My point of this article (in addition to thanking my parents for all they have taught me) is this: the next time you encounter someone who is giving you a hard time or being obnoxious, tell yourself it is better to take the higher road and do not let the person “trigger” you into responding with what could be a continued cycle of negativity. Flip the tables on them by complimenting them on something they did that impressed you and be genuine about it. It always helps me when I’m having a bad day to receive a compliment that I did not expect, or to have someone go out of their way to help me with even the smallest task. It is days like those when I realize, whoever is helping me out must be thinking of what their parents taught them, and how it is vital to treat others as you would want to be treated.

About the Author

Melissa R. Doeblin graduated from Washburn University School of Law in 2005 and received a certificate in Natural Resources Law. She currently serves as advisory counsel for the Kansas Corporation Commission in Topeka.
KBF Supports Law in Education

By Jim Oliver, Foulston Siefkin LLP, Kansas Bar Foundation president, joliver@foulston.com

Mission Statement: The Kansas Standards for History and Government, Economics and Geography enable students to actively participate as informed citizens, to build a foundation of continuous knowledge, to acquire a working knowledge and understanding of these disciplines, and to enrich their lives.

– Kansas Department of Education

I’ve been retired for 39 years ... from teaching. For one year before law school, I tried to get high school students enthused about subjects ranging from pre-colonial America to Columbus, to Jamestown and Plymouth Rock, then onward through colonization to the Declaration of Independence and the Constitution, the Bill of Rights, the Federalist Papers, and Marbury v. Madison. And that was just the first few weeks. From the beginning of the class, slavery and race discrimination continually appear in American history. States’ rights, the Civil War, Reconstruction, the Indian wars, and the Trail of Tears all must be covered, as must the Industrial Revolution, the closing of the American frontier, and the Labor movement. The “War to end War,” the League of Nations, Prohibition, and Women’s Suffrage are all momentous. And we are not even to the Great Depression, World War II, the Holocaust and war crimes trials, Korea, and the Cold War. The civil rights movement and the Warren Court, Watergate, hijackings and terrorism, drug wars, and more foreign wars all vie for the teacher’s attention in a jam-packed attempt to teach American history in one year. And everything I’ve just described involves essential questions of law and justice. Everything.

Equipping the next generation to participate as informed citizens is fundamental to the mission of the Kansas Bar Foundation. We support the mission of our schools and endeavor to support and encourage teachers. I personally have seen how difficult the job is, and it has only become more difficult over time. I remember in particular noting how students who regularly performed poorly in school could repeat in detail everything that happened in the movie they watched Saturday night, while I futilely tried to engender a similar level of interest and attention without much more than an occasional film strip and some maps. Good teachers with the necessary tools capture their students’ attention and learning happens. Some of these tools are provided by the Kansas Bar Association and the Kansas Bar Foundation, including:

- Law Wise
- Constitution Day
- Kansas Bar Association YLS Mock Trial Competition
- Public information pamphlets
- Public service videos
- 150 (or so) Eminent Kansans Survey: Student, educator, or public editions
- U.S. Supreme Court Summer Institute for Teachers

Law Wise is published in cooperation with the Kansas Supreme Court and is available online at www.kscourts.org. Each issue is now sent to nearly all Kansas social studies teachers via email. Law Wise includes articles of interest, teaching aids, lesson plans, and links to lesson plans, information from the KBA Law-Related Clearinghouse, and Technology for Teachers. The YLS Mock Trial Competition is gaining recognition and importance each year. I recently had the privilege of meeting teachers from my district (Olathe) who prepare their students to participate in the mock trial competition. Their enthusiasm for the program and for their students is contagious, and they expressed sincerely their thanks for the support of the Bar Foundation for helping provide this opportunity for their students.

The U.S. Supreme Court Summer Institute for Teachers (sponsored by the Supreme Court Historical Society) is a unique opportunity for a few teachers (60 nationwide) to enhance their knowledge and law-related teaching skills. The KBF has participated in funding expenses for Kansas teachers chosen to attend. Making this opportunity available and creating more like it should be a priority. This sketches some of the law related education supported by your Foundation, but there is more being done, and much more that could be done.

Through the generosity and creative thinking of our members, the KBF has funded three new scholarships this year: the Justice Alex M. Fromme Memorial Law Student Scholarship Award, the Maxine S. Thompson Memorial Scholarship Award, and most recently, the John E. Shamberg Memorial Law Student Scholarship Award. These scholarships also exemplify the commitment of our profession to education.

New opportunities await your creative thinking and generosity. Please think of the KBF as your vehicle to do something extraordinary.

About the Author

James D. Oliver is the partner-in-charge at the Overland Park office of Foulston Siefkin LLP. He serves as the firm’s lead partner for the appellate practice team.

Oliver received his Bachelor of Science from Northwest Missouri State University in 1971 and his Juris Doctor, cum laude, in 1975 from Washburn University School of Law, where he served as an editor of the Washburn Law Journal.

He is admitted to practice in Kansas, Missouri, the U.S. Courts for the District of Kansas and Western District of Missouri, U.S. Court of Appeals for the Tenth Circuit, and the U.S. Supreme Court.
A Nostalgic Touch of Humor

Aging Like a Fine Wine

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

Haste makes waste. Our mothers told us that – as well as other timeless parental clichés, such as “two wrongs don’t make a right” and “ifs and buts were candy and nuts what a merry Christmas we would have.”

But when it comes to litigation, sometimes letting time run its course is not necessarily a good thing. Waiting an inordinate amount of time for a trial judge, for example, to decide a case can be a problem. A big problem. We all have our stories. One I’ve heard involves a Kansas district court judge who had a case under advisement for six years. “Try explaining that to your client,” a fellow Kansas attorney told me. But no matter what your story is, it likely doesn’t compare to what happened to the litigants in Shelby, Tenn.

As reported in early December in the Shelby Times Gazette:

“One of the county’s Circuit Court judges has been reprimanded by the Tennessee Court of the Judiciary for delaying an opinion on a case for nearly 11 years. Judge F. Lee Russell received a public reprimand from the Court of the Judiciary on Monday for his handling of a complaint for damages that had been filed by David Reha against Tennessee Farmers Mutual Insurance Co. in Marshall County Chancery Court. Russell had tried the case in a bench trial on Nov. 12, 1999, and the matter was taken under advisement.”

According to a letter from the presiding judge, a motion to ascertain the status of the case was filed by Reha’s counsel on March 12, 2003. An additional motion to ascertain the case’s status was filed by Reha’s lawyer on July 23, 2009, “and as a result of that motion, you indicated to all counsel in a letter dated August 13, 2009, that you would enter a Memorandum opinion and order in the case on Sept. 4, 2009.” Apparently that didn’t happen.

Judge Russell “admitted the facts of the complaint, accepted responsibility, and entered a proper memorandum opinion and order on October 12, 2010, 10 years and 11 months after the bench trial.” The excessive delay in the case was a violation of Canon 313(8) which requires a judge “to dispose of all matters promptly, efficiently, and fairly.”

The case involved Reha – a builder, who had sued Tennessee Farmers Mutual for, guess what – dragging their feet and then failing to pay a claim in full. The ruling ultimately was in plaintiff’s favor, awarding $10,300 to be paid by the insurance company to Reha.

The ABA Journal reported this, and the bloggers went insane:

• I worked for 2 judges while going to law school at night. One of their colleagues was famous for making “wine” decisions – meaning he liked the cases to age before rendering a decision. He let that case turn to vinegar.
• I imagine that judge will get around to actually READING that letter of reprimand in another decade or two.

Yet there is another case out there that makes Judge Russell look downright expeditious. As reported in the legal blog Loweringthegbar.com: Recently, District Judge Ronald McPhillips of Toole County, Mont., ruled that James Rubow had not breached his agreement with Milan Ayers, who contended that Rubow owed him millions of dollars for improperly taking his share of a natural gas field. This would not be news, except that the lawsuit was filed in March 1983.

In March 1983, Ronald Reagan was president, the last episode of “M*A*S*H” had just aired, the “moonwalk” was performed for the first time (the one by Michael Jackson, not Neil Armstrong), and the big hit at the Consumer Electronics Show in Las Vegas was Commodore’s first portable computer, which offered buyers a full 64 kilobytes of RAM and a 5-inch screen for only $995. Also, Ayers v. Rubow was filed. The last entry in the clerk’s register for the case was in March 1985. After that, the case languished and the court’s file on it apparently disappeared.

Time passed. The Soviet Union fell. Ronald Reagan died. People complained because the battery life of their $299 handheld phone/computer with 64 gigabytes of flash memory was not quite as long as advertised. One day, Judge McPhillips, who had retired in 1994, was doing some spring cleaning and came across an old case file. “I think he found it in an old briefcase he had at home,” said his former administrative assistant, who was probably quite good but may have let things slip a bit with this particular file.

Judge McPhillips brought the file to the courthouse and asked its current occupant, District Judge Laurie McKinnon, what to do. She, in turn, asked the Montana Supreme Court what to do. The high court replied that, if the case was in “good shape,” she should let Judge McPhillips go ahead and rule on it. Was the case in good shape? Well, it was 26 years old, but luckily Judge McPhillips had taken really good notes. “He had taken very good, very copious notes on the case,” said his assistant, “so it was good he was able to rule on it, and we were able to avoid a new hearing.” Good for Mr. Rubow, at least, who ended up winning. Judge McPhillips ruled that he had not breached his agreement with Ayers, and the lawsuit was dismissed.

Kansas lawyers should know – and judges must know – that Supreme Court Rule 166, captioned “Matters Taken Under Advisement,” provides: “All civil matters taken under advisement...”
Law Students’ Corner

Studying Law in a State Capital: Topeka Offers Students Opportunities Outside the Traditional Law Firm Setting

By Ashley Dopita, Washburn University School of Law, ashleydopita@gmail.com

Nearly three years have passed since my first day of law school. Yet, I still vividly remember a conversation I had that day. My study group leader asked the question I have heard at least one hundred times since. “What kind of law do you want to practice?”

Each member of my study group had an equally impressive answer (most of which have undoubtedly changed since then). My response, however, was different. Although I have always kept an open mind, I told her that I did not come to law school with dreams of working at a law firm. I had no aspirations to be in a courtroom. I had never seen “Law & Order.” Stunned, she responded, “Well ... why are you in law school?”

By the end of this article, I hope to convince readers that a legal education is valuable outside of the traditional law firm setting. I also hope to make clear just how much Topeka and Washburn Law have to offer.

Topeka was named the capital city of Kansas in 1861. Just four years later, Lincoln College, now Washburn University, was established. For 150 years, students have been able to study the intersection of law, government, and public policy right here at home.

It was for this very reason that I chose Washburn University School of Law. I had just returned to Kansas from a semester-long internship with the United States Mission to the United Nations and was unsure of my next move. I wanted to be near family, but I wanted to pursue an exciting career. In just a few months, I had met one former president, the current president, the secretary of state, the secretary general of the United Nations, and countless ambassadors. How could I possibly pursue something equally as exciting in Kansas? Several weeks after my college graduation, I received a piece of mail that set my path. Washburn was working toward opening a Center for Law and Government.

I have not been disappointed in my choice. Attorneys with careers in government are regular visitors at the law school and often take time to meet with students over the lunch hour. Classes like constitutional law, negotiation, legislation, and administrative law have taught me much about creating public policy. Moot court competitions have trained me to advocate a position, while understanding the issue from both sides. Washburn’s first year mentor program even paired me with an attorney from the Office of the Revisor of Statutes – a place where a team of lawyers oversees each and every law that goes through the Kansas Legislature.

Most importantly, my legal education has not been limited to the classroom. I spent the spring of my first year working for a lobbying firm. At least three times a week, I found myself in committee hearings at the state capitol. I spent hours in the old Supreme Court chambers, taking notes over hotly debated budget issues. It was not unusual to see the governor on the second floor or a senator visiting with someone in the hallway. I soon realized how open the legislative process is in Kansas and quickly came to appreciate it.

In the summer following my first year, I received an American Bar Association fellowship with the Kansas Attorney General’s Office. My summer project was to draft several different pieces of legislation, including national model legislation. Although budget cuts prevented me from following that legislation in the spring, the experience was invaluable. I returned to lobbying during the school year and was excited to attend an event honoring Secretary of Defense Robert Gates (who happens to be a Kansas native). Volunteering on a campaign during election season was an added bonus. Topeka was truly living up to what Washburn had offered me.

One judicial externship later, I have now worked in each branch of government, at every level from international to local. The culmination of all these experiences was the thrill of finally meeting an iconic figure for any law student – a U.S. Supreme Court justice. Meeting Justice Sonia Sotomayor was one of the highlights of my law school career and would not have been possible had it not been for a professor at Washburn Law.

At the end of the day, a legal education is valuable outside of the traditional law firm setting. Attorneys work in all three branches of government, in a variety of different capacities, and in many different areas of law across the country. Loan repayment programs are an added bonus.

Although this article may sound like a recitation of my resume, I only write to show others what Topeka and Washburn Law have to offer students. I am thankful that regardless of the career I ultimately pursue, I am leaving law school with a better understanding of government and the law it is based upon.

About the Author

Ashley Dopita is a May 2011 graduate of Washburn University School of Law and a recipient of the certificate in law and government. She grew up in Zurich, Kan., and graduated from Fort Hays State University with a bachelor’s degree in political science. In May, Dopita joined the Kansas Bar Association as sections coordinator.
What’s New; How’s the KBA Treating You?

The Kansas Bar Association is always on the lookout for new member benefits and giving our members more bang for their membership buck. 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 highly regarded attorneys in specific areas of practice. The Annual Meeting provides all the required Kansas CLE hours for the year in addition to legendary keynote speakers, such as Scott Turow (author of “Presumed Innocent” and many others), who will be speaking at this year’s Annual Meeting. One of the most invaluable benefits Annual Meeting provides is networking with your peers.

CASEMAKER™

Casemaker has been a great addition to our benefit package. Casemaker is a Google-like search engine giving you access to case law, constitutions, and statutes of all 50 states, including the District of Columbia. Members are provided a KBA customized library containing: case law, ethics opinions, federal and state court rules, workers’ compensation decisions, and the Journal. Live Casemaker Webinar training is also available by logging into Casemaker. You can also have Casemaker with you anywhere you go with Casemaker mobile (http://mobile.lawriter.net) for the iPhone, Android, and Blackberry. Their newest platform, Casemaker Elite, will be rolling out soon as a major upgrade, giving members access to even more information.

Our newest member benefit is CoreVault. CoreVault provides automated and centrally managed data backup and recovery services that help businesses protect critical data. Service portfolio includes off-site protection, regulatory compliance, encryption, restoration, enhanced security, and highly regarded customer service. CoreVault keeps your practice safe by providing:

- Daily off-site backup
- 24/7 restore
- DE-Duplication
- Self-healing
- World-class customer care
- Two private data centers
- SAS 70 Type II certified
- Regulatory compliant
- Tiered storage
- Hosted data services

Additional Benefits

Other member benefits include discounted services from Geico, Office Depot, ABA Retirement Funds, Principal Financial Group, Commerce Bank Visa, ALPS (professional liability program), and Go Next (travel services).

Check our website frequently for new and current benefits at www.ksbar.org/prospective/.

The KBA is always looking for more ways to stretch your membership dollars by giving you the most opportunities available. If you have any ideas as to what new benefits we can offer, please contact Meg Wickham, KBA member services director, at mwickham@ksbar.org.

Aging Like a Fine Wine

(Continued from Page 9)

ment by a district judge shall be decided with dispatch. If, however, the matter is not decided within ninety (90) days after final submission, within seven (7) days thereafter the judge shall file with the Judicial Administrator a written report setting forth the title and the number of the case … and the reasons why a judgment, ruling, or decision has not been entered.”

So here are five suggestions to counsel when a matter has been under advisement a bit long:

5. Dear Judge: I’ve been checking the obituaries. And the probate filings. Are you OK? How’s my case coming?
4. My client is upset about the delay. I’ve given him your home address. He said he might stop by after his anger management class.
3. It’s been two years since we filed our SJ motion. To move things along, I’m submitting a proposed order: Motion sustained.
2. I was talking to opposing counsel about our pending case. I know it’s been nine years, but my adversary said you were lazy and would never decide the matter. I defended your honor and your wife’s too. You shoulda heard what he said about Louise. Anyway, Happy New Year.
1. I don’t want to rush you, but remember that adoption case that’s been pending? Well the child just graduated. From college.

About the Author

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

It is beaten into our heads that good passwords are a critical part of information and network security. We know the mantra: at least eight characters, mixed case, one number, and one symbol. Unfortunately, the folks whacking us on the head are only concerned about their network and information and are clueless about why we resist their password rules. Sure, we ought to be able to remember that one password. Just one password is not our problem.

Take a few seconds to tally every password or passcode in your life. There may be alarm systems at home and office. Add in voice mail PINs for home, work, and mobiles. Desktops, laptops, routers, safes, mobile phones, and servers all have passwords as do the applications we use like case management, imaging, and document assembly. Maybe a few clients have doled out passwords for intranet systems. Do you have any idea how many passwords you have for online sites like banking, court access, vendors, pay-wall newspapers, and so forth? If every password in your life were a little brass key, your key ring would weigh several pounds!

Most responses to the password proliferation issue make security experts cry. For example, a major breach of online media giant, Gawker, resulted in publication of more than 1.3 million usernames and passwords for users of its sites. Analyses of those leaked credentials revealed the top two most used passwords to be “123456” and “password.” (I can hear some of you: “That’s amazing! I’ve got the same combination on my luggage.”) Other favorites were “qwerty” and “111111.” Further digging revealed many of those horrible passwords were used by the same usernames across multiple sites.

Write It Down

Managing all those passwords requires writing them down. Sure, that’s the cardinal sin of password security right? Maybe not; renowned security expert, Bruce Schneier, has said for years: “People can no longer remember passwords good enough to reliably defend against … attacks, and are much more secure if they choose a password too complicated to remember and then write it down. We’re all good at securing small pieces of paper. I recommend that people write their passwords down on a small piece of paper, and keep it with their other valuable small pieces of paper in their wallet.”

Of course, if every password in your life were little scrap of paper, your wallet would weigh several pounds! Better to create a database. We already do this to manage proliferation of another type of password problem that began in 1880 – phone numbers. Yellow pages, little black books, and contact managers neatly organize people and numbers. Fortunately, there are some handy digital options for securing and managing passwords.

The most basic password manager application would be little more than a database associating an application or site with the username and password required to access it. You could do as much with a spreadsheet or even a notebook and probably should, so long as you secure it from prying eyes. Password management software adds security by encrypting the entire password database. Convenience is a focus as well with various levels of auto-login, form completion, and synchronization across computers and devices. An online review of six commercial password managers is currently available at PCMag (http://bit.ly/dVJR7T) and a video demonstration of a free tool, KeePass, is available on YouTube (http://bit.ly/f0h9AZ).

Final (Pass)Words

One very final note about password management: lawyers must get passwords out of their heads and into places available to their firms and successors where appropriate. Being unreachable in court for a day or so when the firm needs access to information behind a password may be an inconvenience. That inconvenience can rise to crisis if the lawyer is incapacitated or deceased.

Even personal accounts for social sites should be evaluated for password backup. An online community I frequent lost several members, but, in a few cases, spouses logged in to share the sad news. As a community, we were thankful those users left their passwords behind. Digital decedent services continue to pop up to address this very issue and an article on Mashable.com surveys some of the options for posthumous password management (http://on.mash.to/dk04Hg). Whatever method you choose, pick one and write those passwords down. At the very least, you can beat the IT guy’s head with it when he assigns another password.

About the Author

Larry N. Zimmerman, Topeka, is a partner at Valentine, Zimmerman & Zimmerman P.A. and an adjunct professor teaching law and technology at Washburn University School of Law. He has spoken on legal technology issues at national and state seminars and is a member of the Kansas Credit Attorney Association and the American, Kansas, and Topeka bar associations. He is one of the founding members of the KBA Law Practice Management Section, where he serves as president-elect and legislative liaison.

To join the LPM Section or any other KBA section, you may register online at www.ksbar.org or call (785) 234-5696.
Coffelt Honored by the City of Hays for Vietnam War Veterans Database

Richard Coffelt, a retired attorney, sought no recognition or personal gain for his 30 years of work when he began collecting information about the Vietnam War dead. At the March 24 meeting of city commissioners, Mayor Barbara Wasinger, of Hays, declared March 24 “Richard Coffelt Day.” She encouraged all citizens to congratulate him on his many years of service to the veterans of the Vietnam War and the nation.

In 1982, Coffelt realized there was no reliable and complete record of the veterans, so at his own expense and using vacation time and his weekends, he began collecting military unit memorials, gravestones, information and condolence letters from presidential libraries, and other similar sources of information. A Korean War veteran, Coffelt began his search at the Hays Public Library and at Fort Hays State University, where he amassed a personal collection of books on the war.

Using these research tools, he was able to put together the information he sought. With the addition of the Internet, he was able to transfer his information to a computer document.

Word got out of Coffelt’s project and he was contacted by relatives and former military personnel for information about friends and family members. He would team up with Richard Arnold and David Argabright, who were both doing similar research.

In 2002, with more than 54,000 entries, he turned his work over to the National Archives. In his honor, this information would be named the “Coffelt Database.” Coffelt currently provides consultative services to the database and to date there are more than 56,300 entries, containing for than a million pieces of data.

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KENTON C. “KENT” GRANGER

Kenton C. “Kent” Granger died January 13 at his home in Punta Gorda, Fla; he was 74. He attended public schools and studied he freshman year at Ottawa University before receiving his bachelor's degree from the University of Kansas in 1959 and his juris doctorate from Stanford Law School in 1962.

He served on the legal staffs of the Kansas Highway Commission and the Kansas Corporation Commission in Topeka before becoming an assistant attorney general for Kansas. In 1968, Granger founded his own law firm and later joined former Kansas Gov. John Anderson in the Overland Park law firm that became known as Anderson, Granger, Nagels, Lastelic, and Gordon. In later years, he became a senior partner in the firm's Kansas City, Mo., offices as an associate.

He is survived by his wife, Carol Vanderwal Granger; daughters, Carmel Lynne Granger and Sarah Elizabeth Granger; and one granddaughter.

H. THOMAS PAYNE

H. Thomas Payne, of Stillwell, died at his home on February 28; he was 80. He was born on October 18, 1930, in Olathe to Howard E. Payne and Fay Thomas Payne.

Prior to serving in the U.S. Navy (1952-54) during the Korean War, he started college at the University of Kansas where he excelled in academics while serving as secretary of Phi Gamma Delta social fraternity and the Owl Society, a member of Sachem, vice president of K-Club, head of the cheerleading squad, a member of the KU Debate Team, and a member of the varsity swim team, where he held a record in the breaststroke. He graduated from KU in 1954 with his bachelor's degree in economics and then attended law school at KU, where he was elected to Order of the Coif. He graduated in 1957 and then practiced law for many years as a member of Payne & Jones Chtd.

Payne was a member of the Kansas and American bar associations; and the Kansas Association of Defense Counsel, where he served as director from 1972-74. He was Olathe city attorney (1960-61); Rotary Club president; and a member of the Patron State Bank and Trust board of directors, First Federal Savings and Loan board of directors, KBA Journal Board of Editors (1974-78), KU Museum of Natural History advisory board, General Society of Mayflower Descendants, and Kansas Society of the Sons of the American Revolution, Delaware Crossing Chapter.

Payne is survived by his three daughters, Kimberly Payne, Melissa Schaffer, and Catherine Payne; and two granddaughters. He was predeceased by his wife of 51 years, Carolyn Nardy Payne.
Welcome Spring 2011 Admittees to the Kansas Bar

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John Michael Adams
Bradley Lawrence Akins
Sarah M. Armendariz
Aaron Karl Arnese
Ashley Elizabeth Ballweg
Ashley Marie Barton
Joshua Ivan Berry
Lance L. Bond
Vo-Laria Nicole Brooks
Christopher Stephen Brown
David S. Brown
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Jason Charles Chambers
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Mary Suzanne Cleveland
Anna Marie Clovis
Jessica A. Crutchfield
Jason Vance Darland
Timothy John Davis
Jon Robert Dedon
Jennifer Michelle Denny
Kaitlin Maude Dixon
Karen Michelle Donnelly
Noemi Florine Marjeta Donovan
Cary W. Eldridge II
Sara Nichole Faubion
William John Ferguson
Mark Aaron Fletchall
Solana Paige Flora
Sheena Ann Foye
John Bentley Gariglietti
Michael George
Ashley Nicole Gillard
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Benjamin Isaac Grother
Elizabeth Anne Haden
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Jeremy Wayne Harris
Ashley Grace Hawkinson
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Douglas Philip Hill
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Marin E. Hoffman
Kersten Leigh Holzhueter
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Lawrence David Indyk
David Andrew Jack
Jeremy Todd Johnston
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Dustin Paul Kelley
Sara Lynn Kelly
Jonathan S. Kemp
Rachel Jol Kibler-Melby
Dustin Lee Kirk
Peter J. Knowles
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D’Erin Renea May
Audrey Elizabeth McCormick
Jennifer Sue McKinley
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Employees’ Misappropriation of Electronic Data: Federal and Kansas Computer Tampering Acts

by John Vering and Jeffrey L. Schultz
I. Introduction

Virtually every business in America uses computers. Many companies provide their employees with laptop computers or personal digital assistants (PDAs) to facilitate their ability to access and utilize company data. Moreover, numerous companies allow their employees to access their computer systems and data remotely through Citrix, virtual private networks, or otherwise. Businesses are thus understandably concerned about safeguarding against the unauthorized access or misappropriation of their company’s data or systems. A recent national survey revealed that 59 percent of employees who quit, were laid off, or were terminated admitted to stealing data. Most of those departing employees stole their employers’ data directly from their employers’ computers or networks. Concern about improper access, alteration, copying, or downloading of computer data by departing employees is particularly heightened when an employee accepts employment with a competitor or starts a competing business. In such a situation, the former employer may request that its information services department or a third-party computer forensics expert examine the hard drive of the departing employee’s computer to determine if any computer data has been improperly accessed or taken from the employer’s computer system. If it appears that there has been improper access, federal computer tampering statutes may provide businesses with civil remedies. The primary purpose of this article is to discuss those statutes, the remedies they provide, and other possible causes of action for the improper access or misappropriation of electronic data. In addition, this article will discuss Kansas criminal computer tampering statutes and offer some suggestions for protecting electronic data.

II. Civil Actions Under the Federal Computer Fraud and Abuse Act

Although originally only a criminal statute, the Computer Fraud and Abuse Act (CFAA) now provides for both criminal and civil remedies. The CFAA allows persons who suffer damage or loss by reason of computer fraud to file civil lawsuits seeking compensatory damages, injunctive relief, and other equitable relief. The CFAA requires that any civil action for a violation must be brought within two years of the date of the act complained of or the date of the discovery of the damage. Importantly, the CFAA provides a basis for federal question jurisdiction, allowing a plaintiff to bring its claims in federal court.

A. Conduct prohibited by the CFAA

Among other things, the CFAA prohibits the following conduct:

1. Intentionally accessing a computer without authorization or exceeding authorized access and thereby obtaining information from any protected computer.

2. Knowingly, and with the intent to defraud, accessing a protected computer without authorization, or exceeding authorized access, thereby furthering the intended fraud and obtaining anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than $5,000 in any one-year period;

3. Knowingly causing the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causing damage without authorization, to a protected computer.

A “protected computer” under the CFAA is any computer “which is used in interstate or foreign commerce or communication.” With the widespread use of email and the Internet, this encompasses virtually all computers.

B. Establishing a civil action under the CFAA

The CFAA provides a civil action to “any person who suffers damage or loss” as a result of conduct prohibited by the CFAA. Although the statute uses the conjunction “or,” courts disagree as to whether damage or loss alone is sufficient to state a civil claim under the CFAA or whether both are required. Although the legislative history indicates that both are required, some courts have found otherwise. A federal court decision in Kansas has adopted the less-strenuous damage or loss formulation. However, the safest practice is to allege both damage and loss when pleading a claim for violation of the CFAA.

The “damage” and/or “loss” resulting from the defendant’s conduct must also include one of the following elements in order for a civil action to exist under the CFAA:

Footnotes:
2. Id.
3. Id.
5. 18 U.S.C. § 1030(g).
6. Id. § 1030(g).
7. See Paradigm Alliance Inc. v. Celeritas Technologies LLC, 659 F. Supp. 2d 1167, 1192 (D. Kan. 2009). The court, in rejecting Celeritas’ summary judgment argument that there was no proof of damage, noted that Paradigm provided evidence that it incurred a loss of $6,015 in investigative consultant fees, and stated that “proving damage is not required for every claim brought under the CFAA.” Id.
8. 18 U.S.C. § 1030(g).
The first element — loss during one year aggregating at least $5,000 — is the element most likely to be present in a civil action for damages under the CFAA. The damages recoverable for a violation involving only the first element are limited to economic damages, which “precludes damages for death, personal injury, mental distress, and the like.”

C. Unauthorized access or access exceeding authorization

As noted in subsection A above, violations of the CFAA generally require that the defendant access the plaintiff’s computers either “without authorization” or that the defendant “exceeds authorized access.” The CFAA does not define the term “without authorization.” The term “exceeds authorized access” means “to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter.”

1. Employee’s access (and subsequent misuse) of employer data

Federal courts disagree about whether an employee accesses a computer either “without authorization” or “exceeds authorized access” by accessing the employer’s computer data that he or she is otherwise permitted to access during employment and subsequently using that information to benefit a competitor. Some courts hold that an employee loses the right to access the employer’s computer “when he obtains information from his employer’s computer for a wrongful purpose, such as the disclosure of confidential information to a competitor,” and focus on the defendant’s intent or use of the information. Those courts generally reason that any access after that point is “without authorization” or in excess of authorized access under the statute, even if the employee is still employed in a position that would otherwise allow him to access the computer, because authorization terminates by operation of law when the employee violates the duty of loyalty to the employer. Other federal district courts have determined that what an employee does, or intends to do, with information accessed by a computer is irrelevant under the statute, so long as the employee remained within the employee’s authorized access when the employee obtained the information. Those courts generally reason that the CFAA is meant to regulate whether access was authorized, not whether the use (or misuse) of the information accessed was authorized.

The U.S. Court of Appeals for the Seventh Circuit, in International Airport Centers LLC v. Citrin, concluded that an employee acted “without authorization” when, while still employed by the company, but after deciding that he was going to quit and pursue interests adverse to the company, he ac-

15. 18 U.S.C. §§ 1030(c)(4)(A)(i)(I) and 1030(g).
16. Id. §§ 1030(c)(4)(A)(i)(II) and 1030(g).
17. Id. §§ 1030(c)(4)(A)(i)(III) and 1030(g).
18. Id. §§ 1030(c)(4)(A)(i)(IV) and 1030(g).
19. Id. §§ 1030(c)(4)(A)(i)(V) and 1030(g).
22. 18 U.S.C. § 1030(c)(6).
23. See Lugo, 595 F. Supp. 2d at 1192 (observing that courts have split on the question of whether an employee with an improper purpose may be held civilly liable under the CFAA for accessing computer information that he or she is otherwise permitted to access within the scope of employment, and collecting cases on both sides of the split); Shamrock Foods Co. v. Gast, 535 F. Supp. 2d 962, 964-65 (D. Ariz. 2008) (observing that there is a split and citing cases).
24. Lugo, 595 F. Supp. 2d at 1192 (describing the rationale of courts adopting this interpretation of CFAA).
25. See, e.g., Int’l Airport Centers LLC v. Citrin, 440 F.3d 418, 420 (7th Cir. 2006). See also Condux Int’l Inc., 2008 WL 5244818, at *4 (collecting cases).
cessed the company's computer to destroy files. The Citrin court noted that the difference between “exceeded authorized access” and “without authorization” is “paper thin.” The court reasoned that the employee's breach of the duty of loyalty terminated his authority to access his employer's computer, regardless of the fact that he was still employed at the time he accessed the computer. Thus, accessing the computer for an improper purpose was without authorization.

Under somewhat similar circumstances, the U.S. District Court for the District of Connecticut, in Modis Inc. v. Bardelli, used different reasoning than the Citrin court to conclude that a plaintiff properly pleaded that the defendant, a former employee of plaintiff, “exceeded her authorization.” The employer claimed that its former employee had obtained and used information from the employer's database for the benefit of the employee's new employer. The employee, in defense, claimed that as an employee she was authorized to access the database at issue. Unlike in Citrin, the employee had agreed in an employment agreement “to refrain from taking or reproducing or allowing to be taken or reproduced any [of plaintiff's] Property except in furtherance of [plaintiff's] business.” The court held that the employer sufficiently pleaded that the employee exceeded her authorized access when she used her access for the purpose of misappropriating the employer's confidential information, because under the agreement her access was limited to “access ‘in furtherance of [plaintiff's] business.”

Contrary to the results in Citrin and Bardelli, some federal courts have reached entirely different conclusions in cases with similar facts, holding that the CFAA is not implicated by the misuse or misappropriation of information that an employee was permitted to access during his or her employment. For example, in LVRC Holdings LLC v. Brekka, the Ninth Circuit rejected Citrin and held that an employee remained authorized to access a computer under the CFAA even when he accessed the company computer to further his own personal interests rather than the interests of his employer. In that case the employee had emailed confidential information to his home computer and to his wife. The court affirmed dismissal of the employer's CFAA claim because there was no evidence that he had agreed to keep the emailed documents confidential or to return or destroy them, or that he logged into the company computer after leaving employment with the plaintiff.

Similarly, in Shamrock Foods Co. v. Gast, the U.S. District Court for the District of Arizona held that an employee did not access the employer's information without authorization or in a manner that exceeded authorization when, while still employed, he emailed company information to himself and provided it to his new employer. The company conceded that the employee was permitted to view the computer file that he allegedly emailed to himself. The court adopted a narrow reading of the CFAA's authorization requirement, reasoning that the CFAA is intended to prevent the unauthorized accessing of information stored on a computer, not the subsequent use or misuse of the information after it has been properly accessed by an authorized user. The court thus concluded that as a matter of law the employee did not access the information at issue “without authorization” or in a manner that exceeded authorized access, even though he allegedly accessed the file after he acquired the improper purpose to use the information to benefit himself and his new employer.

Recently, in US Bioservices Corp. v. Lugo, Judge John Lungstrum of the U.S. District Court for the District of Kansas analyzed the split of authority on this issue and adopted the Shamrock analysis, holding that “access to a protected computer occurs ‘without authorization’ only when initial access is not permitted, and a violation for ‘exceeding authorized ac-

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cess’ occurs only when initial access to the computer is permitted but the access of certain information is not permitted.46 But Judge Lungstrum concluded, under the facts alleged, that the employer had adequately stated a claim under paragraphs (a)(2)(c) and (a)(4) of the CFAA for exceeding authorization because the defendant employees were not authorized to access the particular information that they were accused of obtaining.47

Whether other federal judges in Kansas will follow Lugo remains to be seen. Although the court did not address the authorized or exceeding authorization issue, Judge Julie Robinson of the U.S. District Court for the District of Kansas previously found a likelihood of success on the merits of a CFAA claim in which the employee placed a flash drive on a company computer and, in violation of the employer’s computer policy, downloaded information at 11:40 p.m. on a Sunday, the day before he tendered his resignation.48 That case did not discuss whether the violation of the employer’s computer policy resulted from the accessing of the computer files in question or just the downloading of those computer files.

Two district courts within the Eighth Circuit have disagreed on the scope of CFAA. In Condux International Inc. v. Haugum, which was cited approvingly by Judge Lungstrum in Lugo,49 the U.S. District Court for the District of Minnesota held that the employer’s allegations that the defendant employee downloaded data for use in a competing business and attempted to delete evidence of his download while he was still employed as its vice president were insufficient to establish that the employee acted without authorization or exceeded his authorized access.50 The Condux court agreed with the line of cases holding that “the CFAA is implicated only by the unauthorized access, obtainment, or alteration of information, not the misuse or misappropriation of information obtained with permission.”51 The court reasoned that this view was consistent with the plain language of the CFAA, the legislative history of the CFAA, and the principles of statutory construction.52

By contrast, the U.S. District Court for the Eastern District of Missouri, in Lasco Foods Inc. v. Hall & Shaw Sales, Marketing, & Consulting LLC, adopted the rationale of the Citrin case, discussed above, and refused to dismiss a CFAA claim in which an employer alleged that two employees acted without authorization when they obtained the company’s information for their personal use and in contravention of their fiduciary duty to their employer prior to leaving their employment to form a competing business.53

2. Former employee’s access of former employer’s data

In some instances, the former employee may try to access the former employer’s proprietary information after being separated from employment. It appears undisputed that these cases reflect the type of trespassing and hacking that the CFAA is intended to prevent. For example, in EF Cultural Travel BV v. Explorica Inc., the U.S. Court of Appeals for the First Circuit determined that the use of a computer software program by a competitor to glean prices from plaintiff’s website, in order to allow systematic undercutting of those prices, “exceeded authorized access” within the meaning of the CFAA.54 The competitor employed a number of plaintiff’s former employees, at least one of whom had a confidentiality agreement with plaintiff and used his technical knowledge of the plaintiff’s website and his knowledge of plaintiff’s proprietary codes to help develop the software program for his new employer.55 The court concluded that this action exceeded authorized access.56

3. Non-employee’s access of data

It is important to note that the circumstances constituting “unauthorized access” for purposes of the CFAA are not limited only to those in which an employer or former employee accesses computer data belonging to a former employer. For example, in the Kansas case Paradigm Alliance Inc. v. Celetris Technologies LLC,57 Paradigm alleged that Celetris, with whom it was involved in a joint venture, violated the CFAA by attempting, without authority, to access Paradigm’s web product that was maintained on a secure computer accessible only through a password-protected Internet portal.58 For another example, in America Online Inc. v. LCGM Inc., the court determined that customers of America Online exceeded their authorized access when they maintained email accounts with America Online for the purpose of using “extractor software programs” in chat rooms to harvest other email addresses of AOL customers in order to send bulk emails to those customers.59 The court reasoned

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42. Id. at 1195.
44. Lugo, 595 F. Supp. 2d at 1192.
46. Id. at *4.
47. Id. at *4-5.
49. EF Cultural Travel BV v. Explorica Inc., 274 F.3d 577 (1st Cir. 2001).
50. Id. at 580-83.
51. Id. at 583-84.
53. Id. at 1190.
that the harvesting of other e-mail addresses exceeded authorized access because such activity was not allowed by AOL’s terms of service that were provided to customers.59

4. Evidence needed to prove unauthorized access

A plaintiff is generally not required to go so far as to provide expert testimony that shows that a protected computer was accessed without authorization and something of value was taken.60 However, expert evidence can sometimes be helpful or even critical in determining whether there was unauthorized access.37

In the absence of expert testimony, testimony from others who, for example, witnessed the printing of information or provided passwords, may be sufficient to allow a jury to reasonably find that a computer was accessed in violation of the CFAA.68 The evidence for a CFAA claim, however, must consist of more than an “attenuated series of inferences-on-inferences based on circumstantial evidence.”59 For example, one court determined that there was insufficient evidence to support a claim that plaintiffs’ former joint venturer had accessed plaintiffs’ computers when the evidence before the court was merely circumstantial, based on the former joint venturer’s undisputed physical access to the plaintiffs’ computers and the frequent crashing and malfunctioning of plaintiffs’ computers, resulting in a loss of data. In that case, the plaintiffs presented no evidence to demonstrate either unauthorized access in general or any access by the venturer leading to destruction of the developer’s software or hardware.60 The court found that the utter lack of any expert opinion evidence supporting the plaintiffs’ speculative assertions was fatal to plaintiffs’ case.61

While an expert may not be required, the better course is to have a retained or non-retained computer forensics expert explain the analysis of the computer system that was performed to determine that the system was accessed and whether data was misappropriated.

D. Intentional access

CFAA § 1030(a)(2)(C) requires that the defendant intentionally access the plaintiff’s computer system.62 Normally, whether the defendant acted intentionally will not be a contested issue. One court held that the intent element for § 103(a)(2)(C) was sufficiently pleaded when plaintiffs alleged that a website operator intentionally placed “cookies”63 on visiting users’ computers for the purpose of monitoring the plaintiffs’ Web activity.64

E. Intent to defraud

Under CFAA § 1030(a)(4), the defendant must have an intent to defraud. The intent to defraud requirement simply requires that the defendant have intended some wrongdoing, and it does not require proof of common-law fraud.65 In Hanger Prosthetics & Orthotics Inc. v. Capstone Orthopedic Inc., the court held that a jury could reasonably infer that the defendants had accessed their employer’s computer with the intent to defraud because the evidence showed that a patient list owned by the former employer was intentionally accessed by the defendants who were employees of the plaintiff, the list was never again seen in the office, and the patients on the list began using the competitor’s company after the defendant employees terminated their employment.66 The court concluded this evidence was sufficient for the jury to conclude that the defendant employees had engaged in wrongdoing by access in violation of the CFAA § 1030(c)(4)(A)(i) most likely to be alleged in order to bring a civil action is the requirement of loss to one or more persons aggregating at least $5,000 in value.70 In Resource Center for Independent Living Inc. v. Ability Resources Inc.,

55. Id. at 450.
57. See e.g., LVRC Holdings LLC v. Brekka, 581 F.3d 1127, 1136-37.
58. Id. at 1132.
60. Id.
61. Id. at 605-66.
63. Cookies are electronic files that online companies sometimes implant on a user’s computer when the user visits a website. Cookies collect information about the user. In re Intuit Privacy Litigation, 138 F. Supp. 2d 1272, 1274 (C.D. Cal. 2001).
64. Id. at 1280.
66. Id. at 1132.
67. Id.
68. 18 U.S.C. § 1030(c)(8).
69. 18 U.S.C. § 1030(c)(11).
the U.S. District Court in Kansas found that plaintiff stated a CFAA claim when it alleged that defendants intentionally accessed plaintiff’s protected computer and caused damage aggregating at least $5,000 in one year by obtaining plaintiff’s “confidential and proprietary information for the benefit of defendants’ competing enterprise.”

The U.S. District Court for the Western District of Missouri has been similarly lenient in its analysis of whether a plaintiff has sufficiently pleaded the requisite $5,000 “loss” under the statute. In *H & R Block Eastern Enterprises Inc. v. J & M Securities LLC*, the court held that a plaintiff sufficiently alleged damages and losses of at least $5,000 when the complaint simply stated that “[a]s a result of defendants’ unauthorized, intentional access of [plaintiff’s] protected computer system, [plaintiff] has suffered damages and a loss of no less than $5,000.00, including but not limited to its costs to respond to this offense.”

The court noted, however, that it would consider [p]ersuasive authority narrowly construing compensable losses under the CFAA ... when the facts are developed.

For claims based on CFAA § 1030(a)(4), the defendant must have obtained “anything of value.” In *Triad Consultants Inc. v. Wiggins*, the Tenth Circuit affirmed dismissal of a CFAA lawsuit where Triad alleged that its former president had, with intent to defraud and without authorization or in excess of his authorization, accessed Triad’s computers by trying to convert backup tapes containing Triad’s electronically stored trade secrets and confidential and proprietary information, but alleged no facts showing that its former president accessed the information on either of the backup tapes he had taken.

The Tenth Circuit, citing *United States v. Czubinski*, explained that to make a claim under the CFAA it was necessary to establish that the information was valuable to the defendant, and Triad could not make that showing because it had recovered the backup tape before Wiggins could get anyone to restore the data and because the backup tapes did not constitute “anything of value” for purposes of a claim under § 1030(a)(4) of CFAA absent access to the information they contained.

In *Paradigm Alliance*, the U.S. District Court for the District of Kansas rejected defendant’s argument that the plaintiff’s claim should be dismissed because it could not prove damage to its website or computer system. The court noted that proving damage is not required under every CFAA claim, finding it sufficient that plaintiff alleged that it incurred a loss of $6,015 in investigative consultant fees in response to defendant’s attempted access of plaintiff’s computer system.

Some courts have taken a narrow view of damages and loss to help justify their refusal to apply the CFAA to disloyal employees. For example, in *Mintel International Group Ltd v. Neer-geen*, the U.S. District Court for the Northern District of Illinois stated that in order to recover under CFAA § 1030(a)(5) (A)(iii), a plaintiff must prove “damage.” The court reasoned that the underlying concern of CFAA is damage to data, and that CFA “was not meant to cover the disloyal employee who walks off with confidential information.”

The court rejected Mintel’s claim that it had suffered a loss consisting of fees that it paid to its expert to assess Neergeen’s allegedly improper actions. The court explained that Mintel’s expert was not assessing whether Neer-geen had “damaged” Mintel’s computers or data, but rather was hired to assist Mintel in its lawsuit against Neer-geen. The court thus concluded that “costs that are not related to computer impairment or computer damages are not cognizable ‘losses’ under the CFAA.

### III. Kansas Criminal Computer Tampering Statute

#### A. Statutory scheme

Kansas statutory law does not provide a civil cause of action specifically directed at computer fraud or tampering. The Kansas criminal code, however, does have specific provisions covering “computer crime,” “computer password disclosure,” and “computer trespass.”

This statute covers computer crimes and trespass against “property,” which is specifically defined to encompass “financial instruments, information, electronically produced or stored data, supporting documentation and computer software in either machine or human readable form.”

Computer crime is broadly defined as:

- (A) Intentionally and without authorization accessing and damaging, modifying, altering, destroying, copying, disclosing, or taking possession of a computer, computer system, computer network, or any other property;

- (B) using a computer, computer system, computer network, or any other property for the purpose of devising or executing a scheme or artifice with the

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71. 534 F. Supp. 2d at 1210-11 & n.30 (citing approvingly to other courts that have found similar allegations sufficient to state a claim under the CFAA).
73. *Id.* at *4.
78. *Id.*
80. *Id.* (quoting Kluber Skahan & Assocs. v. Cordogan, Clark & Assocs., 2009 WL 466812, at 8 n.14 (N.D. Ill. Feb. 25, 2009)).
81. *Mintel*, 2010 WL 145786, at *8. Given these considerations, care must be used in retaining experts and drafting expert engagement letters, or the expert’s expenses may not be recoverable as a loss under the CFAA.
82. Id. (citing *Casetta Software Inc. v. Computer Sciences Corp.*, 2009 WL 1703015, at *4 (N.D. Ill. June 18, 2009) (to state a claim based upon a loss “the alleged loss must relate to the investigation or repair of a computer system following a violation that caused impairment or unavailability of data”); *SKF USA Inc. v. Bjerkness*, 636 F. Supp. 2d 696, 721 (N.D. Ill. 2009) (lost revenue caused by copying confidential information is not compensable “loss” under CFAA); and *Del Monte Fresh Produce N.A. Inc. v. Chiquita Brands Int’l Inc.*, 2009 WL 743215, at *4 (N.D. Ill Mar. 19, 2009) (in absence of impairment or unavailability of computerized data, costs incurred for ‘damage assessment’ are not recoverable under the CFAA).
83. See *K.S.A. 21-3755*.
84. *Id.* 21-3755(c)(2)(d).
intent to defraud or for the purpose of obtaining money, property, services, or any other thing of value by means of false or fraudulent pretense or representation; or

(C) intentionally exceeding the limits of authorization and damaging, modifying, altering, destroying, copying, disclosing, or taking possession of a computer, computer system, computer network, or any other property.86

Computer crime is a level 8, nonperson felony.87 It is a defense to a charge of computer crime “that the property or services were appropriated openly and avowedly under a claim of title made in good faith.”88

The crime of computer password disclosure is “the unauthorized and intentional disclosure of a number, code, password, or other means of access to a computer or computer network.”89 Computer trespass means “intentionally, and without authorization accessing or attempting to access any computer, computer system, computer network, or computer software, program, documentation, data, or property contained in any computer, computer system, or computer network.” Computer password disclosure and computer trespass are class A nonperson misdemeanors.90

B. Case law

Case law under the Kansas computer tampering statute is sparse. In State v. Allen, the Kansas Supreme Court held that one does not gain access to a computer system merely by dialing a telephone number answered by a computer; rather, to gain access, one must proceed beyond any security devices so as to have the ability to make use of the computer or obtain something from its memory.91 The court further held that the prosecution had to prove a deprivation of something of value, and that the value of the stolen property does not include the costs of investigation or security measures to prevent further thefts.92 In State v. Jackson, the Kansas Court of Appeals found that the prosecution had produced evidence sufficient to establish a computer crime under K.S.A. 21-3755(b)(1)(B) when there was evidence that the defendant had used a computer to generate documents — particularly, letters, a seller’s affidavit, and a quit claim deed — as part of a fraudulent scheme to illegally inherit property.93

IV. Duty of Loyalty and Fiduciary Duties

If a business learns through a forensic examination of a former employee’s computer or from another source that a former employee, while still employed, misappropriated data to begin, or work for, a competing business, then the business, under an appropriate set of facts, also may have a cause of action against the former employee for a breach of the common law duty of loyalty. Under Kansas law, all employees and agents owe their employers and principals a duty of loyalty and must “act solely for the benefit of the employer in all matters within the scope of the employee’s employment, and ... avoid conflicts between their duty to the employer and their own self-interest.”94 Moreover, the agent or employee has a duty to “act in good faith and with loyalty to further advance the interest of the principal.”95 Thus, secretly funneling confidential information to a competitor and competing with the employer while still employed violates fiduciary duties of loyalty.96

A claim for breach of the duty of loyalty can provide an additional or alternative remedy to a CFAA claim in appropriate cases. For example, in Universal Engraving Inc. v. Duarte there was no evidence that Duarte had earned any profits by accessing UEI’s computer system and uploading its information onto a flash drive while still employed by the UEI.97 However, the court awarded UEI $26,441.59 in damages for breach of the duty of loyalty, which represented Duarte’s total compensation during his last five months of employment with UEI.98

A closely related theory of recovery is a claim for breach of fiduciary duty. Under Kansas law the elements of a breach of fiduciary duty claim are: (1) the existence of a fiduciary relationship, (2) a duty arising out of the fiduciary relationship, (3) a breach of that duty, and (4) damages proximately caused by the breach of the duty.99 A breach of fiduciary duty claim can be asserted against an officer, director, or joint venturer. However, a party seeking to establish a fiduciary relationship must do so by clear and convincing evidence.100

In Paradigm Alliance Inc. v. Celeritas Technologies LLC,101 Paradigm alleged that Celeritas breached its fiduciary duty and duty of good faith and fair dealing by secretly planning and ultimately applying for a patent on a device using Paradigm’s confidential information and trade secrets without disclosing such plans and applications to Paradigm, during the fiduciary relationship, i.e., while they were joint venturers.102 Paradigm convinced the jury that absent the fiduciary relationship created by virtue of the parties’ joint venture, Celeritas would

86. K.S.A. 21-3755(b)(1).
87. Id. 21-3755(b)(2).
88. Id. 21-3755(b)(3).
89. Id. 21-3755(c)(1).
90. Id. 21-3755(c)(2), (d).
92. 260 Kan. at 107-08, Syl. ¶¶ 6, 7, 917 P2d at 849.
96. Id. at 1211 (citing Henderson v. Hassar, 225 Kan. 678, 594 P.2d 650, 659 (1979)).
98. Id. at *5.
102. Id. at 1265-66.
not have been privy to Paradigm’s processes which embody its confidential information and trade secrets.\(^\text{103}\)

While a breach of the duty of loyalty or breach of a fiduciary relationship claim can be a powerful tool to remedy the misappropriation of electronic data, it is important to note that the Kansas Uniform Trade Secret Act (KUTSA) “displaces conflicting tort, restitutory and other law of this state providing civil remedies for misappropriation of a trade secret.”\(^\text{104}\) Thus, there is some authority for the argument that if a breach of fiduciary duty claim is merely duplicative of a claim brought under the KUTSA, the breach of fiduciary duty claim may be displaced.\(^\text{105}\) However, the comments to the KUTSA expressly note that “[t]he Act does not apply to a duty imposed by law that is not dependent upon the existence of competitively significant secret information, like an agent’s duty of loyalty to his or her principal.”\(^\text{106}\)

V. Kansas Uniform Trade Secrets Act

In some cases, the KUTSA\(^\text{107}\) also may provide a remedy for the unauthorized taking or disclosure of computer data. The KUTSA provides a civil action for compensatory damages, punitive damages, and injunctive relief if the owner of the information can show: (1) that the information is a trade secret and (2) actual or threatened misappropriation of the information.\(^\text{108}\) The KUTSA defines a trade secret as:

- information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
  - (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
  - (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.\(^\text{109}\)

Plaintiffs asserting claims under the KUTSA in connection with computer tampering have received multi-million dollar judgments in Kansas courts. For example, in Ice Corp. v. Hamilton Sundstrand Corp.,\(^\text{110}\) a subcontractor brought an action against the general contractor on a military aircraft project alleging a willful and/or malicious misappropriation of its trade secrets and disclosure of those trade secrets to plaintiff’s competitor. The jury awarded compensatory damages of $4,795,300 against both defendants, and punitive damages of $10 million against one defendant and $2.5 million against the other.\(^\text{111}\)

In Universal Engraving Inc. v. Duarte,\(^\text{112}\) the trial judge found that after an employee accepted a position with his employer’s competitor, he uploaded information from his employer’s computer system and shared that information with his new employer.\(^\text{113}\) The court found that the employee violated the KUTSA and awarded the employer more than $6 million in actual damages, nearly $5.5 million in punitive damages, a permanent injunction, and attorneys’ fees and costs.\(^\text{114}\)

VI. Protecting Electronic Data

While there are a number of legal claims that can be asserted against employees and others who misappropriate electronic data, pursuing those claims can be likened to trying to catch a horse once it is out of the barn. The careful company will take steps to prevent the horse from escaping from the barn and, if the horse should escape the barn despite the precautions, to make it easier to catch. The following is a list of some simple precautions that can be taken to protect any employer’s confidential electronic data.

To begin with, through nondisclosure agreements, company policies, and employee handbooks, an employer can make it clear that an employee is only authorized to access the em-

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ployer’s computer and email system and is only allowed to copy and transmit the employer’s electronic data to further the business interests of the employer and not to promote or further the business interests of the employee or some third party. A nondisclosure agreement should spell out what information is confidential. Furthermore, including a provision that the employer can recover its attorneys’ fees for breach of the nondisclosure covenants can be a deterrent to misappropriation of confidential electronic data. Similarly, educating employees that they can be civilly and criminally liable for computer tampering can make some employees think twice about taking the employer’s confidential information.

Restricting access to confidential and trade secret electronic data to those with a need to know the information will reduce the chances of that information’s being misappropriated, especially when combined with a multilayer password system that only allows electronic access to those with a need to know specific confidential and trade secret information. The often overlooked, but simple step of labeling confidential documents “confidential” can deter theft of the information and give you a leg up in convincing a judge or jury that the information really is confidential.

Conducting exit interviews and reminding employees of their nondisclosure obligations also can have the effect of deterring theft of information, especially when coupled with giving the departing employee a copy of his or her nondisclosure agreement and asking the employee to certify in writing that the employee has returned all hard copy and electronic copies of company documents and data and has not retained any such electronic data on a home computer or other type of electronic storage device.

If the employee has a personal smart phone or other data storage device with a confidential list of customer contacts, you can ask that these contacts be deleted in your presence. Also, asking the departing employee about his or her post-employment plans may reveal a plan to go to work for a competitor. If an employer is suspicious that a departing employee has taken confidential electronic data, retaining an independent expert to image the hard drive of the departing employee’s laptop and checking the server for unusual computer activity in the waning days of employment may yield a treasure trove of useful evidence. By the same token, reformatting the hard drive of the laptop and handing it to the next employee might destroy critical evidence needed to establish a violation of the CFAA.

VII. Conclusion

The CFAA’s civil remedies give businesses a useful tool to protect their electronically stored information both from outsiders who break into their networks and employees who use their access to misappropriate sensitive information. A plaintiff generally must show that (1) the offender’s access was either without authorization or exceeded authorized access, (2) information was gained via intentional conduct that involved an interstate communication or that the offender was knowingly intending and furthering a fraud, and (3) the offender’s actions caused damage and a loss in excess of $5,000. In Kansas, the KUTSA and common-law fiduciary, and loyalty duties provide businesses with additional tools for protecting their electronically stored information. When assessing rights and claims relating to misappropriation or misuse of electronically stored information, lawyers representing Kansas businesses should analyze all of these potential causes of action.

About the Authors

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**ATTORNEY DISCIPLINE**

**ORDER OF DISCHARGE FROM PROBATION IN RE RUSSELL W. HASENBACK**

**ORIGINAL PROCEEDING IN DISCIPLINE NO. 97,218 – MARCH 22, 2011**

FACTS: On February 2, 2007, the court placed the respondent, Russell W. Hasenbank, on probation for a period of four years with specific conditions of supervision and reporting. See In re Hasenbank, 283 Kan. 155, 151 P.3d 1 (2007). The four-year probationary period was made retroactive to June 1, 2006. On March 3, 2011, the respondent filed a motion for discharge from probation along with affidavits from the respondent and the supervising attorney demonstrating compliance during the period of probation. The disciplinary administrator filed a response to the respondent’s motion confirming that the respondent has fully complied with all conditions imposed upon him by the court and recommending that the respondent be discharged from probation.

HELD: Court, having reviewed the motion, the affidavits, and the recommendation of the office of the disciplinary administrator, found that the respondent should be discharged from probation and from any further obligation in this matter.

**ORDER OF REINSTATEMENT IN RE MICHAEL R. MCINTOSH N/K/A ATIF MICHAEL MCINTOSH ABDEL-KHALIQ**

**ORIGINAL PROCEEDING IN DISCIPLINE NO. 83,037 – MARCH 22, 2011**

FACTS: On October 29, 1999, Court suspended the petitioner, Michael R. McIntosh, n/k/a Atif Michael McIntosh Abdel-Khalig, from the practice of law in Kansas for an indefinite period of time. See In re McIntosh, 268 Kan. 73, 75-76, 991 P.2d 403 (1999). On June 16, 2009, McIntosh filed a petition with this court for reinstatement to the practice of law in Kansas.

HEARING PANEL: On August 25, 2010, the panel filed its report setting out the circumstances leading to McIntosh’s suspension, a summary of the evidence presented, and its findings and recommendations. The panel unanimously recommended that McIntosh’s petition for reinstatement to the practice of law in Kansas be granted. The panel further recommended that McIntosh’s reinstatement be conditioned on the following items, among others: (a) the petitioner shall provide the disciplinary administrator with documentation from the Kansas Department of Revenue and the Internal Revenue Service establishing that the petitioner does not continue to owe the taxing entities for taxes, interest, or penalties; (b) the petitioner shall work with the disciplinary administrator to locate an attorney that is mutually agreed upon by the petitioner and the disciplinary administrator who is appropriate to supervise the petitioner’s re-entry into the practice of law and management of his practice; and (c) the petitioner shall successfully complete at least 10 hours of education on law office management.

HELD: Court, after carefully considering the record, accepted the findings and recommendations of the panel that the petitioner be reinstated to the practice of law in Kansas conditioned upon his compliance with the annual continuing legal education requirements and upon his payment of all fees required by the Clerk of the Appellate Courts and the Kansas Continuing Legal Education Commission.

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**CIVIL**

**REAL ESTATE AND SELLERS’ DISCLOSURE**

**OSTERHAUS V. TOTH ET AL.**

**JOHNSON DISTRICT COURT – REVERSED AND REMANDED**

**COURT OF APPEALS – AFFIRMED NO. 97,847 – MARCH 11, 2011**

FACTS: The Rosses sold their house to Toth in 2001 and disclosed they had experienced cracks in the foundation, wall movement, and water in the basement. After a heavy rain that caused water in the basement, Toth moved dirt around the foundation exterior. The next spring Toth put the house on the market and failed to disclose in the seller’s disclosure any problems with the foundation walls, cracks or movement, basement water, or knowledge of the problems explained by the Rosses. One potential sale failed to
go through after an inspector for the buyer (Tomlinson) discovered cracks in the back of sheetrock in the basement. Toth’s real estate broker (Schunk) told Toth to have the cracks in the foundation fixed with epoxy, which he did. Shortly thereafter, Osterhaus’ real estate agent, Lenci, expressed interest in Toth’s house. Schunk testified that he provided Lenci with a copy of Tomlinson’s inspection report. Osterhaus made an offer on the house and signed a Buyer’s Acknowledgment wherein the property was being sold without warranties or guaranties. Osterhaus’ inspector said that he did not notice any cracks in the drywall or basement walls because shelves and appliances were in front of the cracks, but the inspector did say he noticed a continuous line of epoxy filling over a crack. Osterhaus purchased the house after Toth agreed to pay $900 in closing costs in lieu of correcting the listed unacceptable conditions: fix the specified wiring issue, have the chimney cleaned, and blow additional insulation. Osterhaus sued Toth, Schunk, and TopPros (Schunk’s company) after water came in the basement when it rained. The district court granted summary judgment to the defendants based on prior case law and held that Osterhaus’ signature in the buyer’s acknowledgment granted summary judgment to the defendants based on prior case law and held that Osterhaus’ signature in the buyer’s acknowledgment did not amount to judgment as a matter of law to the defendants. The Court of Appeals reversed departing from Kansas law.

ISSUES: (1) Real estate and (2) sellers’ disclosure

HELD: Court discussed prior Kansas case law on sellers’ failure to disclose defects in a house. Court held the district court erroneously granted summary judgment to the defendants based on prior case law and held that Osterhaus’ signature in the buyer’s acknowledgment did not amount to judgment as a matter of law to the defendants. Court held the district court erred in granting summary judgment on the factual issue of whether Osterhaus was fraudulently prevented from making “a full, fair, and complete examination of the property.” Court held the “as-is” clause did not extend to the foundation problems and did not preclude Osterhaus’ claim for breach of contract. Court remanded to the district court to make factual findings as to whether a reasonable inspection would have revealed the defects in the foundation. Court held the district court failed to resolve the question of whether Osterhaus’ fraud and negligent misrepresentation were barred by the statute of limitations and remanded for determination by the district court of when the fact of injury was reasonably ascertainable by Osterhaus. Court remanded to the district court for determination of whether Toth is a supplier under the Kansas Consumer Protection Act. Court held genuine issues of material fact remained under the Brokerage Relationships in Real Estate Transactions Act concerning what information Schunk knew and what he disclosed to Osterhaus or Osterhaus’ agent that were omitted from, or contradict any information included by Osterhaus’ inspector. Court held the district court did not directly address the issue of Osterhaus’ motion to amend his petition and remanded for clarification. Court held that because it did not know whether the district court would allow Osterhaus to amend his petition on remanded, it was impossible to determine whether Osterhaus’ fraud claims were identical to those for breach of contract. Court held Schunk’s arguments concerning the incorporation of his company and the fact that he was also not a party to the real estate contract were only incidentally raised on appeal and would not be addressed.


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**Appellate Practice Reminders . . .**

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

**Annual Attorney Registration Begins**

In mid-May, the Appellate Clerk’s Office will mail 2011-2012 attorney registration forms to the 14,451 attorneys currently registered in Kansas. Fees are due on or before July 1 and a $100 late fee will be imposed on August 1. In 2010, there were 639 attorneys who paid the late fee and 220 who were suspended from the practice of law for failure to pay the attorney registration and CLE fees. Failure of any attorney to receive a statement from the Clerk shall not excuse the attorney from paying the fee. See Supreme Court Rule 208(c) (2010 Kan. Ct. R. Annot. 321).

Fees are set by Supreme Court order. In 2011, active attorneys will again pay $175 and inactive attorneys $65. There has been no fee increase. Those who are 66 years of age or older and elect retired status do not pay a fee. Only attorneys registered as active may practice law in Kansas.

The completed registration form and the fee must be sent together in the self-addressed envelope provided. Any form that is received without an enclosed fee will be returned to the sender. A check or money order is acceptable. The back of the registration form must be signed or it will be returned as incomplete.

Firms may remit fees for more than one attorney in a single check. The check must be accompanied by (1) a list giving firm name, firm address, name of each attorney, attorney’s registration number, and amount paid for each attorney; and (2) a completed registration form for each attorney listed.

A great deal of communication is now done by email. Inquiries can be addressed to registration@kscourts.org. The registration form includes the attorney’s current email address on file. Check to make sure it is accurate. Beginning in 2011, all attorneys on active status will be REQUIRED to provide an email address.

Remember that registration fees are sent to a bank lockbox. Upon receipt by the bank, fees are deposited, and the forms are sent to the Registration Office for data entry. The bank deposit date is used to credit the attorney’s payment. Mail the registration form and fee well before the deadline to avoid the late charge.

For further information about attorney registration or the status of a particular Kansas attorney, call Sally Brown at (785) 296-8409. For other questions related to appellate practice, call the Clerk’s Office and ask to speak with Carol G. Green, Clerk of the Appellate Courts, at (785) 296-3229.
RULING THAT THE HEARING OFFICER'S INITIAL ORDER AND SUPPLEMENTED THE REASONS FOR IMPOSING A $10,000 CIVIL PENALTY AND AGAIN IMPOSED A $10,000 PENALTY. ON REMAND, THE HEARING OFFICER ARTICULATED THE REASONS FOR IMPOSING A $10,000 PENALTY. THE SECRETARY SUMMARILY AFFIRMED THE DIVISION'S ORDER IMPOSING A $10,000 PENALTY.
been in out-of-home placement since 2004 when his juvenile history began; he stole from a store when he was 12 years old; he has been using marijuana since he was 11 years old; and he stole a car in 2007. Based on those observations, the Court of Appeals found there was no substantial competent evidence to support the district court’s decision to prosecute D.D.M. under the extended jurisdiction juvenile prosecution statutes.

ISSUE: Extended juvenile prosecution
HELD: Court held the relief the state sought, i.e., the immediate transfer of jurisdiction to the adult court for prosecution, was effectively denied by the court’s order for extended jurisdiction juvenile prosecution. The provisions of K.S.A. 2010 Supp. 38-2381(a)(2) provided the Court of Appeals with explicit statutory jurisdiction to review the district court’s ruling on the State’s motion to prosecute D.D.M. as an adult. Court addressed the determinations the district court was required to make under K.S.A. 38-2347 in order to designate the proceedings as an extended jurisdiction juvenile prosecution. Court found the district court’s findings belie the notion that its decision was based solely on the juvenile record. Court found nothing that would preclude a district court from relying solely on the files, records, and reports in prior adjudications, if they contain substantial competent evidence to allow the district court to assess the statutory factors. Court of Appeals should have been looking for evidence and accompanying inferences to support the district court. Court found that applying the appropriate review standard, the district court’s factual findings were supported by the evidence and that the district court did not abuse its discretion in assessing the statutory factors.

STATUTE: K.S.A. 38-2347(a), (b), (c), (f), -2381(a)(2)

STATE V. FLOYD
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 103,781 – MARCH 18, 2011

FACTS: In agreement for Alford plea in Jessica’s Law case, state agreed to not oppose departure from life sentence with mandatory 25-year minimum, and allowed Floyd to seek 36-month departure sentence. District court imposed 55-month sentence. Floyd appealed.

ISSUE: Departure sentence
HELD: After departure from Jessica’s Law, presumptive sentence under KSGA was 55 to 61 months. No abuse of discretion demonstrated in sentencing court’s refusal to grant a downward durational departure from the grid sentence in this case.

STATUTE: K.S.A. 21-4643(d), -4701 et seq., -4704

STATE V. FREEMAN
LEAVENWORTH DISTRICT COURT – REVERSED
COURT OF APPEALS – REVERSED
NO. 100,792 – APRIL 1, 2011

FACTS: Freeman entered plea with expectation of a 71-month total sentence. When sentencing, PSI indicated a more severe criminal history than expected, Freeman sought to withdraw plea due to their mistaken belief by counsel and state of a 71-month presumptive sentence. District court denied the motion. Freeman then sought downward departure to 71 months. District court imposed 120-month concurrent sentences. Freeman appeal. In unpublished opinion, Court of Appeals affirmed. Freeman’s petition for review granted.

ISSUE: Withdrawal of plea
HELD: Disagrees with Court of Appeals panel that Freeman abandoned contention that mutually mistaken belief about his criminal history constituted good cause to withdraw plea. Resolution of merits of this case is controlled by State v. Schow, 287 Kan. 529 (2008). District court’s summary denial of motion to withdraw plea without any analysis under State v. Edgar, 281 Kan. 30 (2006), was an abuse of discretion. Denial of Freeman’s motion to withdraw plea is reversed, and case is remanded to district court for further proceedings.

STATUTES: K.S.A. 20-3018(b); K.S.A. 22-3210(a)(2), -3210(a)(3), -3210(d); and K.S.A. 60-2101(b)

STATE V. HUERTA
SEDGWICK DISTRICT COURT
COURT OF APPEALS – DISMISSAL OF APPEAL
AFFIRMED
NO. 101,438 – MARCH 18, 2011

FACTS: Huerta sentenced to consecutive presumptive sentences after guilty pleas in two multi-felony cases. He appealed, claiming state presented false information during sentencing hearing, sentence was disproportionate to co-defendant’s sentence, and state impermissibly urged sentencing judge to rely on Huerta’s post-arrest silence. Pursuant to K.S.A. 21-4721(c)(1), Court of Appeals dismissed the appeal for lack of jurisdiction. Huerta filed petition for review, arguing dismissal of his appeal violated due process and equal protection. He also claimed an appeal relying on a constitutional argument is not truly “presumptive.”

ISSUES: (1) Equal protection challenge to K.S.A. 21-4721(c), (2) due process challenge to K.S.A. 21-4721(c), and (3) constitutional challenge to presumptive sentence

Huerta abandoned his due process challenge to K.S.A. 21-4721(c)(1).

No jurisdiction for direct appeal alleging constitutional infirmity in a presumptive sentence. Remedies remaining under K.S.A. 22-3504 and 60-1507 are noted.

STATUTES: K.S.A. 21-4703(q), -4704, -4716(a), -4716(b), -4718(a)(3), -4718(b)(1), -4720(b), -4721, -4721(a), -4721(c), -4721(c)(1), -4721(d), -4721(e), -4721(e)(1); K.S.A. 22-3504, -3716(b); K.S.A. 60-1507; and K.S.A. 1994 Supp. 21-4721(e)(1)

STATE V. JOLLY
SALINE DISTRICT COURT – SENTENCE VACATED AND REMANDED
NO. 101,512 – MARCH 18, 2011


ISSUES: (1) Statutory authority to impose 300-month sentence and (2) electronic monitoring
HELD: Under fact of case, district court’s departure was not performed according to either Jessica’s Law or Kansas Sentencing Guidelines Act. Illegal sentence imposed when district court departed from life imprisonment in Jessica’s Law without first proceeding to sentence pursuant to sentencing guidelines. Sentence vacated and remanded to district court for resentencing.

Lifetime monitoring issue addressed to supply guidance on resentencing. Under facts of case, district court incorrectly imposed electronic monitoring as a condition of sentence pursuant to K.S.A. 22-3717(u).

STATE V. KELLY  
SHAWNEE DISTRICT COURT – AFFIRMED  
NO. 100,913 – MARCH 25, 2011

FACTS: Kelly entered 1991 guilty plea to attempted rape and aggravated criminal sodomy. No direct appeal from sentence. District court denied motions filed in 2007 and 2008 to correct illegal sentence, to withdraw plea, and for post-conviction relief. District court denied Kelly’s motion for reconsideration and new allegations of wrongful conduct by trial attorneys. On appeal, Kelly reiterated claim that pleas were not voluntarily and knowingly entered, and claimed district court failed to inquire into attorney’s conflict of interest.

ISSUES: (1) Conflict of interest and (2) plea withdrawal

HELD: Conflict of interest claim is considered in context of K.S.A. 60-1507 rather than as motion to withdraw plea. Appellate review barred because 60-1507 motion not a substitute for appeal, abuse of remedy to not raise claim in either a direct appeal or in first 60-1507 motion, and time barred.

Kelly did not appeal ruling on merits of motion to withdraw pleas. Doctrine of res judicata applies and prevents relitigation of plea withdrawal issue.

STATUTES: K.S.A. 22-3210, -3210(d), -3504; K.S.A. 60-1507, -1507(c), -1507(f)(1), -1507(f)(2); and K.S.A. 22-3430 (Ensley 1988)

STATE V. MALMSTROM  
RENO DISTRICT COURT – SENTENCE VACATED AND REMANDED  
NO. 101,604 – MARCH 25, 2011

FACTS: Malmstrom convicted of attempted aggravated indecent liberties with a child. District court departed from mandatory 25-year minimum life sentence under Jessica’s Law, but found he was unable to depart a second time to a more beneficial criminal history. After state filed appeal, Spencer sought expansion of reasons considered for departure to be on the record, which was addressed by a district court order. Issues on appeal include whether sentencing judge properly relied on same findings to support departure from mandatory hard 25-year sentence under Jessica’s Law to a Kansas Sentencing Guidelines Act (KSGA) sentence, and a disposition departure from KSGA prison term to probation; whether reasons articulated by sentencing judge for those departures were substantial and compelling; and whether sentencing judge abused his discretion in the extend of the departure granted.

ISSUES: (1) Sameness of findings supporting departures, (2) evidence of substantial and compelling reasons for departure from Jes-

STATE V. SPENCER  
SHAWNEE DISTRICT COURT – SENTENCE VACATED AND REMANDED  
NO. 101,077 – MARCH 18, 2011

FACTS: Spencer pleaded guilty to two counts of aggravated indecent liberties with a child, off-grid felonies punishable under Jessica’s Law, and moved for departure. Citing three departure factors, district court departed from life sentence with mandatory minimum under Jessica’s Law, and imposed 155-month guideline sentence with dispositional departure for probation. After state filed appeal, Spencer sought expansion of reasons considered for departure to be on the record, which was addressed by a district court order. Issues on appeal include whether sentencing judge properly relied on same findings to support departure from mandatory hard 25-year sentence under Jessica’s Law to a Kansas Sentencing Guidelines Act (KSGA) sentence, and a disposition departure from KSGA prison term to probation; whether reasons articulated by sentencing judge for those departures were substantial and compelling; and whether sentencing judge abused his discretion in the extend of the departure granted.

ISSUES: (1) Sameness of findings supporting departures, (2) evidence of substantial and compelling reasons for departure from Jes-

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sica’s Law, (3) evidence of substantial and compelling reasons for dispositional departure from guidelines, (4) extent of departure, (5) permissible actions on remand, and (6) terminology note.

HELD: Standard of review in Jessica’s Law and non-Jessica’s Law sentencing departure cases is synthesized and stated. Sentencing judge need not differentiate between reasons supporting departure from mandatory minimum imprisonment under K.S.A. 21-4643(d) and reasons supporting dispositional departure from sentencing guidelines. Reasons for departure from mandatory minimum prison term must be stated on record at sentencing. Sentencing judge, prior to or in lieu of appeal, may not later add other reasons to record to support a granted departure.


On facts of case, sentencing judge abused his discretion in dispositional departure to probation. Factors again individually reviewed.

Extent of departure not reached because sentences are vacated and remanded.

On remand for resentencing, sentencing judge in Jessica’s Law case may re-evaluate and/or add to reasons for departure from mandatory minimum prison term under K.S.A. 21-4634(d) and for dispositional departure to probation and decide whether to re-grant the departure(s), and may also decide whether to grant a durational departure. If sentencing judge departs from mandatory minimum of Jessica’s Law to a sentence under KSGA, appropriate grid sentence for an off-grid Jessica’s Law crime is that dictated by severity level assigned to crime when it lacks element of disparity between the defendant’s and victim’s ages.

As closing note, court corrects labels previously used for departures from mandatory minimum of Jessica’s Law to sentencing grid, finding past references to “durational departure,” “downward departure,” or “downward durational departure” are confusing misnomers to be avoided.


STATE V. WALKER
WYANDOTTE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 99,457 – APRIL 1, 2011

FACTS: Walker convicted of possession of drugs discovered during a pedestrian stop to investigate an alleged burglary. Walker filed motion to suppress, claiming his encounter with the officer was an investigatory detention unsupported by reasonable suspicion of criminal activity where Walker did not sufficiently match witness’ description of clothing of suspect being sought. Walker also claimed the officer exceeded the scope of the detention by running a records check on Walker. District court denied the motion. Court of Appeals affirmed that decision, 41 Kan. App. 2d 337 (2009). Walker’s petition for review granted.

ISSUES: (1) Reasonable suspicion to detain and (2) scope of the detention

HELD: Officer’s encounter with Walker was a seizure because reasonable person in Walker’s position would not feel free to refuse officer’s request or otherwise terminate the encounter. Under totality of circumstances, however, officer possessed reasonable suspicion to detain and investigate the pedestrian defendant. State v. Anguiano,
FACTS: Crowther convicted in 2004 of attempted aggravated kidnapping. No Kansas case discusses the validity of a records check during a police-pedestrian encounter. Based on State v. Morlock, 289 Kan. 980 (2009), and U.S. Supreme Court authority it cites, officer in this case did not exceed the detention's constitutionally permissible boundaries by taking the Walker's ID and using it to run a computer records check. Notwithstanding Walker's dispute regarding sequence of events in his encounter with the officer, substantial competent evidence supported the district court's decision.

STATUTES: K.S.A. 20-3018(b); K.S.A. 22-2402, -2402(a); and K.S.A. 65-4160(a), -4162(a)

ISSUE: Ineffective assistance of counsel
HELD: Specific allegations of ineffective assistance examined and rejected. Search warrant improperly authorized unfocused inspection of Crowther's files, and good faith exception in Leon would likely not apply, but no showing of prejudice or of reasonable probability verdict would have been different if evidence obtained with warrant had been suppressed. No deficient performance by attorney failing to object to evidence that was not hearsay, and evidence having a sufficient foundation. No prejudice resulted from failure to object to prosecutorial misconduct because issue could have been raised on direct appeal without contemporaneous objection. State v. Taylor, 217 Kan. 706 (1975), defeats claim that insufficient evidence of bodily harm supported aggravated kidnapping charge.

STATUTES: K.S.A. 2010 Supp. 60-460; K.S.A. 21-3301(a), -3420, -3421; and K.S.A. 60-1507, -1507(b)

VICARIOUS LIABILITY AND SUMMARY JUDGMENT WAYMAN V. ACCOR NORTH AMERICA POTTAWATOMIE DISTRICT COURT – AFFIRMED NO. 103,456 – MARCH 18, 2011

FACTS: Wayman was a guest at the Motel 6 in Manhattan when he was struck and injured by a car driven by the motel general manager, Frederick Ristow, who was intoxicated. Ristow had not performed any act in furtherance of his employer's business the entire day of the accident. He was returning from a purely personal six-hour drinking excursion at Mel's Tavern. He had not been called to respond to any emergency at the motel. Even though Ristow made it back to the motel parking lot where the accident occurred, he was not performing any work-related activity at the time he injured Wayman. Wayman filed a lawsuit against Ristow individually and Accor North America Inc., d/b/a Motel 6 (Accor), claiming (1) Accor was vicariously liable for Ristow's negligent behavior and (2) Accor negligently hired, retained, and supervised Ristow. The district court granted summary judgment in favor of Accor on both claims. Wayman obtained a judgment against Ristow and timely appealed the district court's decision granting summary judgment in favor of Accor.

ISSUES: (1) Vicarious liability and (2) summary judgment
HELD: Court held that applying the Kansas test for whether an employee is acting within the scope of his or her employment, the uncontroverted facts establish that Ristow was not performing services for which he had been employed or doing anything reasonably incidental to his employment at the time he injured Wayman. Although Accor would be liable for Ristow's wanton conduct if he had acted with a view to the furtherance of Accor's business, in this instance Ristow had stepped aside from that business and committed an individual wrong for a purpose personal to Ristow. Court concluded the district court correctly found as a matter of law that Ristow was not acting within the scope of his employment when he injured Wayman. Therefore, the district court did not err by granting summary judgment in favor of Accor on the issue of vicarious liability. Court also found the district court did not err in granting

HABEAS CORPUS CROWTHER V. STATE JOHNSON DISTRICT COURT – AFFIRMED NO. 102,923 – MARCH 25, 2011

FACTS: Crowther convicted in 2004 of attempted aggravated kidnapping, aggravated arson, aggravated battery, criminal threat, and violating a protective order. In 2007 motion under K.S.A. 60-1507, he alleged in part ineffective assistance of counsel. District court summarily denied relief. Crowther appealed, claiming evidence was insufficient to support conviction for attempted aggravated kidnapping.

STATUTES: K.S.A. 66-118a, -118b, -118c; and K.S.A. 77-529(b), -601, -607, -631

VICARIOUS LIABILITY AND SUMMARY JUDGMENT WAYMAN V. ACCOR NORTH AMERICA POTTAWATOMIE DISTRICT COURT – AFFIRMED NO. 103,456 – MARCH 18, 2011

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COURT OF APPEALS

CIVIL

FINAL AGENCY ACTION SPRINT COMMUNICATIONS ET AL. V. KANSAS CORPORATION COMMISSION KANSAS CORPORATION COMMISSION – APPEAL DISMISSED NO. 105,571 – MARCH 2, 2011 FACTS: Kansas City Power and Light Co. (KCPL) filed an application with the Kansas Corporation Commission to modify its tariffs, continue implementation of its regulatory plan, and increase electricity rates. Several businesses, including various Sprint corporations, intervened in the proceedings. The Commission approved a part of KCPL's application for a rate increase. The Commission made certain modifications based on a motion for reconsideration and gave additional time for further reconsideration. Several parties filed motions for reconsideration, but Sprint and various hospitals filed a petition for judicial review with the Kansas Court of Appeals.

ISSUE: Final agency action
HELD: Court found the Kansas Corporation Commission was still dealing with motions for reconsideration filed by various parties when this petition for judicial review was filed. These motions focus on the substantial issue of the award of rate case expenses, one of the many components of the revenue requirements of utilities that is at the heart of this judicial review. Court held the utility rate case was still under active consideration by the Commission. Court held the petition for judicial review of agency action is premature because the Commission has not yet taken its final action. Following the wording of K.S.A. 66-118b, Court found the time for filing an appeal of any order in a proceeding arising from a utility rate hearing shall run from the date that all petitions for reconsideration have been denied or deemed denied due to the passage of time. Court dismissed this case without prejudice.

STATUTES: K.S.A. 66-118a, -118b, -118c; and K.S.A. 77-529(b), -601, -607, -631

HABEAS CORPUS CROWTHER V. STATE JOHNSON DISTRICT COURT – AFFIRMED NO. 102,923 – MARCH 25, 2011 FACTS: Crowther convicted in 2004 of attempted aggravated kidnapping, aggravated arson, aggravated battery, criminal threat, and violating a protective order. In 2007 motion under K.S.A. 60-1507, he alleged in part ineffective assistance of counsel. District court summarily denied relief. Crowther appealed, claiming evidentiary hearing was required on allegations of ineffective assistance of counsel that included failure to file motion to suppress warrant that did not limit files to be seized from Crowther's computer, failure to lodge objections to inadmissible evidence, failure to object to prosecutorial misconduct during closing argument, and failure to argue evidence was insufficient to support conviction for attempted aggravated kidnapping.

STATUTES: K.S.A. 20-3018(b); K.S.A. 22-2402, -2402(a); and K.S.A. 65-4160(a), -4162(a)
summary judgment in favor of Accor on Wayman's claim of negligent hiring, retention, and supervision.

STATUTES: No statutes cited.

WORKERS' COMPENSATION AND FUTURE MEDICAL BENEFITS
SILER V. SHAWNEE MISSION SCHOOL DISTRICT, U.S.D. 512
WORKERS COMPENSATION BOARD – APPEAL DISMISSED
NO. 103,714 – APRIL 1, 2011

FACTS: Siler, a teacher for U.S.D. 512, was struck by lightning on August 30, 2001, as she was walking students to cars during a thunderstorm. Siler suffered injuries including herniated disks and pain along her right side. Siler had many doctors. A settlement hearing was held on September 6, 2007, at which Siler agreed to accept $50,000 in settlement of all her claims except her right to future medical treatment. The administrative law judge (ALJ) stated at the settlement hearing that Siler's future medical treatment would “remain open upon proper application to the director unless the parties otherwise agree.” U.S.D. 512 paid Siler's medical bills for approximately seven years until it requested an independent psychiatric evaluation of Siler's condition. A doctor found psychotherapy was no longer therapeutic. Siler appeals from the order of the Workers Compensation Board (Board) finding that the ALJ had jurisdiction to issue a preliminary order denying her future psychotherapy treatment. U.S.D. 512 argues that the ALJ's preliminary order was not a final order and this court does not have jurisdiction to hear her appeal.

ISSUES: (1) Workers' compensation and (2) future medical benefits

HELD: Court held that when the parties do not agree on future medical treatment that has been left open in a workers' compensation settlement award, the ALJ has jurisdiction to hear the issue under K.S.A. 44-534a. No workers' compensation preliminary finding or preliminary award is appealable by any party, and the same shall not be binding in a full hearing on the claim. After an ALJ has entered a preliminary order under K.S.A. 44-534a, the Workers Compensation Board does not have jurisdiction to review that order unless the ALJ exceeded his or her jurisdiction. This court does not have jurisdiction to review a decision of the Workers Compensation Board when the Board did not have jurisdiction.

STATUTE: K.S.A. 44-528, -531, -534a; and K.S.A. 2010 Supp. 44-551(i)(2)(A)

CRIMINAL

STATE V. COOK
MONTGOMERY DISTRICT COURT – REVERSED AND REMANDED
NO. 102,375 – MARCH 4, 2011

FACTS: Cook convicted of felony possession of marijuana. On appeal he claimed trial court erred in allowing evidence of Cook's prior marijuana conviction for which Cook was still on probation, and failed to fully investigate Cook's requests for a new attorney. Cook also claimed he was denied a fair trial by prosecutorial misconduct during closing argument by implying Cook was credible because he failed to volunteer or impeach evidence of his prior conviction, and cumulative error. Cook also claimed trial court unconstitutionally used Cook's criminal history score to increase sentence without the cumulative error. Cook also claimed trial court unconstitutionally failed to volunteer or impeach evidence of his prior conviction, and during closing argument by implying Cook was credible because he also claimed he was denied a fair trial by prosecutorial misconduct failed to fully investigate Cook's requests for a new attorney. Cook also claimed his conviction without establishing the material prong of relevance test, and Cook merely taking the witness stand did not place his credibility in issue for purposes of using the prior conviction to impeach his credibility. Only purpose for presenting this evidence was to show Cook's propensity to possess marijuana. This evidence did not have any tendency to prove any material fact at trial, and was prejudicial, and error was not harmless under facts of case. Prosecutor's comments were outside the wide latitude allowed in discussing the evidence. Prosecutor's conduct was intentional, gross, and flagrant and demonstrated ill will to obtain a conviction at the expense of Cook's right to a fair trial. Completion of errors in this case requires reversal of Cook's conviction.

Court failed to establish a justifiable dissatisfaction with appointed counsel. No abuse of discretion in denying what was essentially a motion to substitute appointed counsel.

Cook's Apprendi sentencing claim is defeated by controlling Kansas Supreme Court precedent.


STATE V. MCCAMMON
JOHNSON DISTRICT COURT – VACATED IN PART AND REMANDED WITH DIRECTIONS
NO. 103,343 – MARCH 4, 2011

FACTS: Cummings pled guilty to attempted aggravated robbery and was sentenced to 31 months' imprisonment. The trial court ordered Cummings to reimburse his Board of Indigents' Defense Service (BIDS).

ISSUE: BIDS attorney fees

HELD: Court held the district court failed to make the requisite findings to impose BIDS attorney fees against Cummings and remanded for additional proceedings.

STATUTE: K.S.A. 22-3717, -4513

STATE V. GRAY
RENO DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 101,481 – MARCH 18, 2011

FACTS: Gray was convicted by jury of one count of aggravated assault of a law enforcement officer and three alternative counts of fleeing and attempting to elude a police officer. After the jury rendered its verdict, the trial court failed to inquire in open court, before the jurors were discharged, whether the jury agreed with the verdict just announced by the foreperson.

ISSUE: Jury's verdict

HELD: Court held the trial court's failure to follow the statutory mandate of K.S.A. 22-3421 to inquire as to whether the verdict was the jury verdict was the jury's verdict was reversible error.

STATUTE: K.S.A. 22-3421

STATE V. MCCAMMON
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 102,713 – MARCH 4, 2011

FACTS: McCammon charged with theft when two of the vehicles were determined to have been stolen. District court denied motion to suppress the VIN evidence and convicted McCammon on stipulated facts. On appeal, McCammon claimed district court erred in denying motion to suppress VIN evidence that was obtained outside scope and purpose of the administrative search warrant to inspect the building for fire code violations. McCammon also claimed insufficient evidence supported his conviction.
ISSUES: (1) Search and seizure and (2) sufficiency of evidence
HELD: No error in district court’s denial of motion to suppress. McCammon had standing to challenge the search because he had a possessory interest in the premises being searched. Officer’s mere observation of VINs through windshields was not a search implicating Fourth Amendment, and her recording of VINs was not a seizure within meaning of Fourth Amendment. Also, McCammon had no reasonable expectation of privacy in a VIN. Because Fourth Amendment was not implicated, no need to examine reasonableness of officer’s action, and whether the officer exceeded the purpose and scope of the administrative search.

When criminal defendants agree to stipulated facts without objection, they are precluded from arguing on appeal that the evidence was insufficient to support the convictions if they conceded in the stipulation that the convictions were supported by sufficient evidence. This rule applies in this case. Additionally counsel’s statement could be considered invited error, and evidence was legally sufficient.

STATE: K.S.A. 21-3701(a)(4), -3701(b)(3)

STATE V. SILHAN
RENO DISTRICT COURT – AFFIRMED
NO. 102,249 – APRIL 1, 2011

FACTS: Silhan pled guilty to two counts of involuntary manslaughter while driving under the influence of alcohol and two counts of aggravated battery after he drove his vehicle on the wrong side of a divided highway and crashed head-on into another vehicle. Silhan was seriously injured in the accident and hospitalized for a significant period of time. The district court denied Silhan’s motion for dispositional departure to a probation sentence and sentenced him to prison. Almost two years after his plea, Silhan, with the help of a new attorney, filed a motion to withdraw his plea based on his low cognitive abilities, that he did not understand his plea, and that he was denied effective representation. The district court denied the motion to withdraw this plea.

 ISSUES: (1) Post-sentencing motion to withdraw plea and (2) intelligent waiver

HELD: Court held the record reflected there was never a concern raised about Silhan’s competency by the district court, Silhan himself, his family, his plea counsel, or anyone else connected to the case until after well after he was sentenced and his motion denied. Court found that Silhan never took the stand to testify he had not understood the nature of the charges or the consequences of his plea. He never refuted his attorney’s testimony about their conversations. He never refuted the statements he made in the DVD prior to entering his plea about the consequences of his actions. The same judge who denied the motion to set aside the plea had presided over many of the prior proceedings in the case, including the actual entry of the plea. That judge had ample opportunity to observe Silhan. Court held no abuse of discretion in the determination that Silhan was competent to enter his plea. Court rejected Silhan’s claims of ineffective assistance of counsel based on allegations of a failure to insure that Silhan was competent, failure to understand the causation element of involuntary manslaughter and advising Silhan accordingly, and coercing and misleading Silhan into pleading guilty. Court found none of Silhan’s attorney’s performance fell below a standard of reasonableness or that had the errors not occurred Silhan would not have pled guilty.

STATE: K.S.A. 22-3210, -3301(l)

STATE V. SIMMONS
SEDGWICK DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS
NO. 102,715 – MARCH 4, 2011

FACTS: Simmons was convicted of aggravated battery and two other misdemeanors when he punched his girlfriend and stole several items of her property. Simmons challenges the jury instructions, the fees of his appointed counsel and his criminal history.

ISSUES: (1) Prosecutorial misconduct, (2) jury instruction, (3) BIDS fees, and (4) criminal history

HELD: Court held the prosecutor committed misconduct by asking the victim whether she had seen Simmons since he’d been in custody. Prosecutor admitted that the question was inartfully phrased, but there was no ill will on the part of the prosecutor who said he was trying to establish there had been no communication between the two since the incident. Court held the trial court erred by failing to instruct the jury on the lesser charge of simple battery and as a result the jury was never given the opportunity to consider whether or not Simmons’ actions in punching the victim created circumstances whereby great bodily harm could have been inflicted. Court reversed for new trial on the aggravated battery charge. Court also held the trial court erred in assessing the costs of services of Simmons’ appointed public defender against him without taking into account his ability to pay and his financial circumstances and should reconsider the Board of Indigents’ Defense Service fees. Court dismissed Simmons’ Apprendi claims.

STATUTES: K.S.A. 21-3108(5), -3412, -3414; and K.S.A. 22-3420(3), -4513

STATE V. THOMPSON
OSAGE DISTRICT COURT – REVERSED AND REMANDED
NO. 103,633 – MARCH 11, 2011

FACTS: Thompson convicted of speeding and DUI. His case was assigned to district magistrate judge for a bench trial, but due to magistrate judge’s illness, a district judge presided and found Thompson guilty. The magistrate judge later sentenced Thompson and signed
journal entry of judgment for underlying six-month prison term, fines and costs, and 12-month probation. Thompson appealed to district court and requested a jury trial. District court dismissed the appeal, finding it had no jurisdiction because the charges had already been tried before a district court judge. Thompson appealed, claiming he was denied right to a jury trial, and claiming insufficient evidence supported the conviction.

ISSUES: (1) District court’s jurisdiction and (2) sufficiency of the evidence

HELD: No case law addresses this precise issue. Under peculiar facts of case, final judgment did not occur until magistrate judge pronounced Thompson’s sentence from the bench. Although district judge presided over the bench trial, the final judgment was a decision of the magistrate judge. Thompson had the right to appeal the judgment to the district court. Error to dismiss Thompson’s appeal to the district court. Case is remanded to district court for trial de novo. Thompson entitled to jury trial pursuant to his timely request.

Because Thompson had no statutory right to appeal the magistrate judge’s judgment directly to Court of Appeals, there is no appellate jurisdiction to consider Thompson’s claim regarding sufficiency of the evidence.

STATUTES: K.S.A. 22-3404(1), -3609a(1), -3609a(3); K.S.A. 2003 Supp. 22-3609a; and K.S.A. 1997 Supp. 22-3609a, -3609a(1)

STATE V. WITTEN
PRATT DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS
NO. 103,476 – MARCH 18, 2011

FACTS: In district court case No. 08CR89, a jury found Witten guilty of the sale of methamphetamine within 1,000 feet of a school and possession of methamphetamine without a drug tax stamp. In a companion case, No. 08CR276, Witten pled guilty to the possession of methamphetamine and possession of a controlled substance without a drug tax stamp. On appeal, Witten challenges his convictions in case No. 08CR89, claiming that prosecutorial misconduct deprived him of a fair trial and that there was insufficient evidence that he sold methamphetamine within 1,000 feet of a school. Witten also contends the district court erred in denying his motion to withdraw his guilty pleas in case No. 08CR276. Finally, Witten challenged the use of his criminal history.

ISSUES: (1) Sufficiency of the evidence, (2) motion to withdraw guilty plea, and (3) allocution

HELD: Court reversed Witten’s conviction for sale of methamphetamine based on the state’s failure to prove that the school in question was being used for student instruction or attendance or extracurricular activities of pupils enrolled in kindergarten or any of the grades one through 12. Court remanded for resentencing for the lesser-included offense of simple sale of methamphetamine. Court found the prosecutor’s comments that it was up to the jury to stop Witten from selling methamphetamine in the community was improper and intended to appeal to the passions of the jurors, but the error was harmless based on the overwhelming nature of the evidence. Court found no error in the prosecutor’s comments concerning the use of the school and the prosecutor’s vouching for a witnesses’ credibility. Court found Witten’s belated attempt to inject during allocution a claim that he was coerced into entering a plea was untimely and untrustworthy. Witten failed to demonstrate good cause to support the setting aside of his guilty pleas. Court denied Witten’s Apprendi claim.

STATUTES: K.S.A. 22-3210(d); K.S.A. 60-261, -409; and K.S.A. 65-4161(d)
JUNE

Wednesday, June 8 – Friday, June 10
KBA Annual Meeting & Joint Judicial Conference
Capitol Plaza Hotel & Maner Conference Center, Topeka

Friday, June 17, 8:25 a.m. – 12:25 p.m. (Session I);
1:25 – 5:25 p.m. (Session II)
Legislative & Case Law Institute Video Debut
Lenexa, Topeka, and Wichita

Features the 2011 Kansas Annual Survey as seminar materials.

Tuesday, June 21 – Thursday, June 30
Video Replay Week – Brown Bag Ethics, The Relevance of Civil Rights, and Legislative & Case Law Institute
Multiple Sites Statewide

Thursday, June 23, 2:30 – 4:10 p.m.
Ethics for Good XII
Folly Theater, Kansas City, Mo.

Friday, June 24, 2:30 – 4:10 p.m.
Ethics for Good XII
Polsky Theatre, JCCC Carlsen Center, Overland Park

JULY

Thursday, July 7, 8:25 a.m. – 12:25 p.m. (Session I); 1:25 – 5:25 p.m. (Session II)
Legislative & Case Law Institute Video Replay
Kansas Law Center, Topeka

Features the 2011 Kansas Annual Survey as seminar materials.

Wednesday, July 13, 8:30 a.m. – 12:05 p.m.
The Relevance of Civil Rights Video Replay
Kansas Law Center, Topeka

Thursday, July 14, 9 – 10:40 a.m. and
1 – 2:40 p.m.
Brown Bag Ethics Video Replay
Kansas Law Center, Topeka

Thursday, July 21, 9 – 10:40 a.m.
Brown Bag Ethics Video Replay
Kansas Law Center, Topeka

Thursday, July 21, 12:30 – 4:05 p.m.
The Relevance of Civil Rights Video Replay
Kansas Law Center, Topeka

Register online at: www.ksbar.org/public/cle.shtml
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