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by Joseph A. Schremmer
P22
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Spotlight the BEST & BRIGHTEST attorneys you know With a 2018 KBA Awards Nomination

- Phil Lewis Medal of Distinction
- Distinguished Service
- Professionalism
- Pillars of the Community
- Distinguished Government Service
- Courageous Attorney
- Outstanding Young Lawyer
- Diversity
- Outstanding Service
- Pro Bono

Learn more about the awards online at http://www.ksbar.org/awards
The KBA Awards Committee is seeking nominations for award recipients for the 2018 KBA Awards. These awards will be presented in June at the KBA Annual Meeting in Overland Park. Below is an explanation of each award and a nomination form for completion. The Awards Committee, chaired by Sara Beezley, of Girard, appreciates your help in bringing worthy nominees from throughout the state of Kansas to the committee's attention! Deadline for nominations is Friday, March 2.

**Phil Lewis Medal of Distinction**

The KBA’s Phil Lewis Medal of Distinction is reserved for individuals or organizations in Kansas who have performed outstanding and conspicuous service at the state, national, or international level in administration of justice, science, the arts, government, philosophy, law, or any other field offering relief or enrichment to others.

- A recipient need not be a member of the legal profession or related to it, but the recipient’s service may include responsibility and honor within the legal profession;
- This award is only given in those years when it is determined that there is a worthy recipient.

**Distinguished Service Award**

This award recognizes an individual for continuous long-standing service on behalf of the legal profession or the public, rather than the successful accomplishment of a single task or service.

- The recipient must be a lawyer and must have made a significant contribution to the altruistic goals of the legal profession or the public;
- Only one Distinguished Service Award may be given in any one year. However, the award is given only in those years when it is determined that there is a worthy recipient.

**Professionalism Award**

This award recognizes an individual who has practiced law for 10 or more years who, by his or her conduct, honesty, integrity, and courtesy, best exemplifies, represents, and encourages other lawyers to follow the highest standards of the legal profession.

**Pillars of the Community Award**

This award is available to a Kansas lawyer and KBA member with a minimum of 10 years active non-specialized, general legal practice in a predominately low-density population area of Kansas. Recipients will have had substantial practice in small or solo law firms or local government service. Requirements are flexible but consideration will be given to the following factors, including how such factors apply to the lawyer’s community:

- the variety/diversity of law practiced
- impact/high profile law work
- general contributions to the law and legal profession
- specific contributions to the legal profession
- mentoring and support for legal education
- contributions to the State/community
- notable civic activities
- periods of elected or appointed public/government service
- military service
- examples of volunteerism and charitable activity
- reputation in the organized bar, State and community

This award may be but need not be given every year. More than one recipient can receive the award in a one year.
Awards of the Kansas Bar Association (Con’t.)

Distinguished Government Service Award

This award recognizes a Kansas lawyer who has demonstrated an extraordinary commitment to government service. The recipient shall be a Kansas lawyer, preferably a member of the KBA, who has demonstrated accomplishments above and beyond those expected from persons engaged in similar government service. The award shall be given only in those years when it is determined that there is a recipient worthy of such award.

Courageous Attorney Award

The KBA created a new award in 2000 to recognize a lawyer who has displayed exceptional courage in the face of adversity, thus bringing credit to the legal profession. Examples of recipients of this type of award in other jurisdictions include a small town lawyer who defended a politically unpopular defendant and lost most of his livelihood for the next 20 years, an African-American criminal defense attorney who defended two members of the white supremacist movement, and a small town judge who lost his position because he refused the town council’s request to meet monetary quotas on traffic offenses. This award will be given only in those years when it is determined that there is a worthy recipient.

Outstanding Young Lawyer

This award recognizes the efforts of a KBA Young Lawyers Section member who has rendered meritorious service to the legal profession, the community, or the KBA.

Diversity Award

This award recognizes an individual who has shown a continued commitment to diversity; or a law firm; corporation; governmental agency, department, or body; law-related organization; or other organization that has significantly advanced diversity by its conduct, as well as by the development and implementation of diversity policies and strategic plans, which include the following criteria:

- A consistent pattern of the recruitment and hiring of diverse attorneys;
- The promotion of diverse attorneys;
- The existence of overall diversity in the workplace;
- Cultivating a friendly climate within a law firm or organization toward diverse attorneys and others;
- Involvement of diverse members in the planning and setting of policy for diversity;
- Commitment to mentoring diverse attorneys, and;
- Consideration and adoption of plans to continue to improve diversity within the law firm or organization, whereas;
- Diversity shall be defined as differences of gender, skin color, religion, human perspective, as well as disablement.

The award will be given only in those years when it is determined there is a worthy recipient.

Outstanding Service Award(s)

These awards are given for the purpose of recognizing lawyers and judges for service to the legal profession and/or the KBA and for recognizing nonlawyers for especially meritorious deeds or service that significantly advance the administration of justice or the goals of the legal profession and/or the KBA.

- No more than six Outstanding Service Awards may be given in any one year.
- Recipients may be lawyers, law firms, judges, nonlawyers, groups of individuals, or organizations.
Awards of the Kansas Bar Association (Con’t.)

Outstanding Service Awards may recognize:

- Law-related projects involving significant contributions of time;
- Committee or section work for the KBA substantially exceeding that normally expected of a committee or section member;
- Work by a public official that significantly advances the goals of the legal profession or the KBA; and/or
- Service to the legal profession and the KBA over an extended period of time.

Pro Bono Award(s)

This award recognizes a lawyer or law firm for the delivery of direct legal services, free of charge, to the poor or, in appropriate instances, to charitable organizations whose primary purpose is to provide other services to the poor.

No more than three Pro Bono Awards may be given in any one year.

In addition to the Pro Bono Award, the KBA awards a number of Pro Bono Certificates of Appreciation to lawyers who meet the following criteria:

- Lawyers who are not employed full time by an organization that has as its primary purpose the provision of free legal services to the poor;
- Lawyers who, with no expectation of receiving a fee, have provided direct delivery of legal services in civil or criminal matters to a client or client group that does not have the resources to employ compensated counsel;
- Lawyers who have made a voluntary contribution of a significant portion of time to providing legal services to the poor without charge; and/or
- Lawyers whose voluntary contributions have resulted in increased access to legal services on the part of low and moderate income persons.
KBA Awards Nomination Form

Nominee’s Name _______________________________________________________________

Please provide a detailed explanation below of why you have nominated this individual for a KBA Award. Attach additional information as needed.

- Phil Lewis Medal of Distinction
- Distinguished Service Award
- Professionalism Award
- Pillars of the Community Award
- Distinguished Government Service Award
- Courageous Attorney Award
- Outstanding Young Lawyer
- Diversity Award
- Outstanding Service Award
- Pro Bono Award/Certificates

______________________________________________________________________________
______________________________________________________________________________
______________________________________________________________________________
______________________________________________________________________________
______________________________________________________________________________
______________________________________________________________________________

Nominator’s Name _____________________________________________________________
Address ______________________________________________________________________
Phone _______________________________ E-mail____________________________________

Return Nomination Form by Friday, March 2, 2018, to:

KBA Awards Committee
Attn: Deana Mead
1200 SW Harrison St.
Topeka, KS 66612-1806
ANNUAL MEETING 2018
Thurs. & Fri. June 14 & 15
DoubleTree Overland Park

Save the Date

JUNE 2018
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Taking care of yourself and your practice

My father ran every single day from the day he graduated from law school until he had his first surgery a few months before he passed away from colon cancer. He kept meticulous logs documenting the time, distance and route of every single run. It was his daily escape, his passion. He guarded it jealously and obsessively. It was, as he once confided in me, the only time he truly had to himself on any given day. A time to clear his head and refresh his mind from the constant pressure of dealing with the parade of troubles presented by his clients for guidance and resolution. My father worked hard as a lawyer and, from the perspective of a now practicing lawyer myself, his work ethic and client service were impressive and admirable. Running, in his case, allowed him to maintain his personal well-being.

This past August, the National Task Force on Lawyer Well-Being issued a 73-page report entitled, The Path to Lawyer Well-Being: Practical Recommendations for Positive Change. The report begins with the premise that “to be a good lawyer, one has to be a healthy lawyer” and acknowledges that “sadly, our profession is falling short when it comes to well-being.” The report goes on to provide indispensable advice and recommendations to judges, regulators, employers, law schools, bar associations, professional liability carriers and lawyer assistance programs for improving the well-being of lawyers. Well-being is defined as the “continuous process whereby lawyers seek to thrive in each of the following areas: emotional health, occupational pursuits, creative or intellectual endeavors, sense of spirituality or greater purpose in life, physical health, and social connections with others.” Well-being is an indispensable part of a lawyer’s duty of competence and is critical to a lawyer’s ability to effectively represent clients in an ethical and professional manner.

As lawyers, it is sometimes difficult to maintain perspective. It is hard to maintain a healthy work/life balance while developing and growing a successful law practice. Perspective and boundaries are important. For most lawyers, practicing law is not a 9-5 pursuit. Client calls, court deadlines, board meetings, civic events and numerous other duties necessary to maintaining a viable legal practice have eroded the boundaries between the time of day traditionally reserved for work and that time of day reserved for other equally, if not more, important aspects of life. This includes time spent with family and friends, time spent exercising or time spent simply relaxing. Lawyers are caretakers who constantly look out for the needs and well-being of their clients. Yet lawyers are notorious for not taking care of themselves. Visits to the dentist or doctor are postponed because of some emergency imposed by a client, opposing counsel or the court. Meals are skipped to get through a deposition or trial. Children’s activities are missed because a hearing or meeting ran long. Technology has, in many ways, made it worse. Lawyers are now accessible 24/7 with responses to emails, texts or phone messages expected immediately rather than limited to the regular work day. It is no wonder that the legal profession has become
increasingly competitive and stressful and faces unacceptably high rates of substance abuse, addiction and depression.

I do not have my father’s passion for running, but I share his passion for the law and his same dedication to providing needed service to my clients. I also understand his need for escape and the necessity of resetting my mental and physical clock so I can maintain the well-being necessary to be a productive lawyer with a quality life both inside and outside the profession. I hope that each of you has a passion outside the practice of law. Take time to exercise, get medical check-ups, spend time with family and friends, and otherwise live a healthy life so you can maintain well-being. I hope you also, as a member of our profession, take the time to make sure others in our profession are also maintaining balance in their lives. Know that assistance is always available from the Kansas Bar Association and other organizations if you or a lawyer you know is ever in need of help in dealing with the pressures of the practice of law. It is critical for us to instill greater well-being into the members of our profession to maintain public confidence in the legal system and to perhaps re-envision in a more positive and healthy way what it means to live the life of a lawyer.

About the Author

Gregory P. Goheen is a shareholder at McAnany, Van Cleave & Phillips, P.A., where he has practiced since graduating from Southern Methodist University’s Dedman School of Law in 1993. He received his bachelor’s degree in 1990 from the University of Kansas. Greg is past President of the Kansas Association of School Attorneys and Fellow and past Trustee of the Kansas Bar Foundation.

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Gregory P. Goheen is a shareholder at McAnany, Van Cleave & Phillips, P.A., where he has practiced since graduating from Southern Methodist University’s Dedman School of Law in 1993. He received his bachelor’s degree in 1990 from the University of Kansas. Greg is past President of the Kansas Association of School Attorneys and Fellow and past Trustee of the Kansas Bar Foundation.
Holiday Gift Guide

There is still time to troll Pinterest for handmade holiday gifts as your schedule is sure to include plenty of craft time. Should your efforts land you a spot on PinterestFail.com (Where good intentions come to die), then whip out the credit card and try one of these suggestions:

**Google Pixel Buds** ($159 at store.google.com) – Google’s wireless headphones may not be much to look at but they integrate Google Translate functionality. Two Pixel Bud wearers can chat using their own native languages and the conversation is translated for each user in real time. The Buds can translate 40 languages currently thanks to Google’s robust AI language infrastructure. You can play with the system now using the free Google Translate app for Android or iOS. Lawyers should be hesitant replacing trained human translators with this type of technology, but it is already used by many lawyers informally for more routine conversations and fact-gathering with clients.

**Anker PowerCore+ 26800 PD** ($120 at amazon.com) – Keeping laptops, tablets, and phones charged on the go is always a challenge. The huge capacity PowerCore+ can fully recharge a MacBook Pro once and any smartphone at least seven times. It supports high-speed charging on output and the PowerCore+ itself can be fully recharged in just 4.5 hours. Anker has a solid reputation for better, faster, longer-lasting battery cells you will not find in no-name battery banks.

**YouTube Red** ($9.99/month at youtube.com) – Presenters love video to convey a message or make a point but are often surprised when the video that played back at the office fails on the road. Slow or no internet at the presentation site or disruptive ads can make any presentation using YouTube videos look amateurish. A Red subscription solves the problems. In addition to getting ad-free videos and first-run content, Red provides offline use and downloadable videos—no internet connection needed. Red also allows music or video playlists to play uninterrupted in the background when another app is opened. The subscription features make YouTube Red a valuable professional and personal tool.

**Cassette Tape Subscription** (£150/year at theretro.co.uk) – Some people treasure the nostalgic warble of low fidelity music over digital, high-quality music available from a service like YouTube Red. They want to rewind to a specific a track using nothing but a pencil and then feel the solid “kerchunk” as the play head locks into position against the delicate magnetic tape. The subtle background hiss and hypnotic rotation of the pullies takes them away to an earlier age of aerosol hairspray, popped collars, and acid wash jeans. TheRetro will “curate” a monthly selection of three music cassettes (you pick the genre) and ship to your door. There are U.S.-based options but none as cheerfully schlocky as the U.K. site.

**Cross Peerless TrackR Pen** ($250 at cross.com) – The Cross pen is a ridiculously expensive ballpoint pen with a dash of technology thrown in. The pen is Bluetooth enabled to help you keep track of it. After linking the pen to your phone, you can receive alerts if you move out of range of the pen. Pull up a map and a pin will drop on the last known location of your pen. A mesh network of millions of other TrackR devices can also provide GPS-like tracking for the lost pen. Once the lost is found, you can thank the $250 technology for finding the
The Kansas Bar Association greatly appreciates the firm’s generous support.
On the second Friday of September, lawyers of all stripes converge on Dodge City for the Southwest Kansas Bar Association annual meeting and CLE. As many as 150 attorneys, most from the Southwest region of the state, gather for much needed social interaction and quality continuing education. How did a small bar association create such a successful event?

The SWKS bar annual meeting has not always been what it is today. Several decades ago, prior to mandatory CLE, the SWKS bar would assemble for a few rounds of golf and many rounds of adult beverages. It seems consistent with the era in which it occurred, and it is good that we have moved beyond that. (In a future article, I’ll address the issue of young lawyers’ drinking)

As times changed, the SWKS bar annual meeting went dormant for a number of years. Then, about 25 years ago, three or four local attorneys and judges decided it was time to revive the annual meeting. The Silver Spur in Dodge City, the meeting venue prior to its dormancy, was selected as the location. The event offered CLE and social time, and it eventually outgrew the Silver Spur location. The event was relocated to the Knights of Columbus in Dodge City. Enter Dave Rebein.

Dave’s office is located next to the Knights of Columbus, and he decided to host an old fashioned chuckwagon breakfast the morning of the CLE. He even hired a professional chuckwagon cook. Don’t know what a “chuckwagon” is? Think the Sooner Schooner barreling across the football field.

As the years clicked off, the event continued to grow in size and stature. Speakers from across the state would come to give CLE presentations. Eventually, the Depot Theater became available, and the annual event moved to its present location. In this beautiful theater setting, you find lawyers in cowboy hats and boots and others in suits and ties. Federal and state court judges are always on hand as well.

How did an event in Dodge City become so successful? What keeps them coming year after year? Dave’s emphasis on the attorneys being able to catch up with one another. We all can become so isolated and busy with our practices, families and other events, we forget to connect on a deeper level. The meeting now begins with a Thursday social at the world-famous Boot Hill Museum, followed by the Friday CLE at the Depot Theater. It sounds great, right? But a leader does not allow complacency to set in.

Hampered by an aging population and the allure of the bright lights of the bigger cities in Eastern Kansas, rural Kansas struggles to recruit and retain attorneys. Former Liberal attorney Rex Sharp settled a large class-action lawsuit and convinced the judge to order that the cy pres money be spent on recruiting attorneys to Southwest Kansas. That money, coupled with invaluable support from the SWKS Bar Association board, has led to dozens of attorneys being recruited.
2017 was an exciting, eventful year for the KBF. Review the KBF Annual Report to see:

- The KBA/KBF building renamed the Robert L. Gernon Law Center
- KBF Strategic Plan Finalized
- 60th Anniversary (1957-2017)
- Justice Marla J. Lukert named the 2017 Robert K. Weary Award Recipient
- Foundation Dinner 1950's Theme
- Grant and Scholarship Recipients
- 2017 Donor List

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**Automatic or Rotating Lead Pencils** ($8-50 at jetpens.com) – Some lawyers love writing with pencil (true story) and the Japanese have perfected the mechanical variety. Rotating lead pencils have a ratcheting mechanism that constantly turns the lead as you write so the point is always at its sharpest. Automatic pencils have a clutch mechanism that constantly advances the lead without need to stop and click a button. JetPens sells every lead size, every lead grade, and at least 8 lead colors. (Pens and ink of all types are available at great prices too.)

**Analog/Electronic Writing** ($20-200 at amazon.com) – Studies suggest that writing notes long-hand reinforces memory and prompts creativity better than banging on a keyboard. It is certainly less distracting in many situations. Even so, having an immediate digital copy is often desirable. The Boogie Board (myboogieboard.com) and Moleskine+ (us.moleskine.com) are two different approaches to the same need. Boogie Board is an inexpensive plastic slate and stylus with ridiculously long battery life. Write out your notes and press a button to sync a PDF copy to an Android/iOS app. Press another button and the slate is a tabula rasa for more notes. The Moleskine+ system is another option. Write in your little Moleskine+ notebook and you get a paper copy together with the digital PDF that is saved to app or cloud.

**Logical Fallacies Poster** ($0-20 at yourlogicalfallacyis.com) – A 24x36” wall poster listing 24 of the most common logical fallacies that you must never allow into your work as a lawyer. A second poster of 24 cognitive biases is available as well. We can all use reminders.

Cont’d from Pg. 15

$3,000 stipends are distributed to new attorneys in the region. In the past two years alone, 13 attorneys have been awarded the stipend.

Dave wanted to get the state’s two law schools involved in the annual meeting. Representatives from KU and Washburn began to attend as did the development staff. As time passed, law professors began joining the esteemed list of CLE presenters. A few years ago, the SWKS Bar Association decided to give each school $5,000.00 annually to bring students interested in a rural practice to the annual meeting. This has become a highly successful recruiting tool, with 15-20 students coming out each year. Law students get to mingle—and this year, merengue—(Dave always has a professional dance instructor at the Thursday night social!) with practitioners, judges and the CLE presenters.

Lawyers from across the state know Dave’s commitment to the profession, and the SWKS bar annual meeting is a true feather in his Stetson. The next generation of attorneys, including myself, need to take note of this commitment to the profession and do our part to continue what others have worked hard to create.

Cont’d from Pg. 13

Eric Melgren and Dave Rebein

**About the Author**

**Larry N. Zimmerman** is a partner at Zimmerman & Zimmerman P.A. in Topeka and former adjunct professor, teaching law and technology at Washburn University School of Law. He is one of the founding members of the KBA Law Practice Management Committee.

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**Clayton Kerbs** currently practices in his hometown of Dodge City, with his father, Glenn. Clayton’s practice consists of domestic and municipal law cases. He attended Creighton University and Washburn University School of Law. Prior to practicing law, Clayton worked for U.S. Senator Jerry Moran. Clayton is married to Leah; they have two sons, Porter and Chandler.

ckerbs@kerbslaw.com

**Lawyers from across the state know Dave’s commitment to the profession, and the SWKS bar annual meeting is a true feather in his Stetson. The next generation of attorneys, including myself, need to take note of this commitment to the profession and do our part to continue what others have worked hard to create.**

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Any everyday words have different legal meanings. To a lay person, torts are something you eat, battery is something you charge, and consideration is something you give when making significant decisions. But for the lawyer, those words each convey something very different. Legal writing requires precision. Precision, however, is not just about the words you choose but also where you chose to place them. A dangling or misplaced modifier can convey a meaning you did not intend. So too can a confusingly-placed word or sentence, or an ambiguous pronoun or adjective.

Now I could give you examples from legal writing where the unintended meaning could affect the outcome of a case, but instead I am going to give you a couple of examples I found on the internet that purport to come from actual church bulletins or from announcements made in church services. I am doing so because it is easier to see that a modifier is misplaced or dangling in a simpler sentence. But if I am being honest, I am largely using these examples because I find them amusing. See if you can identify what is wrong with the following sentence:

For those of you who have children and don't know it, we have a nursery downstairs.

The phrase “don’t know it” is intended to modify the phrase “we have a nursery downstairs.” As written, however, it appears the author is worried that some readers do not know whether they have children. The modifier is misplaced or, as some would say, it is squinting. A misplaced modifier is in the wrong place, while a squinting modifier is squished between two options that make the meaning ambiguous. The solution is to rewrite the sentence, moving the unintended option elsewhere in the sentence, further away from the modifying phrase: For those of you who don’t know it, we have a nursery downstairs for those of you who have children. Here is another one:

Don’t let worry kill you off—let the Church help.

Here the writer meant to say that the Church was there to help those with worry. Instead it sounds like the Church is interested in assisting a suicide or committing a homicide. To make the meaning clear, the writer needed to put the “help” closer to the “worry” and further away from the “kill.” The key is proximity. Notice what proximity implies in this excerpt:

Barbara remains in the hospital and needs blood donors for more transfusions. She is also having trouble sleeping and requests tapes of Pastor Jack’s sermons.

Apparently Pastor Jack needs to add a bit of a zip to his sermons to keep his parishioners awake. By putting the ideas of sleep trouble and listening to sermons together in the same sentence, the writer implies they are linked. But proximity can imply ambiguity even when the information is in separate sentences. Look at the following examples:

Ladies, don’t forget the rummage sale. It’s a chance to get rid of those things not worth keeping around the house. Don’t forget your husbands.

Clearly the author does not think her husband is worth keeping around the house. But I’m not sure he will sell for much at the rummage sale. Here is another one:

At the evening service tonight, the sermon topic will be “What Is Hell?” Come early and listen to our choir practice.

Apparently listening to this church choir is akin to spending eternity in hell. Now I’ll be the first to admit that this last example is not actually confusing: “What is Hell?” clearly relates back to the sermon topic and not to the choir practice. It is just funny to assume that ambiguity is implied. Many times, however, a writer chooses language that, when combined with its proximity to multiple options, makes the meaning unclear. The word “this,” which can be a demonstrative pronoun or a demonstrative adjective, often contributes to ambiguity in meaning:

The eighth-graders will be presenting Shakespeare’s Hamlet in the Church basement Friday at 7 PM. The congregation is invited to attend this tragedy.

Does “this tragedy” refer to Shakespeare’s Hamlet or to the eighth-graders’ presentation of it? If you have ever seen a middle school play, you might assume the latter. To avoid offending the eighth-grade thespians, the writer needs to be clearer about what “this” refers to. In addition to the word “this,” writers should also be careful whenever they use pronouns:

The Fasting & Prayer Conference includes meals. The ladies of the Church have cast off clothing of every kind. They may be seen in the basement on Friday afternoon.

The pronoun “they” is ambiguous. Does it refer to the la-
dies of the Church or to the clothing? Assuming the ladies of the Church are not exhibitionists hoping those coming to the Conference are voyeurs, the second sentence alone is misleading. The writer wanted to convey that the clothing has been cast off. The writer intended to use the words “cast off” as a collective adjective describing the kind of clothing. When you use two words combined as an adjective before a noun, you may use a hyphen between the two words: *The ladies of the Church have cast-off clothing of every kind*. Note that a hyphen is not always required with collective adjectives, but you should include one, at a minimum, whenever omitting it would erroneously imply you are naked.

Many people of faith believe that it is important to forgive others for their transgressions. The law, however, can be less merciful. Lest you inadvertently call your opponent’s argument a tragedy or the judge’s order hell, choose your words carefully to precisely convey your intended meaning. ■

About the Author

**Betsy Brand Six**, a native Kansan, practiced environmental law for thirteen years before she began teaching legal writing in 2004. A graduate of Stanford Law School, she is a Clinical Associate Professor, the Director of Academic Resources, the Director of Diversity & Inclusion, and the Robert A. Schroeder Teaching Fellow at the University of Kansas School of Law. She knows she has four children and thinks her husband is worth keeping around the house.

---

1. The title of this article includes a dangling modifier. Is the grammar bad or are the examples bad? The better title would be “Examples of Bad Grammar.” See *Examples of Bad Grammar*, YOUR DICTIONARY, http://examples.yourdictionary.com/bad-grammar-examples.html.


3. I will be the first to admit that I may be alone in chuckling at these examples, but I find something particularly funny about the earnestness implicit in these sentences. Or perhaps it is just because I have read too many dry church bulletins over the years.
December CLE Schedule

Live:

35th Annual Plaza Lights Institute
December 7-8, 2017
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Secured Oil and Gas Transactions in Kansas

by Joseph A. Schremmer
I. Introduction

Oil and gas financing in Kansas is common, but not commonsense. Often the complexities become apparent after the price of oil has fallen and lenders must defend the priority of their claims in bankruptcy and foreclosure proceedings. Successfully handling oil and gas secured transactions in Kansas requires understanding two bodies of law: Article 9 of the Kansas Commercial Code (Article 9 or UCC) and Kansas real property law. This article surveys the creation, perfection, priority, and enforcement of consensual liens in oil and gas property under both sets of rules. Liens under joint operating agreements and statutory oil and gas liens are outside the scope of this article.

A secured transaction is a business arrangement by which a borrower gives collateral to the lender to guarantee payment of an obligation. The lender's interest in the collateral is a lien, in this case a consensual lien. A lien lasts until the debt or duty it secures is performed. A lien attaches only to the debtor's interest in the collateral. The lienholder can enforce it by taking or selling the collateral in satisfaction of the debt if the debtor defaults on its obligation.

In Kansas, consensual liens in real property are called mortgages, while those in personal property are security interests. Article 9 governs security interests in personal property and fixtures. Kansas real property law governs mortgages in real property. Oil and gas lending implicates both security interests and mortgages because the collateral in an oil and gas transaction generally include real and personal property. Oil and gas property, such as oil and gas leases, wells, production equipment, and related contracts, are more valuable when integrated together in a producing lease or unit. Because the producing unit's value is greater than the sum of its parts, lenders want to secure exploration and production operating loans with liens on all the property necessary to operate the unit in the event of default. If the lender has to foreclose, it can repossess all the property necessary to operate the producing unit and sell it together for more than it would bring piecemeal.

The components typically needed to operate the producing unit include the debtor's interest in the oil, gas, or other minerals in place and as produced and any proceeds of production; oil and gas lease or leases; oil, gas, and injection wells; surface and downhole equipment for producing, treating, and storing oil and gas; oil and gas gathering and transmission pipelines; and associated contracts such as oil or gas purchase contracts and operating and exploration contracts. Debtors in the oilfield services sector tend to offer moveable equipment like drilling and well-servicing rigs as collateral. This list is not exclusive. Parties to oil and gas financing transactions often execute an instrument (commonly called a “Mortgage, Security Agreement, and Financing Statement”) describing all of the above property as well as general categories like “all other real and personal property of the debtor.”

II. Attachment: Creating a Lien

A lien must first attach in the collateral to be enforceable. The term attach is used “to describe the point at which property becomes subject to a security interest.” Under Article 9, a security interest attaches when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment. A security interest is considered enforceable against the debtor, and third parties, with respect to the collateral when value has been given; the debtor has rights in the collateral or the power to transfer rights in the collateral to the secured party; and the debtor has authenticated a security agreement that describes the collateral or possession of the collateral is in the secured party under the security agreement.

A lien in real property is effective when the debt arises and a written instrument creating a lien in the real property, typically a mortgage, is signed by the owner of the property (the mortgagor). There are otherwise no special formalities to create a mortgage in real property. In addition to satisfying these basic formal requirements, security agreements and mortgage agreements usually define the parties’ respective rights and obligations as to the collateral, define the events of default by the debtor, and circumscribe the secured party’s enforcement rights. Section V on lien enforcement describes certain provisions often included in security and mortgage agreements for these purposes.

III. Perfection of Liens and the Effect of Perfection or Nonperfection

Perfecting a mortgage or security interest in oil and gas property is necessary to give notice to and maintain priority over subsequent lienholders and purchasers of the property.
Correctly classifying the property serving as collateral is crucial to proper perfection. Drafters must first determine whether the intended collateral is real or personal property. That determines the applicable body of law.\textsuperscript{14} Article 9 controls security interests in collateral that is personal property and fixtures.\textsuperscript{15} Non-UCC Kansas real property law controls perfection of mortgages in real property.\textsuperscript{16} Perfecting a mortgage in real property in Kansas is fairly straightforward. Under Kan. Stat. Ann. § 58-2221, the mortgagee must record the written instrument creating the mortgage, signed by the mortgagor, in the office of the register of deeds for the county where the property is located.\textsuperscript{17} Recording provides constructive notice to the public.\textsuperscript{18} Unless and until recorded, the mortgage is only enforceable between the parties.\textsuperscript{19}

A. Article 9 and Choice of Law

For security interests in personal property and fixtures, determining the manner of perfection under Article 9 is more complex. The first issue is to determine which state’s version of Article 9 applies. Under Kan. Stat. Ann. § 84-9-301(1), the law of the location of the debtor generally controls perfection, the effect of perfection or nonperfection, and the priority of security interests. But the law of the jurisdiction in which the wellhead is located governs the manner and effect of perfection and the priority of a security interest in as-extracted collateral (oil and gas, discussed below), regardless where the debtor is located.\textsuperscript{20} Under revised Article 9, the perfection of a security interest in goods (a particular type of collateral, discussed below) is governed by the law of the debtor’s location, but the effect of perfection or nonperfection and the priority of security interests in goods is determined by the law of the location of the goods.\textsuperscript{21} The drafters of the 2000 revisions to Article 9 intentionally divorced the question of perfection from the effect of perfection or nonperfection and relative priorities of security interests in goods in order to address situations where goods owned by an out-of-state debtor, but located in Kansas, become subject to a non-UCC Kansas statutory lien (e.g., an execution lien or oil and gas mechanic’s lien). When that happens, the law of the debtor’s location determines whether the security interest is properly perfected, but Kansas law determines the relative priority of the security interest and the statutory lien.\textsuperscript{22}

B. Methods of Perfecting Article 9 Security Interests

Once we determine which state’s Article 9 applies, the next issue is how to perfect a security interest in the collateral under that law. This issue requires classification of the collateral. Article 9 requires different manners of perfection for different collateral classifications. The most common types of collateral in oil and gas transactions are goods, equipment, fixtures, accounts, and as-extracted collateral. Goods are “all things that are movable when a security interest attaches.”\textsuperscript{23} Goods other than inventory, farm products, or consumer goods are considered equipment.\textsuperscript{24} Fixtures are another subcategory of goods. Fixtures are defined as goods “that have become so related to particular real property that an interest in them arises under real property law.”\textsuperscript{25} Goods specifically do not include oil, gas, or other minerals before extraction.\textsuperscript{26} Accounts are rights to payment of a monetary obligation for, among other things, property that has been sold or services rendered.\textsuperscript{27} As-extracted collateral is a special category created specifically for oil and gas and mining transactions, and is discussed in detail below.

There is often uncertainty in classifying common types of oil and gas collateral for perfection purposes, which begets uncertainty in how to properly perfect a lien in those types of collateral. The remainder of this section discusses the classification of typical collateral in oil and gas transactions. Table A summarizes the primary method of perfection for common collateral types.

1. Liens in Oil, Gas, or Other Minerals as Produced

Oil, gas, or other minerals that have not been extracted, \textit{i.e.}, that are in place in the ground, are specifically excluded from Article 9’s definition of goods.\textsuperscript{28} Official Comment 4 to Kan. Stat. Ann § 84-9-102 explains that “oil, gas, and other minerals that have not been extracted from the ground are treated as real property, to which this Article does not apply.” A lien in oil, gas, or other minerals in place is thus a mortgage in real property and is perfected under Kan. Stat. Ann. § 58-2221 by recording the signed mortgage instrument in the office of the register of deeds for the county where the land is located.

Once extracted however, oil, gas, or other minerals become personal property, specifically goods, that are subject to Article 9. When produced, oil and gas is goods for a brief moment, but then becomes inventory (goods held for sale). The oil and gas is transformed into accounts (rights to payment) in the hands of the producer once it is actually sold, only to then become identifiable cash proceeds once payment is received by the debtor for the sale.\textsuperscript{29} All of these transformations occur quickly. To deal with the ephemeral nature of extracted oil or gas, revised Article 9 creates a special category of collateral called \textit{as-extracted collateral}, defined as

\begin{enumerate}
\item (A) Oil, gas, or other minerals that are subject to a security interest that:
\begin{enumerate}
\item (i) is created by a debtor having an interest in the minerals before extraction; and
\item (ii) attaches to the minerals as extracted; or
\end{enumerate}
\item (B) Accounts arising out of the sale at the wellhead or minehead of oil, gas, or other minerals in which the debtor had an interest before extraction.\textsuperscript{30}
\end{enumerate}

As-extracted collateral refers to both oil and gas as it is produced and the accounts receivable created when the production is sold at the wellhead. The phrase “at the wellhead” encompasses arrangements based on a sale of the produced oil or gas at the moment it issues from the ground and is measured, without technical distinction” as to where title passes.\textsuperscript{31}
A security interest in as-extracted collateral is perfected in the same manner as security interests in fixtures, by filing a financing statement describing the collateral in the office of the register of deeds for the county where the property is located. The law of the wellhead jurisdiction governs perfection, the effect of perfection or nonperfection, and priority of a security interest in as-extracted collateral. In other words, if the wellhead is in Kansas, Kansas Article 9 controls. Under Kansas Article 9, a lender’s financing statement covering as-extracted collateral should be filed in the office of the register of deeds for the county where the wellhead is located. The financing statement must (1) provide the debtor’s name; (2) provide the secured party’s name; (3) indicate the collateral; (4) indicate it covers as-extracted collateral; (5) indicate it is to be filed in the real property records; (6) provide a legal description of the real property to which the collateral is related; and (7) if the debtor does not have an interest of record in the real property, provide the name of the record owner (this would apply if the financing statement is filed before the security agreement is authenticated by the debtor).

If it meets the requirements set forth above for financing statements and is recorded in the office of the register of deeds, a mortgage instrument may be effective as a financing statement for as-extracted collateral. Secured creditors taking a lien in as-extracted collateral usually also take a real property lien in the debtor’s interest in the underlying oil and gas leasehold. Both liens can be perfected by the filing of a mortgage that is also effective as a financing statement. The register of deeds office must accept and record a financing statement covering as-extracted collateral, and index it under the name of the debtor as if it were a mortgagor and, when other law requires it, in the numerical tract index as if it were a mortgage. Lenders often record a single mortgage, security agreement, and financing statement, or similar document, covering both the debtor’s interest in the as-extracted collateral and the oil and gas lease on the real property.

2. Liens in Oil and Gas Lease Interests

Ownership of an oil and gas lease is often divided into numerous distinct interests. Briefly, an owner of a mineral interest in real property owns the oil and gas in place and has the right to explore and develop the property for oil and gas production or transfer those rights to a third party. Normally, a mineral interest owner conveys the exploration and development rights to a lessee under an oil and gas lease. Under the lease, the lessor also grants the lessee the right to all oil and gas produced but reserves as a royalty a fractional, non-cost-bearing share of the production or proceeds of production. The lessee thus owns 100% of the leasehold interest and is entitled to all of the production from the premises less the landowner’s royalty. The lessee is also responsible for 100% of the costs of production. The lessee’s leasehold interest is called the working interest. The lessee can convey all or part of its working interest or carve out other distinct interests from the working interest.

In Kansas, working interest is personal property. But when perfecting a lien in working interest, or determining the effects of perfection and relative priorities of liens in such interests, working interest is treated as an interest in real property. The Kansas Supreme Court settled this issue in *Ingram v. Ingram*, when it held that “a mortgage or assignment of an oil and gas leasehold interest for security purposes is to be treated as a real estate mortgage and such instruments are not subject to the provisions of the Uniform Commercial Code.” This appears to be the majority rule among states. It is consistent with Kan. Stat. Ann. § 58-2221, which requires oil and gas leases, and instruments creating an interest in oil and gas leases, to be recorded as a real property conveyance to give notice to third parties. A consensual lien in a working interest is therefore considered a mortgage in real property that must be perfected by recording the mortgage in the office of the register of deeds for the county where the lease is located.

Courts in other states also hold that a landowner’s royalty interest created under an oil and gas lease is a real property interest for purposes of determining the manner and effect of perfection and priority. While there appears to be no Kansas case on point, lenders treat the lessor’s royalty as real property and perfect liens in such royalty interests by recording the mortgage in the appropriate register of deeds office. Lenders commonly encumber both the lessor’s royalty and the lessor’s mineral interest under a single mortgage instrument.
3. Liens in Interests Carved Out of Working Interest

To finance exploration, development, and operation of an oil and gas lease, the working interest owner often sells nonoperating interests in the oil and gas produced under the lease. These nonoperating interests derive from the working interest. Common nonoperating interests are overriding royalty interests, production payments, and net profits interests.

An overriding royalty interest (or override) is an interest in oil and gas produced at the surface from the lease premises free of the expenses of production. The duration of an overriding royalty interest is limited by the duration of the lease from which it is created. Production payments (or oil payments) entitle the owner to a share of the oil or gas produced at the surface from the lease premises free of the expenses of production, terminating when a specified sum from the sale of such oil or gas is realized. The difference between a production payment and an overriding royalty is thus duration. A net profits interest is a share of gross production from the lease premises measured by the net profits from operation of the lease. Like an overriding royalty, a net profits interest typically continues in duration for the life of the lease.

We treat overriding royalties, production payments, and net profits interests like interests in real property when perfecting a consensual lien in them because they are created from a real property interest (the working interest, for purposes of the manner and effect of perfection). The customary manner of perfecting liens in overriding royalties, production payments, and net profits interests is by recording a mortgage in the office of the register of deeds. No Kansas case appears to decide whether Article 9 or non-UCC real property law governs the means or effects of perfection or priority of liens in such interests. But, in National Bank of Tulsa v. Warren, the Kansas Supreme Court interpreted a statutory mortgage registration tax to apply to a production payment assignment that was given as security for a loan because the assignment was recordable as an interest affecting real property. The court reasoned that leases are recordable as instruments affecting real property and the production payment “sprang from and owed its existence to oil and gas leases ....” Though the interest at issue in Warren was not a lien in a production payment but rather the production payment itself, its rationale should apply equally to the landowner’s royalty interest, overriding royalties, and net profits interests as well.

None of these leasehold-derived interests empower the owner to set foot on the land or operate the oil and gas lease. In many ways, these interests are more akin to a right to payment, which would be an account or general intangible subject to Article 9. Lacking controlling authority, the cautious lender may purchase the relatively cheap insurance of filing an Article 9 financing statement covering liens in leasehold-derived interests in addition to filing an assignment or mortgage with the office of the register of deeds. Secured parties and debtors may also execute division orders which direct the first purchaser of oil or gas from a lease to make payment directly to the secured party. This practice allows the secured party to liquidate the collateral as production proceeds become due, regardless whether the debtor has defaulted.

4. Liens in Wells and Equipment

A well is a borehole drilled into the earth to draw oil or gas to the surface. The term well commonly refers to the assembly of equipment associated with the borehole as well as the hole itself. The borehole is usually partially cased by steel pipe (casing) that is cemented in the hole. A wellhead is installed on the surface where the casing begins. Equipment is placed into the wellbore and on the surface to produce fluids, including oil and gas, from the borehole.

There is little guidance in Kansas law for perfecting a lien in a well. The components of a well can be either equipment (i.e., goods that are not farm goods, inventory, or consumer goods) or fixtures under Article 9, depending on the extent they are annexed to the real property. Distinguishing between personal property and fixtures can be “difficult and vexatious.” Fixtures are personal property that has “become so related to particular real property that an interest in them arises under real property law.” Though fixtures are real property, liens in fixtures are governed under Article 9.

Whether personal property has become a fixture is a question of real property law. In determining this question, Kansas courts consider the property’s annexation to the real property,
its adaptation to the use of the land, and the intent of the party that annexed the property to make it a permanent annexation. Courts look to the degree of the permanency of the property’s attachment to the land to determine if it is sufficiently annexed to be an improvement to the land. Permanency does not mean the property is immovable. Rather the controlling factor is the annexing party’s intent, which is deduced largely from the party’s acts and surrounding circumstances.

One early case, *Atchison, Topeka & Santa Fe Railroad Company v. Morgan*, considered whether a railroad’s steam pump, boiler, and boilerhouse used to operate a water well were fixtures or personal property. The court held that the equipment was not fixtures because it was placed on the land to operate the owner’s railroad rather than to improve the real property. The parties in *Morgan* were the railroad and a neighbor on whose property the railroad mistakenly installed the equipment. But the court wrote in dicta that “very many authorities hold that the buckets in a well are real property ... between mortgagor and mortgagee.” *Morgan* suggests that equipment associated with oil and gas wells is likely personal property between the oil and gas lessee and lessor, but may be fixtures between the lessee and a lender with a lien in the property.

Kansas appellate courts have held that the casing in oil and gas wells is a *trade fixture*. Trade fixtures are distinguishable from fixtures in that they do not sufficiently attach to real property to become a real property interest. They remain personal property despite their presence on the real property and, under Article 9, are most likely a category of equipment. The borehole itself is really nothing more than a hole in the ground that the lessee has a right to use for production or injection of fluids. The right to use the borehole arises from the oil and gas lease, and conceptually a lien in a borehole should be perfected in the same manner as a lien in working interest.

Lots of other equipment is necessary to produce, treat, and store oil and gas and associated substances from a cased wellbore. This includes downhole equipment such as pumps, tubing, and rods, and surface equipment like pumpjacks, engines and motors, compressors, equipment to separate produced fluids, and storage or stock tanks. Pumpjacks, or pumping units, are often cemented in place on the property and might arguably be fixtures. Stock tanks are moveable but are large, cumbersome, and often remain on the premises for long periods. These, too, can be deemed fixtures. Absent specific court decisions, it is impossible to definitively classify such surface components as fixtures or equipment. Lenders should therefore treat liens in wells and equipment as both fixtures and equipment when perfecting the liens.

Security interests in fixtures are perfected by filing a fixture filing in the register of deeds office where the real property is located in much the same manner as for perfecting a security interest in as-extracted collateral. Security interests in equipment are perfected by filing a financing statement in the central filing office. The financing statement must: (1) provide the name of the debtor, (2) provide the name of the secured party, and (3) indicate the collateral. The place for filing a financing statement covering goods, including equipment, is determined by the law of the state where the debtor is located. If the debtor is an individual, under Kan. Stat. Ann. § 84-9-307, the debtor’s place of principal residence controls. If the debtor is an organization, its place of business controls. If it is an organization with multiple places of business, its chief executive office controls. If the debtor’s location is in Kansas, Kansas Article 9 designates the office of the Kansas Secretary of State as the place for filing.

Even though the method of perfection of an interest in equipment is governed by the debtor’s location’s law, the effect of perfection or nonperfection and priority are determined under the law of the jurisdiction where the collateral is located. Therefore, the relative priority of a security interest in an oil or gas well and a statutory oil and gas mechanic’s lien in a Kansas well would be determined under Kansas law without regard to the debtor’s location (assuming the well is deemed equipment rather than a fixture).

When it is unclear whether a well or equipment should be classified as equipment or a fixture, secured parties should perfect a security interest by both filing a financing statement with the Secretary of State’s central filing office and a fixture filing in the local office of the register of deeds. Recorded mortgages creating liens in an oil and gas leasehold interest may also serve as fixture filings so long as they describe the covered equipment and satisfy the other formal requirements of Kan. Stat. Ann. § 84-9-502. Lenders may thus perfect liens in working interest, as-extracted collateral, and fixtures by the simultaneous filing of a satisfactory fixture filing. Lenders should take the additional step of filing a financing statement describing the wells and equipment with the Secretary of State’s central filing office to perfect in case the collateral are later deemed goods. Lenders often file the fixture filing in the Secretary of State’s office for this purpose.

5. Liens in Self-Propelled Equipment

Self-propelled oilfield equipment poses yet another method-of-perfection quandary. This subcategory of collateral includes things like drilling and well-servicing rigs as well as smaller tank trucks, vacuum trucks, winch trucks, fracking trucks and trailers, pickup trucks, and so forth. Rigs consist of specialized equipment designed to hoist other equipment in and out of wells. The hoisting equipment is usually fixed to a truck chassis for transportation.

The problem that arises with self-propelled collateral is whether to treat it as fixtures, equipment, or goods covered by a certificate of title. The problem is most acute with drilling and service rigs that may remain on the lease premises for extended periods, but which may be half heavy equipment and half motor vehicle. We know that security interests in fix-
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Duties are perfected by filing a fixture filing in the local register of deeds office and that security interests in equipment are perfected by filing a financing statement in the central filing office. But neither of those methods is effective to perfect a security interest in goods that are covered by a certificate of title. Goods are deemed to be covered by a certificate of title when their owner has submitted a valid application for a certificate of title and paid the applicable fee to the appropriate state agency (here, the Kansas Department of Revenue's Division of Vehicles) and as long as the certificate remains effective under other law. Security interests in goods covered by a certificate of title are perfected under non-Article 9 state law—in Kansas, the Motor Vehicle Code. In general, a security interest in certificate of title property is perfected by noting the lien on the certificate of title.

Drilling and service rigs are often covered by certificates of title when they are attached to a truck. If a rig is not attached to a truck, it is likely equipment (or maybe an accession.) Likewise, if a rig remains on a single lease for a long time, it could conceivably become a fixture. The very careful lender might consider perfecting its lien in that rig three ways: noting the lien on the certificate of title, filing a financing statement in the central filing office, and filing a fixture filing in the local register of deeds office. In most cases, self-propelled oilfield equipment should be considered either equipment or certificate of title property for purposes of determining the method of perfection. Perfecting by filing a financing statement in the central filing office and noting the lien on the certificate of title usually suffices to protect the lender's interest.

Table A: Summary of Methods of Perfecting Liens in Common Oil and Gas Property

<table>
<thead>
<tr>
<th>Property</th>
<th>Controlling Law</th>
<th>Primary Manner of Perfection (assuming Kansas Article 9 controls)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oil, gas, or other minerals in place</td>
<td>Kansas real property law</td>
<td>Record a mortgage in the register of deeds office for the county where the property is located under Kan. Stat. Ann. § 58-2221.</td>
</tr>
<tr>
<td>Oil, gas, or other minerals as extracted</td>
<td>Article 9 of the wellhead state</td>
<td>File a financing statement that covers as-extracted collateral in the office of the register of deeds for the county where the wellhead is located under Kan. Stat. Ann. § 84-9-502(a)–(c).</td>
</tr>
<tr>
<td>Leasehold working interest</td>
<td>Kansas real property law</td>
<td>Record a mortgage in the register of deeds office for the county where the property is located under Kan. Stat. Ann. § 58-2221</td>
</tr>
<tr>
<td>Wells and equipment</td>
<td>Article 9 of the debtor's state</td>
<td>If equipment, file a financing statement with the Kansas Secretary of State's central filing office under Kan. Stat. Ann. § 84-9-502(a). If a fixture, file a fixture filing in the office of the register of deeds for the county where the property is located under Kan. Stat. Ann. § 84-9-502(a)–(b). If there is doubt which manner of perfection is appropriate, do both.</td>
</tr>
<tr>
<td>Pipelines</td>
<td>Article 9 of the pipeline state</td>
<td>If debtor is a transmitting utility, file a financing statement with the Kansas Secretary of State's central filing office under Kan. Stat. Ann. § 84-9-502(a). If debtor is not a transmitting utility, file a fixture filing in the register of deeds office of each county where the property is located under Kan. Stat. Ann. § 84-9-502(a)–(b). If there is doubt which manner of perfection is appropriate, do both.</td>
</tr>
</tbody>
</table>
6. Liens in Pipelines

Oil and gas pipelines are generally considered fixtures. If the debtor is a transmitting utility, however, Article 9 spares the secured party the inconvenience of filing a fixture filing in each county where the pipeline crosses. A transmitting utility is a person primarily engaged in the business of transmitting goods by pipeline or transmitting gas. This exception is likely unavailable when the lender takes a security interest in a pipeline owned by a debtor that is not primarily engaged in transmission. That security interest likely should be perfected by making a fixture filing in each county the pipeline crosses. The most common type of pipeline in Kansas is probably a gas gathering line, which is not intended for gas transmission. Gas gathering lines generally are not owned by persons primarily engaged in gas transmission. Most financing transactions involving a gathering pipeline therefore likely require filing a fixture filing in the register of deeds office for each county where the pipeline is located.

IV. Priorities of Competing Interests in Collateral

A. As Against Buyers of Collateral


The general rule under Article 9 is that a buyer of collateral takes it subject to any security interests. Whether or not it is permitted by the parties’ security agreement, a debtor’s rights in the collateral may be voluntarily or involuntarily transferred. But the terms of the security agreement remain effective as against purchasers of the collateral. A security interest therefore continues notwithstanding sale, lease, license, exchange, “or other disposition” of the collateral, unless the secured party allows the collateral to be transferred free of the security interest. Under Kan. Stat. Ann. § 84-9-315(a), however, a buyer of collateral takes free of the security interest if the security agreement permits transfer.

When collateral is transferred, a security interest in it automatically attaches to any identifiable proceeds of the collateral. The secured party also has the right to repossess the collateral from the transferee. The secured party may have only one satisfaction as between identifiable proceeds and re-possession of the collateral. In appropriate cases, the secured party may maintain an action for conversion of the collateral against the transferee. One such case is when the debtor’s transfer breaches the parties’ security agreement. In Farmers State Bank v. FFP Operating Partners, L.P., the Kansas Court of Appeals held that a secured party had a claim for conversion of certain inventory collateral against the debtor’s landlord who claimed ownership of the inventory after the debtor voluntarily abandoned her lease. The court held that a security interest is personal property and may be the subject of a conversion, and that the landlord, by asserting an ownership claim over the inventory adverse to the secured party’s security interest, converted the inventory.


 Buyers who buy outside the ordinary course of business take subject to perfected security interests. Such buyers, however, may take free of unperfected security interests under Kan. Stat. Ann. § 84-9-317(b). That section states that a buyer takes free of a security interest “if the buyer gives value and receives delivery of the collateral without knowledge of the security interest ... and before it is perfected.” Value under the UCC includes any consideration sufficient to support a simple contract. Knowledge means actual knowledge. Actual knowledge, for UCC purposes, does not encompass facts that a person has reason to know or should know. A transferee does not have actual knowledge of a lien merely because it has reason to know an enforceable lien might exist. Of course, when the security interest is perfected, that perfection imparts knowledge of the prior interest to the world and protects against creditors and transferees of the debtor.

For a buyer not in the ordinary course to prevail over a lienholder, the buyer must have lacked knowledge of the existence of the security interest and have received the collateral at a moment when the security interest was not perfected. Perfected security interests can become unperfected by the lapse of time. Thus, a buyer receiving property without knowledge of a preexisting security interest whose perfection has lapsed qualifies as a buyer not in the ordinary course under Kan. Stat. Ann. § 84-9-317(b). Staying perfected is as important as getting perfected.

Financing statements lapse automatically after five years from the filing date unless a continuation statement is filed within the last six months of the effective period. A continuation statement is also effective for five years and may be continued in turn by filing another continuation statement. A mortgage that is filed as a fixture filing remains effective as a financing statement until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real
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property.101 In Kansas, mortgages recorded after January 1, 1965, are effective (unless released or satisfied of record) for 42 years from the date of recording, and may be effective longer if the mortgagee timely records an appropriate affidavit.102


Kan. Stat. Ann. § 84-9-320(e) provides a special exception for a buyer in the ordinary course of business buying oil, gas, or other minerals at the wellhead after extraction. This is a buyer that buys oil, gas, or other minerals in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person in the business of selling oil, gas, or other minerals at the wellhead.103 Only if the buyer buys extracted minerals from a seller in the business can the buyer benefit from this exception. Buyers in the ordinary course take priority over an interest arising out of an encumbrance even if the encumbrance interest is perfected and even if the buyer knows it exists. Encumbrances include mortgages and other liens in real property.104 Accordingly, an ordinary course buyer of oil or gas takes free of a perfected mortgage or other lien in lessor’s royalty and lessee’s leasehold interest (or both).

This exception protects purchasers of oil and gas from security interests created in the as-extracted collateral by the seller. Secured parties with an interest in the as-extracted collateral are nonetheless entitled to a security interest in the account arising from the sale (which is actually part and parcel of the as-extracted collateral). The security interest also attaches to identifiable cash proceeds of the as-extracted collateral.105

But ordinary course mineral buyers should be aware of a caveat. Kansas has adopted Kan. Stat. Ann. § 84-9-339a, a non-uniform amendment to Article 9 that grants holders of interests in produced oil and gas sold at the wellhead a purchase-money security interest in the oil and gas sold, and the related proceeds, as against the first purchaser of the production.106 A first purchaser under the statute is the first person that purchases oil or gas production from the operator of an oil and gas lease or an interest owner in the production.107 One common example of a first purchaser is a crude oil purchaser. If the purchaser pays the sale proceeds to the lease operator for distribution to other interest owners, the operator becomes the first purchaser under the statute.

Under § 84-9-339a, any signed writing that gives an interest owner a right in oil or gas production under real property law suffices as a security agreement. The first purchaser is deemed to authenticate the security agreement by issuing a division order, signing an agreement to purchase production, or making any voluntary communication with the interest owner or a governmental agency recognizing the interest owner’s right.108 The purchase-money security interest is deemed perfected by the filing of an affidavit of production stating that a well or wells capable of producing oil or gas in paying quantities have been completed under the oil and gas lease. Filing affidavits of production is common industry practice, and the legislature appears to have intended the § 84-9-339a purchase-money security interest to perfect almost automatically. Regrettably for producers, it doesn’t always work.

Though no Kansas courts have interpreted or applied § 84-9-339a, this section received significant attention in the bankruptcy of SemCrude, L.P., a Tulsa-based Delaware limited partnership and a large purchaser of oil in Kansas. In a proceeding arising out of In re SemCrude, L.P., the Third Circuit Court of Appeals held that Kansas oil and gas producers failed to perfect security interests in the crude oil they sold to SemCrude before the bankruptcy despite following the procedures of § 84-9-339a.109 The court reasoned that Kansas Article 9 contains the uniform choice of law provision of § 9-301(1). Under § 9-301(1) the law of the debtor’s location determines the method of perfecting a security interest in goods such as produced oil and gas.110 Because SemCrude was located in Delaware, Delaware Article 9 determined the method of perfection of the producers’ security interests. Delaware Article 9 lacks an analog to § 84-9-339a. As a consequence, the only method of perfecting the producers’ security interests in oil sold to SemCrude was to file a financing statement in Delaware, which was not done.

This decision in In re SemCrude undermines the usefulness of § 84-9-339a for producers and interest owners in oil and gas because many if not most first purchasers of oil and gas are located for UCC purposes in states outside of Kansas. That ultimately raises a choice of law argument that producers will lose in every state that has adopted the uniform version of § 9-301(1), which provides that the local law of the jurisdiction in which the debtor is located governs perfection and its effects. Though it remains untested whether a purchase-money security interest in oil or gas under § 84-9-339a takes priority over competing security interests under Kansas law, it seems clear that in the case of a Kansas-domiciled debtor, the producers’ § 84-9-339a rights would trump the perfected se-
curity interests of the debtor's other creditors. But, if the first purchaser\textsuperscript{111} is domiciled outside of Kansas, interest owners in produced oil and gas must look to that state to determine the manner of perfecting a security interest in the production.

4. Security Interests in “Abandoned” Property

Wells and equipment are sometimes abandoned by their owners, especially in times of low prices. This most often occurs following expiration of an oil and gas lease. Kansas law provides that abandoned wells and equipment vest in the owner of the real property where the wells and equipment are located.\textsuperscript{112} Subsequent parties often take possession of the abandoned property, or purchase it from the landowner, and return it to operation for their own benefit. Then these parties must grapple with whether any prior security interests in the property remain enforceable.

Abandonment of collateral is a disposition by the debtor that does not cut off the secured party’s interest. One court has addressed a similar issue in Standard Dyeing & Finishing Company v. Arma Textile Printers Corporation.\textsuperscript{113} There the debtor defaulted on a loan, abandoned equipment collateral in breach of the security agreement, and surrendered its manufacturing building to its mortgagee. A third party, Arma, immediately leased the building and took the equipment. Rather than attempt repossession, the secured party sued Arma for conversion. The court held that the secured party’s “security interest in the [equipment] continued to be a lien on the [e]quipment” even after the debtor abandoned it.\textsuperscript{114} It further held that the secured party “properly elected its remedy of bringing an action for conversion” against Arma, even though it already had an unsatisfied money judgment against the debtor and did not repossess the collateral.

Kansas courts would likely reach the same result. The Kansas Court of Appeals in Farmers State Bank v. FFP Operating Partners, L.P., discussed above,\textsuperscript{115} found FFP liable to a secured party for conversion of collateral. FFP argued it was entitled to the collateral free of the prior security interest because the debtor had abandoned it, cutting off the secured party’s rights. The court disagreed, stating “even if we were to assume [the debtor] abandoned the inventory, that fact is no defense to FFP’s blatant violation of the [secured party’s] security interest.”\textsuperscript{116} Secured parties may thus repossess or sue for conversion under § 84-9-315 when collateral is abandoned. If their security interest is not perfected, however, such secured parties may be subordinate to a taker or transferee of the abandoned collateral that qualifies as a buyer not in the ordinary course under Kan. Stat. Ann. § 84-9-317(b).

5. Production Buyers’ Rights Under Non-UCC Kansas Law

Turning briefly to non-UCC real property law, subsequent buyers of property generally take subject to prior-recorded mortgages.\textsuperscript{117} Real property encumbered by a mortgage remains alienable by the debtor. A grantee of encumbered property takes subject to recorded mortgages. Unrecorded mortgages are not enforceable against subsequent buyers of the property who buy without knowledge of the mortgage.\textsuperscript{118} Kansas real property law, like Article 9, appears to permit a mortgagor to retake possession of abandoned collateral over claims of transferees.\textsuperscript{119}

If the collateral is a type of leasehold interest, the lender’s rights may not be enforceable against the lease, the debtor, or subsequent lessees if the lease terminates. A typical oil and gas lease provides for a definite, or primary, term of years followed by a secondary term that continues as long as oil or gas is produced from the premises in commercial quantities.\textsuperscript{120} Courts have held that with expiration of the lease, the mortgage expires, too. In Macquarie Bank v. Knickel, a case before the United States District Court for the District of North Dakota, the plaintiff loaned money to defendants to develop oil and gas leases.\textsuperscript{121} The plaintiff took and perfected a mortgage and security interest in collateral that included several oil and gas leases. The defendants defaulted and the plaintiff foreclosed on the leases, but the primary terms of several leases had already expired. The plaintiff claimed the defendants converted its liens in the leases by allowing them to expire without renewing them. The court denied the claim, holding that plaintiff’s liens in the leases expired when the leases did and the security agreement did not prohibit defendants from letting the leases expire.\textsuperscript{122}

The holding in Knickel generally aligns with Kansas real property law. In the context of statutory liens, when the issue has arisen, the rights of a lien claimant “can rise no higher” than those of the debtor.\textsuperscript{123} When the debtor’s only interest in real property is a leasehold interest, and the debtor abandons its interest or it otherwise terminates, the lien claimant’s lien in the debtor’s interest “become[s] a nullity.”\textsuperscript{124} A lender on an oil and gas lease may be able to protect itself by drafting the mortgage or security agreement to require the debtor to renew or extend the lease rather than let it expire. If the collateral lease expires, the lender may at least have a claim for conversion or breach of the mortgage or security agreement.

B. Priority Against Other Competing Consensual Liens


The general rules of priority among competing liens under Article 9 are as follows. A security interest is subordinate to prior perfected security interests\textsuperscript{125} as well as persons that become lien creditors before the security interest is perfected.\textsuperscript{126} Perfected security interests in the same collateral rank according to priority in time of perfection.\textsuperscript{127} As between unperfected security interests in the same collateral, the first security interest to attach or become effective has priority. A purchase-money security interest in goods (other than inventory) has priority over a conflicting security interest in the same goods. Security agreements commonly provide that
the collateral secures future advances to the debtor. Generally the time a future advance is made plays no role in determining priorities among conflicting security interests. For purposes of determining priority, an advance made under a future-advances clause is considered perfected when the underlying security interest was perfected.

A security interest is subordinate to the rights of a person that becomes a lien creditor before the security interest is perfected. A lien creditor means (1) a creditor that has acquired a lien by attachment, levy, or the like; (2) an assignee for benefit of creditors from the time of assignment; (3) a trustee in bankruptcy from the date of filing of the petition; or (4) a receiver in equity from the time of appointment. The most common types of lien creditors are execution creditors and trustees in bankruptcy. The Bankruptcy Code, 11 U.S.C. § 544(a)(1), grants trustees in bankruptcy the status of a hypothetical lien creditor as of the date of the bankruptcy petition. The trustee can avoid liens that were unperfected on that date as a hypothetical lien creditor could, and thus preserve the property for the bankruptcy estate. To prevail on an avoidance claim, “the trustee must show that the competing creditor has a valid lien in the subject property and that the lien was not properly perfected as of the commencement of the bankruptcy case. If the creditor's lien never attaches, there is no lien for the trustee to avoid...” Article 9 contains special rules pertaining to lien creditors’ priority as to competing security interests that are beyond the scope of this discussion.

Competing rights to fixtures are governed by special rules because of their unique quality of transcending real and personal property. A security interest in fixtures is generally subordinate to a conflicting interest of an encumbrancer or owner of the related real property to which the fixtures are annexed (unless the owner of the real property is the debtor, in which case the security interest would necessarily obtain priority). Under Kan. Stat. Ann. § 84-9-334(f)(2), however, the secured party has priority over the owner or encumbrancer if the debtor has a right to remove the fixtures as against the owner or encumbrancer. In the oil and gas context, Kansas law permits lessees to remove equipment and casing anytime during the lease term and for a reasonable time after termination. Security interests in a lessee’s equipment and casing therefore should claim priority over the rights of the landowner and mortgagees. This is not true if the secured property is deemed to be personal property. When the status of the secured property is unclear, a lender should consider obtaining a subordination agreement from the landowner or competing encumbrancer.

2. Priorities Under Kansas Real Property Law

The priority of competing mortgages is generally based on order of recording. Purchase-money mortgages, however, take priority over earlier-recorded ones if they are recorded without “unnecessary delay.” Mortgages in oil and gas leasehold interests often secure future advances. The mortgage has priority as of the time of its recording as to all advances made thereunder until the mortgage is released of record, except for advances made that exceed the maximum amount stated in the mortgage.

3. Competing Priorities of Nonpossessory Statutory Liens

Priority issues often arise when oil and gas leases, wells, equipment, and materials become subject to both consensual liens and statutory oil and gas liens. Chapter 55 of the Kansas Statutes provides for nonpossessory liens in oil and gas property in favor of oilfield contractors, subcontractors, and transporters to secure payment for goods and services. These so-called oil and gas mechanics’ liens and their priority over other nonpossessory statutory liens and security interests are not governed by Article 9.

Kan. Stat. Ann. § 55-207 provides a lien in oil and gas leases, wells, pipelines, equipment, and materials in favor of any person that, under an express or implied contract with the owner of an oil and gas leasehold interest or pipeline, performs labor or furnishes materials in the development, operation, or maintenance and repair of the leasehold or pipeline. Kan. Stat. Ann. § 55-208 provides a lien in favor of any person that furnishes machinery or supplies or performs labor as a subcontractor for an oil and gas leasehold or pipeline owner. Kan. Stat. Ann. § 55-213 provides a lien in favor of any person that transports or hauls oilfield equipment, defined in § 55-212, under an express contract with the owner or operator of an oil and gas lease, pipeline, or oilfield equipment.

Kan. Stat. Ann. § 55-207 controls the priority of §§ 55-207, -208, and -213 liens. The liens “shall be preferred to all other liens, or encumbrances which may attach to or upon such leasehold... and upon any oil pipeline, or gas pipeline, or such oil and gas wells... subsequent to the commencement of or the furnishing or putting up of any such machinery or supplies.” Kansas courts hold that these liens have priority over security interests, mortgages, and other nonpossessory statutory liens that attach after the lienor first performed labor and furnished materials, but are subordinate to such interests that attach before that time. One court has held that a § 55-207 lien is subordinate to a subsequent purchase-money security interest.

V. Enforcement of Liens in Oil and Gas Property

Consensual liens are generally enforceable against the collateral and the debtor if and when the debtor defaults on the underlying obligation. The security agreement or mortgage document defines when default occurs and the agreements and liens may be enforced. The debtor’s failure to pay the debt as required is usually an event of default, but noneconomic acts or omissions of the debtor may also constitute events of default. Agreements commonly provide the debtor an opportunity to cure the default, such as by paying late subject to a fee. It is possible for a secured party to waive its rights to en-
force the debt and related lien by failing to timely act in response to a default. The terms of the security agreement or mortgage may help avoid this pitfall by requiring any waiver of rights to be in writing. The remainder of this section discusses a secured party’s rights and duties with respect to enforcing its liens upon default.

A. Enforcing the Article 9 Security Interest

In many oil and gas financing transactions, the collateral consists of both real and personal property. The typical oil and gas mortgage encumbers an oil and gas leasehold interest, which is real property, as well as the proceeds of production (or the runs) and wells and equipment, which are personal property. In mixed-collateral situations, secured parties may proceed either under Part 6 of Article 9 as to the collateral that is personal property (without prejudicing its rights to proceed separately against the real property collateral as well), or proceed completely outside the provisions of Article 9 as to both the personal and real property under real property law. Article 9 likewise permits secured lenders with rights in both the personal and real property under real property or applicable real property law.

There are many avenues for enforcement following a default under Article 9 and the remedies are cumulative, not exclusive. A secured party may reduce its claim for default to judgment, foreclose, or otherwise enforce the security interest by any available judicial procedure. If the secured party reduces its claim to judgment, it may execute on the collateral, or proceeds of the realization of the collateral, in the manner on a recognized market, at the price current in any recognized market or subject to quotations. The leading case in Kansas on commercial reasonableness is Westgate State Bank v. Clark. Clark adopts the so-called totality of the circumstances test for determining commercial reasonableness. In it, the Kansas Supreme Court set forth the nonexclusive factors that determine the reasonableness of a disposition: (1) the duty to clean up, fix up, and paint up the collateral; (2) whether disposition was made public or private; (3) whether the collateral was disposed of wholesale or retail; (4) whether the collateral was disposed of by unit or in parcels; (5) the secured party’s duty to advertise the sale; (6) the length of time the collateral is held prior to sale; (7) the creditor’s duty to give notice of the sale to the debtor and competing secured parties; (8) the actual price received at the sale; and (9) other factors such as the number of bids received and the method employed to solicit bids.

The fact a better price could have been obtained at a sale at a different time or place or by a different method is not sufficient alone to establish that the sale was not commercially reasonable. There is a safe harbor for sales made in the usual manner on a recognized market, at the price current in any recognized market at the time of disposition, or otherwise in conformity with reasonable commercial practices among dealers in the collateral. A sale is also per se commercially reasonable if a court approves it.

As the Tenth Circuit case Liberty National Bank & Trust Company v. Acme Tool Division of Rucker Company illustrates, it is important to conduct collateral sales roughly ac-
secured oil and gas transactions in kansas

cording to industry standards. The secured party in that case had been advised of the industry's standard method for selling the drilling rig securing the loan. The standard was to clean and paint it, move it to a convenient location, schedule an auction, notify interested persons, and advertise the auction in trade journals and newspapers. Instead the secured party sold the uncleaned, unpainted drilling rig on the drilling site, with an untrained and inexperienced auctioneer, and without advertising the sale. To make matters worse, the sale took place during a blizzard. The court concluded the secured party failed to take reasonable steps to maximize the price for the rig at the public sale and violated the rights of a competing secured party.164

There are consequences for selling collateral in an unreasonable manner. If a court determines that a secured party is not proceeding in a commercially reasonable manner, it may restrain disposition of the collateral and award the debtor damages against the secured party.165 A competing secured party may also claim damages, as in Acme Tool Division of Rucker Company.166 Courts may also award the debtor and competing secured parties a civil penalty of $500 per violation of Article 9.167 A secured party may recover a deficiency judgment against the debtor for the amount by which the debt exceeds the proceeds of the collateral, even if the sale of the collateral was not commercially reasonable.168 However, in any action to recover the deficiency judgment there is a rebuttable presumption that the value of the collateral was equal to the unpaid balance of the debt. The secured party has the burden of rebutting the presumption. The debtor may set off its damages from an unreasonable sale against the amount owed to the secured party.

B. Enforcing Non-UCC Liens in Kansas

Under Kan. Stat. Ann. § 55-210, liens in oil and gas leasehold interests are enforced in the same manner as mortgages in real property.169 In Kansas, a mortgagee brings a foreclosure action to enforce a mortgage in oil and gas leasehold interests and the underlying debt.170 Unlike the enforcement of an Article 9 security interest, a mortgage foreclosure is an equitable action.171 The mortgage seeking foreclosure must maintain "clean hands" throughout the process to be entitled to equity.172 A lender therefore must proceed reasonably in enforcing an obligation under both Article 9 and Kansas real property law.

The mortgagee is a necessary party to a mortgage foreclosure action. Mortgagees should also name any other person who claims an interest in the subject leasehold interest, including junior mortgagees, lien creditors, and statutory lienholders. The foreclosure proceeding merges all junior encumbrances in the property joined in the lawsuit and extinguishes them.173 Although junior encumbrancers are not necessary parties for jurisdiction, any junior encumbrancer not joined in the action may assert its rights to the collateral following a sheriff's sale.174 Junior encumbrancers must answer or appear in the proceedings to claim a share of any excess sale proceeds beyond the amount of the mortgage being foreclosed.175

When a lease is producing income at the time of default, the mortgagee generally wants to take possession of the production and the runs before reducing its claim to judgment in a foreclosure action. For this reason, oil and gas leasehold mortgages often assign the rents and runs to the mortgagee upon an event of default. The runs are applied against the debt. Mortgages may alternatively authorize the mortgagee to petition a court to appoint a receiver to collect rents and runs and apply them against the debt.176

The district court determines the amount of the debt and the priority of competing liens in the leasehold collateral in a journal entry of judgment. Because judgment may be entered only for past due amounts, mortgages typically contain an acceleration clause that causes the entire debt secured by the mortgage to become immediately due on default. If the debtor fails to pay the judgment, the mortgagee may ask the court for an order of sale directing the sheriff to sell the lease for cash.177 Oil and gas leases are sold as real property under the execution provisions of Article 24 of the Kansas Code of Civil Procedure.178 The mortgagee must advertise the sale and publish notice of it once a week for three consecutive weeks in the official newspaper of the county where the lease is located.179 The mortgagee may credit bid the amount of its judgment at the sheriff's sale. As under Article 9, the mortgagee may seek a deficiency judgment against the mortgagor personally for the amount by which the judgment exceeds the sale proceeds.180 The court has no discretion in entering a deficiency judgment, and it is a mathematical equation.181

After the sheriff's sale, the sheriff returns to the court an order of sale indicating the purchaser of the collateral and the amount of the purchase price. The mortgagee must then ask the court to confirm the sale. The court may deny confirmation of the sale if it finds the bid to be substantially inadequate.182 In determining whether the bid was substantially inadequate, the court does not consider the impact of the foreclosure proceeding itself on the price nor deduct holding costs.183 The court may consider local, long-term economic conditions; the type of property involved; its unique qualities, if any; its intrinsic worth; and other characteristics affecting the collateral's value.184 If the court confirms the sale, the sheriff must execute a sheriff's deed conveying the property to the purchaser.185 The sheriff's deed should describe the lease and the real property it covers. The purchaser should record the sheriff's deed in the office of the register of deeds for the county where the lease is located. The debtor under an oil and gas leasehold lien has no right of redemption.186

VI. Conclusion

The stakes are high in many oil and gas secured transactions, the collateral can have different property characteristics,
and the law is complex and often incomplete. Practitioners should begin their examination of any transaction by determining the proper classification for each type of collateral. If the proper classification is unclear, the practitioner should perfect in all the ways that might be appropriate. Counsel generally drafts a single mortgage, security agreement, and financing statement that describes all the collateral, including leasehold interests, extracted oil and gas, wells and equipment, and all other real and personal property necessary to the operation of the producing unit. The omnibus document is recorded in the office of the register of deeds as a mortgage and a fixture filing and filed in the Secretary of State’s central filing office as a financing statement. In the enforcement of liens, practitioners should consider industry standards to determine what method of disposition is commercially reasonable.

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1. See Woodward v. Wright, 266 F.2d 108, 115 (10th Cir. 1959) (“We know that oil and gas financing is a strange world of its own.”).
3. Black’s Law Dictionary 1475 (9th ed.).
4. Id. at 1006.
5. Id.
8. See Waters, 854 P.2d at 314.
11. K.S.A. 84-9-203(b).
17. K.S.A. 58-2221.
19. K.S.A. 58-2223; see also In re Coffelt, 395 B.R. at 140.
20. K.S.A. 84-9-301(4).
21. See K.S.A. 84-9-301(3)(C). This is a change from former Article 9. Id. off. cmt.7.
22. See generally id. off. cmt. #7.
23. K.S.A. 84-9-102(44).
31. K.S.A. 84-9-102 off. cmt.4.c.
32. K.S.A. 84-9-301(4).
34. K.S.A. 84-9-502(a)(b).
35. K.S.A. 84-9-502(c).
36. K.S.A. 84-9-519(d). In Kansas, registers of deeds have no duty to furnish a numerical tract index unless the board of county commissioners “deems it necessary.” K.S.A. 19-1209. Nearly all registers of deeds offices maintain numerical tract indexes.
41. K.S.A. 58-2221.
42. See, e.g., Cruse v. Marston, 148 P.2d 1004, 1005–06 (Colo. 1944).
43. See 1 David E. Pierce, Kansas Oil and Gas Handbook § 4.09 (Kan. Bar Ass’n. 1986).
44. 8 Patrick H. Martin and Bruce Kramer, Williams & Meyers, Oil and Gas Law 728 (LexisNexis Matthew Bender 2016).
46. Martin & Kramer, supra note 44, at 691, 824.1.
47. Id. at 649.
50. Id. at 264.
51. See Muslow, 697 P.2d at 1274 (holding that overriding royalty interests are not subject to partition because “the nature of an overriding royalty interest is such that only when oil and gas are reduced to possession does the interest attach. The overriding royalty interest does not create a cotenancy in the leasehold or a possessory interest.”); accord Merker v. Ambassador Oil Co., 308 F.2d 875, 882–83 (10th Cir. 1962) (Okla.), rev’d 375 U.S. 160, 84 S. Ct. 273, 11 L. Ed. 2d 261 (1963).
52. See generally Wellington Bank v. Nicolay, 638 P.2d 975 (Kan. Ct. App. 1982), which holds that a partner’s assignment of his rights to pay-
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...and benefits under the partnership's contract to assign an oil and gas lease created a security interest under Article 9 which must be perfected, if at all, by filing a financing statement. Nicolay should caution any lender which takes a lien in a right to receive payment from production of oil or gas such as, arguably, an overriding royalty interest, production payment, or net profits interest.

53. See K.S.A. 84-9-607 off. cmt. #2 ("[T]his section allows the assignee to liquidate collateral by collecting whatever may become due on the collateral, whether or not the method of collection contemplated by the security arrangement before default was direct . . . or indirect.").

60. 21 P. 809 (Kan. 1889).
61. Id. at 812–13.
62. Id. at 813.
63. Pratt v. Gerstner, 360 P.2d 1101, 1104 (Kan. 1961) (quoting 3 Summers, the Law of Oil and Gas § 526, p. #453 (perm. ed.)); see also Arney v. Hoffman, No. 83,695, 2000 Kan. App. unpub. LEXIS 1040, at *2–3 (Kan. Ct. App. Mar. 3, 2000) (citing 3 Summers Oil and Gas § 526 (1988)). Though these cases clearly apply the majority rule that well casings are trade fixtures, they are not precedent on this point. This is the rule in Oklahoma, as well. Gutierrez v. Davis, 618 F.2d 700, 702 (10th Cir. 1980) (Okla.).
64. K.S.A. 84-9-310(a) (requiring filing a financing statement for perfection), -501(a)(1)(B) (designating the register of deeds office of the county where the fixture is located as the place for filing fixture filing), -502(b) (stating requirements for fixture filing) & -502(c) (stating requirements for a mortgage to be effective as a fixture filing); see also supra text accompanying notes 32–34.
65. K.S.A. 84-9-310(a) (requiring filing a financing statement for perfection) & -501(a)(2) (designating the Secretary of State's office as the place for filing the financing statement).
67. K.S.A. 84-9-301(1).
68. K.S.A. 84-9-307(b).
70. See K.S.A. 84-9-501(3)(C).
71. K.S.A. 84-9-502(c).
73. K.S.A. 84-9-310(a), -501(a)(2).
74. K.S.A. 84-9-311(a)(2).
75. K.S.A. 84-9-303(b).
76. K.S.A. 84-9-303(c).
77. K.S.A. 8-135(c)(6) (requiring taking possession of the certificate of title, completing an application for a mortgage title prescribed by the Kansas Department of Revenue, and delivering both the title and mortgage title application, along with a fee, to the Department); see also K.S.A. 8-135(c)(5) (stating requirements for perfection of a purchase-money security interest in a vehicle covered by a certificate of title).
78. See In re Dawley, 30 B.R. 477, 478–79 (Bankr. W.D. Pa. 1983) (affirming district court finding that a drilling rig ‘lost its identity as separate piece of equipment when built and incorporated into the Mack International Truck.’).
79. See K.S.A. 84-9-335(d).
81. K.S.A. 84-9-501(b).
82. K.S.A. 84-9-102(a)(81).
84. K.S.A. 84-9-401(a)–(b).
85. K.S.A. 84-9-201(a).
86. K.S.A. 84-9-315(a)(1).
87. K.S.A. 84-9-315(a)(2).
88. K.S.A. 84-9-315 off. cmt. #2.
89. Id.
91. Id. at Syl. ¶ 3.
92. Id. at 235–36.
93. K.S.A. 84-9-317(b).
94. K.S.A. 84-1-204.
95. K.S.A. 84-1-202(b).
98. See K.S.A. 84-9-515(c) (stating financing statements lapse after five years).
99. K.S.A. 84-9-515(a), (c).
100. K.S.A. 84-9-515(e).
101. K.S.A. 84-9-515(g).
103. K.S.A. 84-1-201(b)(9).
110. Id. The court noted that while the collateral in this case was produced crude oil, it was goods rather than as-extracted collateral because SemCrude did not have a pre-extraction interest in the crude oil. The distinction is significant because a security interest in as-extracted collateral is perfected under the law of the wellhead's location, here Kansas, rather than the debtor's location, which was Delaware.
111. K.S.A. 84-9-339a(p)(3).
112. In Kansas, a lessee under an oil and gas lease may remove casing, derricks, engines, and other machinery placed by the lessee on the premises any time during the existence of the lease. If the lessee does not remove any such property within a reasonable time following termination, the property is presumed abandoned and becomes the property of the landowner. Pratt v. Gerstner, 360 P.2d 1101, 1104 (Kan. 1961). See SemCrude Oil, Inc. v. J.I. Case Co., 749 F.2d 1526, 1529 (11th Cir. 1985); 69 Am. Jur. 2d § 459, p.312).
114. Id. at *22 (citing U.C.C. § 9-306(2); Taylor Rental Corp. v. J.I. Case Co., 749 F.2d 1526, 1529 (11th Cir. 1985); 69 Am. Jur. 2d § 459, p.312).
116. Id. at 236.
117. See K.S.A. 58-2222.
118. K.S.A. 58-2223.
119. See Sallee v. King, 277 P. 49, 50 (Kan. 1929) ("The taking of possession is a method of payment and is one of the remedies afforded mortgages to obtain satisfaction of their liens.").
121. 723 F. Supp. 2d 1161 (D.N.D. 2010).
122. Id. at 1200–01.

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secured oil and gas transactions in kansas

128. K.S.A. 84-9-324(a).
129. See K.S.A. 84-9-204(a).
130. K.S.A. 84-9-323 off. cmt. #3.
133. See K.S.A. 84-9-204(a).
134. See K.S.A. 84-9-323 off. cmts. #4–5 (concerning filed but unattached security interests vs. lien creditor and security interest of consignor or receivables buyer v. lien creditor, respectively).
135. K.S.A. 84-9-334(c).
136. See K.S.A. 84-9-317 off. cmts. #4–5 (concerning filed but unattached security interests vs. lien creditor and security interest of consignor or receivables buyer v. lien creditor, respectively).
144. K.S.A. 84-9-604(a); see also Northern Tr. Co. v. Buckeye Petroleum Co., 389 N.W.2d 616, 620 (N.D. 1986) (holding that a secured party that elected to proceed under Article 9 only as to the personal property collateral did so properly and did not waive its rights under North Dakota real property law to proceed against the oil and gas leasehold collateral which was characterized as real property).
146. K.S.A. 84-9-601(c).
149. K.S.A. 84-9-609(a)–(b).
150. K.S.A. 84-9-609(c).
151. K.S.A. 84-9-620(a)–(c).
152. K.S.A. 84-9-610(a)–(b).
153. K.S.A. 84-9-610(b).
154. K.S.A. 84-9-610(c).
155. K.S.A. 84-9-604(c).
156. K.S.A. 84-9-604(d).
159. 642 P.2d 961 (Kan. 1982).
160. Id. at 970–71.
162. K.S.A. 84-9-627(b)(1)–(3).
163. 340 F.2d 1375 (10th Cir. 1965).
164. Id. at 1381–82.
165. K.S.A. 84-9-625(a)–(b).
166. K.S.A. 84-9-625(c)(1). 
167. K.S.A. 84-9-625(e).
168. Clark, 642 P.2d at 969.
170. For a thorough survey of the procedure and substance of mortgage foreclosure in Kansas, see Kansas Real Estate Law Handbook, Mortgages and Conventional Real Estate Lending §§ 6.4–6.4.3 (Kan. Bar Ass’n).
175. King, 109 P.3d 180, Syl. ¶ 2.
177. See K.S.A. 60-2410.
178. K.S.A. 60-2401(d).
179. K.S.A. 60-2410(a).
180. See Fed. Land Bank of Wichita v. Cummings, 735 P.2d 1110, 1112 (Kan. 1987) ("Deficiency judgments are contemplated and permitted by Kansas law.").
182. K.S.A. 60-2415(a).
183. Mann, 845 P.2d at Syl. ¶ 3.
184. Id. at Syl. ¶ 2.
185. K.S.A. 60-2410(e).
The End of the World as We Know It. Good-bye Briefcases. Hello Backpacks.

The Bar Journal is known for its informative and often scholarly articles on topics like mechanic liens, oil and gas law, expungements and legislative changes that impact our practice areas.

This isn’t one of those articles.

This article is about backpacks.

Now, don’t turn the page. In a bit you will understand how their proliferation is threatening the end of the world as we know it.

A long time ago in a galaxy far away, the world was a different place. Cars had drivers. I mean, like, people in them. The legal practice was different. You had to actually go to court to file something. You got a file stamp on your pleadings. It was like an endorsement of your work product. “Your honor, I will offer file-stamped copies of the exhibit list for the court’s consideration.”

And in the universe of the old days, pretty much every lawyer had a briefcase. My Uncle Bob got me a legal briefcase when I graduated from KU law school in 1984. I still have it. The briefcase was a must-have accessory for professionals whose business included important documents. Some briefcases have locks with keys.

Hollywood understood this. Briefcases sometimes form the central part of iconic movies. James Bond always had an attaché,
especially if he was going to kill someone. The movie “No Country for Old Men” was an Academy award winning movie, and in its storyline, the briefcase holds the money and something else, which—SPOILER ALERT—leads to many killings.

The “American” is another great movie involving a hit man and his Samsonite briefcase. This briefcase is not used for legal pleadings. And then you have the movie “Briefcase,” which is not remotely iconic or whatever is the opposite of that word. I found a plot summary that described the movie this way: “A man finds a briefcase while filling up his tire at a gas station late at night. Once he sees what’s inside, his life will never be the same.”

Memo to file: don’t pick up briefcases at gas stations. Or go to movies where “briefcase” is in the movie title.

But in some circles, the conventional briefcase went the way of the dodo bird. Then the rolling briefcase took its place. Now I know this may shock you, but I once wrote an article trashing the rolling briefcase. I described how they tend to run over my toes, clank against my arm rest and then get jammed in the overhead while those wheels still protrude. Trying to slam the door four times does not improve your odds for success. And invariably this display happens just as the flight attendant says “we need everyone to take their seats for an on-time departure.” Followed by “the seat belt sign is on, the plane is now moving, so please take your seats.”

Slam. Slam. Slam.

But I could tolerate all this, shake my head, and keep talking to myself. Something I’m good at.

But then the WSJ ran this headline last month:

“The Backpacks are coming: why executives are ditching their briefcases.” The article described a “shift in what constitutes a boardroom-worthy bag, and backpacks are assuredly in the game. Enter an office elevator in any city, and you’ll spot nearly as many backpacks as tightly gripped Starbucks cups. The article continued, “According to NPD, Inc., which tracks retail trends, sales of adult men’s backpacks have grown steadily in the past two years. Sales of that segment increased five percent to $864 million between August 2016 and August 2017, representing 48% of the entire U.S. backpack market.”

I checked Amazon. It shows 780,000 items under backpack. Search for old school briefcases that lack wheels: one.

Briefcases are used to carry nuclear codes, highly confidential documents, and weapons. Backpacks? Coloring books, PBJ sandwiches, fruit snacks and Pringles.

At this point, I will resist the temptation to go low and suggest this is a Gen X snowflake phenomenon—the kind of thing that goes with a safe room, trigger words, comfort pet, selfie-loving, bootie-wearing, postage stamp-denying, Tesla-lusting, kale-munching young person.

Backpacks are here to stay. One of my law partners, Stan Sexton, loves backpacks. He was one of the first adult attorneys to use one. I asked him why. This is what he told me:

1. All kinds of pockets for mouse, keyboard, power cords, headphones not found in messenger bags or standard briefcases;
2. Even distribution of weight keeps shoulders from sagging and reduces the risk of developing carpal tunnel from holding onto a bag;
3. Fits over the handle of a standard roller board;
4. A lot cooler—and I’m not talking about heat.

So I’m old and, some would say, grumpy. And should our paths cross at KCI, and you are a full-fledged member of the backpack brigade, do me a favor.

Offer me a fruit roll-up.

About the Author

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Funeral arrangements, legal documents, inventory of property, beneficiary designation of property, debts and obligations, taxes.

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On Friday, November 17, 2017, The Kansas Law Center—home of the Kansas Bar Association and the Kansas Bar Foundation—located at the corner of 12th and Harrison in Topeka, Kan., was renamed and rededicated to honor the memory of the late Robert L. Gernon, former Kansas Supreme Court Justice.

The dynamic Topeka High Drumline welcomed those in attendance, setting the uplifting, positive, energetic tone of the event. KBA/KBF Executive Director Jordan Yochim welcomed the crowd and introduced the Gernon family members who were able to join in the celebration. KBF Immediate Past President Todd N Thompson and current KBF President, the Honorable Evelyn Z. Wilson spoke about the Foundation and the good works in which it is involved, recognizing the fact that retiring the mortgage (thanks in no small part to the generosity of the Gernon family) will enable the Foundation to do even more.

The Honorable Lee A. Johnson, Kansas Supreme Court Justice, spoke of his friendship with Justice Gernon. Rebecca and Kristin Gernon concluded by talking about their father as only daughters can, with deep devotion, humor and great love.

After the speakers concluded, Thompson and Judge Wilson burned the mortgage on the patio of the newly named Robert L. Gernon Law Center. A champagne toast was raised. Then, all were invited for cake and punch, and to tour the facility.

Justice Gernon’s grandsons Finn (13), Satchel (11) and Oliver Wilson (9); and Fletcher Vannerson (4) were able to witness this event, honoring their late grandfather. While the younger boys might have mostly been impressed by the drumline, they will undoubtedly come to a greater understanding of the significance of this event when they are older. It was a wonderful time for the family, for Justice Gernon’s friends and for the KBA/KBF staff.
Burning the mortgage! Justice Gernon’s daughters, Kristin and Becky, look on with their families as the Past and present Presidents of the Kansas Bar Foundation formally burn the mortgage for the building, thanks in part to the Gernon family’s generosity. From L-R: Lance Vannerson, Marc Wilson, Kristin Gernon, Fletcher Vannerson, Becky Gernon, Finn Wilson, Satchel Wilson and Oliver Wilson; Todd N Thompson (Past KBF President) and the Hon. Evelyn Z. Wilson (current KBF President).
Justice Robert L. Gernon
July 29, 1943 – March 30, 2005

My family viewed the law as a profession where those who were lawyers helped people who were in trouble or needed assistance... I believe the courts are a place where everyone ought to expect a level playing field... The courts ought to be colorblind, gender-blind, religion-blind, and blind to all other reasons for bias.

The Honorable Robert L. Gernon

Robert L. Gernon was born into the legal profession. His father was an attorney and later a judge; his mother a court reporter; his brother and sister both attorneys. He entered the profession as a probation officer and presentence investigator while attending the Washburn School of Law. After earning his JD, he returned to his home town of Hiawatha and joined his brother in private practice. Robert Gernon went on to serve the state of Kansas as a district court judge, a judge on the Kansas Court of Appeals, and a Justice on the Kansas Supreme Court. His was a distinguished legal career by any measure.

However, Justice Gernon gave much more than time expertise to the legal profession. He gave endlessly of himself, and the Kansas Bar Association was one of many organizations that benefitted from his generous and open-hearted spirit. He joined the KBA in 1969, the year he graduated from law school, and remained a dedicated and active member for the rest of his life. In 1990, he launched an annual publication detailing changes to Kansas law—the Annual Survey—which continues as the KBA’s longest running publication, second only to The Journal. He also served on the KBA’s Continuing Legal Education, Awards, Law Related Education, and Bench Bar Committees. Justice Gernon was twice recognized by his peers for his service to the KBA and the profession; in 1991, he received the Outstanding Service Award; and in 2001, the Professionalism Award, given to someone “who, by his or her conduct, honesty, integrity, and courtesy, best exemplifies, represents, and encourages other lawyers to follow the highest standards of the legal profession.”

Upon Justice Gernon’s death, the Gernon family and their many friends established the Robert L. Gernon Fund with the Kansas Bar Foundation. In 2017, the family agreed to devote the fund to retire the mortgage on the building which houses the Kansas Bar Association and the Kansas Bar Foundation. The activities that take place in this building—a place where KBA members gather and work, where people can find help, where a dedicated staff serves the profession and the public—are the very activities that typified Justice Gernon’s career and philosophy. The KBA and KBF are proud that our building is named, in dedication, for Justice Robert L. Gernon.
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Ultra Vires: The IRS's Illegal Regulation of Nonprofit Governance

The Internal Revenue Service is unfairly—and unlawfully—regulating the governance affairs of the nation’s public charities and other categories of tax-exempt organizations. It is engaging in this activity by means of its private letter ruling policies, as well as its structuring of the annual information return that most of the larger exempt organizations must file.

The IRS, however, lacks the jurisdiction, and the basic authority, to do what it is doing in this context. This is certainly not the first time a federal agency has been caught wandering outside the realm of its legal authority. Indeed, this is not the first time in recent years that the IRS has been tagged for regulating beyond the bounds of its jurisdiction. In this case, however, there is no tax regulation involved, nor is there anything of lesser authority, such as an IRS ruling, or even announcement or notice.

Concept of Nonprofit Governance

Governance of nonprofit organizations encompasses many topics, including duties and responsibilities of directors and the personal liability of directors and officers. At its core, however, governance focuses on who is doing the governing and how the governors ended up in their positions.

Traditionally, governance has been a matter of state law. Nearly every state (but not Kansas) has a nonprofit corporation statute, for example. These and comparable laws, such as those pertaining to management of trusts, dictate matters such as the minimum number of directors, how the directors are elected or appointed, and their terms. They do not address topics such as directors being representative of a community, board diversity, or board members’ competence.

This state of affairs has radically changed in recent years. The IRS has plunged into the realm of nonprofit governance, trying to dictate the composition of nonprofit boards and impose requirements as to the adoption of policies.

How This Began

Often, agency overreach is triggered by an event, such as a well-publicized scandal. It can be the result of a personal predilection of an agency head. It can be the consequence of an agency with too little work to do, looking for tasks to justify its existence. None of these factors, however, apply in this case.

It is not clear why the IRS decided to enter the realm of nonprofit governance or why it decided to move when it did. There was no scandal. The Department of the Treasury was not under a court order to begin regulating nonprofit governance. The U.S. Congress did not ask the IRS to act. No known major force dragged the federal government into this field of regulation.

Whatever the reason, the public aspect of this can be pinpointed; it occurred on April 26, 2007. On that day, the then-Commissioner of the Tax-Exempt/Government Entities Division of the IRS announced to a stunned audience at a nonprofit law conference that the IRS was contemplating entry into the field of nonprofit governance. The Commissioner conceded at the outset of his remarks that, for the IRS to propound and enforce good governance principles, the agency would have to go “beyond its traditional spheres of activity.”

The Commissioner revealed that he was pondering the question of “whether it would benefit the public and the tax-exempt sector [for the IRS] to require organizations to adopt and follow recognized principles of nonprofit governance.” In fact, there are no “recognized principles of good governance” for nonprofit organizations. There are ample sets of principles to choose from; they are, however, often inconsistent.

But in subsequent speeches the Commissioner made it clear that the IRS was undertaking that task. Later that year, for example, he stated that, “While a few continue to argue that governance is outside our jurisdiction, most now support an active IRS that is engaged in this area.” No evidence was provided then or since in support of that observation.

He expressed his view that the IRS “contributes to a compliant, healthy charitable sector by expecting the tax-exempt community to adhere to commonly accepted standards of good governance.” He continued: “We are comfortable that
OPINION: ultra vires

we are well within our authority to act in these areas.” And: “To more clearly put our weight behind good governance may represent a small step beyond our traditional sphere of influence, but we believe the subject is well within our core responsibilities.”

With those inconsistent statements, he launched the IRS’s effort to regulate nonprofit governance, violating much law in the process.

The Analytical Framework

The U.S. Supreme Court directly addressed this matter of agency jurisdiction, recognizing the dichotomy between an “assertion of authority not conferred” and an “incorrect application of agency authority.”2 In either instance, an agency’s action is “ultra vires.”3

In a sense, this distinction has little meaning, inasmuch as the endpoint is the same. The Court thus stated: “The reality, laid bare, is that there is no difference, insofar as the validity of agency action is concerned, between an agency’s exceeding the scope of its authority (its ‘jurisdiction’) and its exceeding authorized application of authority that it unquestionably has.”4 The Supreme Court admonished the judiciary to “tak[e] seriously, and apply[] rigorously, in all cases, statutory limits on agencies’ authority.”5 The Court added: “Where Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow.”6

Role of the IRS

Usually, when evaluating an agency’s jurisdiction and/or authority, a court begins with the statute creating the agency and setting forth its powers (known as an “organic” statute). Here, however, there is no statute creating the IRS. Nonetheless, there is statutory law concerning the role of the IRS. For example, the duty of the Commissioner of Internal Revenue is to “administer, manage, conduct, direct, and supervise the execution and application of the internal revenue laws.”7

There are other provisions of the Internal Revenue Code that support the conclusion that the IRS is essentially the tax collection and tax law enforcement agency for the federal government.8 Certainly, this is the function of the IRS from the standpoint of the Treasury Department. Thus, a tax regulation states: “The Internal Revenue Service is a bureau of the Department of the Treasury under the immediate direction of the Commissioner of Internal Revenue. The Commissioner has general superintendence of the assessment and collection of all taxes imposed by any law providing internal revenue.”

The IRS states, on its website and in the weekly Internal Revenue Bulletin, that its mission is to “provide America’s taxpayers with top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all.”

There is nothing in this statutory law, or in any accompanying regulation or IRS precedential statement, that provides the slightest hint of IRS jurisdiction to regulate nonprofit governance.

IRS’s Claim of Authority

The IRS finds its ostensible authority to regulate the governance of public charities and other tax-exempt organizations in the private benefit doctrine.9 It relies almost solely in this regard on a U.S. Tax Court opinion.10 Yet the IRS often distorts what the court said. The Tax Court merely stated that the domination of an ostensible church by three family members does not alone disqualify it for tax exemption, but does provide an opportunity for abuse, warranting a close scrutiny of the facts.11 The IRS, however, from time to time cites this opinion for the proposition that a small governing board and/or an unrelated board automatically is evidence of private benefit, precluding exemption.

The IRS has characterized this opinion in this way. The “undue control of the organization by a related board causes the organization to serve private interests.” Private inurement is “indicated by the fact that the board members consist of the same family and control all aspects of the program.” A “small group of individuals . . . have [sic] exclusive control over the management of [an organization’s] funds and operations” and “as a result of this exclusive control [the entity’s] founders benefit.” None of these statements are true.

IRS’s Initial Efforts

Before the IRS began issuing its spate of private letter rulings concerning nonprofit governance, it revamped the annual information return filed by the largest charitable and other tax-exempt organizations (Form 990). The IRS, via this return, asks many questions about governance (generally, in Part VI), most of which are irrelevant in relation to qualification for tax exemption.

The IRS openly concedes this point. The instructions to the form state that “[a]though federal tax law generally does not mandate particular management structures, operational policies, or administrative practices, every organization is required to answer each question in Part VI.” Powered by that audacity, the IRS asks questions about, and strongly suggests adoption of, over 30 governance policies. This point is reiterated in the instructions: “Even though the information on policies and procedures . . . generally is not required under the Internal Revenue Code, the IRS considers such policies and procedures to generally improve tax compliance.” An IRS advisory committee recommended, however, that “[t]o ensure that the form remains focused on meeting the Service’s core mission, Form 990 should be designed to determine compliance with federal tax law.” That advice has been ignored.

The IRS tried its hand at crafting a set of good governance
principles. They were poorly received and jettisoned soon after they were proposed. One of their many flaws was that they were designed for the larger charities, with their considerable financial and staff resources. Also, they seemed predicated on the assumption that there is a constant mass of talented individuals who want nothing more than to serve on one or more charities’ boards and who are willing to devote unlimited amounts of time to that assignment, without need for compensation or fear of personal liability. The IRS’s proposed principles were criticized for offering nothing innovative in its list of “best practices” for nonprofit governance, rehashing platitudes and fiduciary law summaries that appear in countless other governance standards.

After months of launching its nonprofit governance regulation campaign, the IRS decided it should train its agents on the subject. The IRS “training materials,” eventually made public, turned out to be little more than a rework of the agency’s proposed, then abandoned, good governance principles.

The IRS has undertaken one study, in over ten years of this regulation, intended to prove its touted direct correlation between an exempt organization that is governed in accordance with good governance practices and its compliance with the federal tax law. Yet, close analysis of the data leads to other, sometimes contradictory, positions. In many ways, all this study shows is that exempt organizations that are knowledgeable about the federal tax law are more likely to be in compliance with that body of law.

**IRS Ruling Policy**

Since 2007, the IRS has been ruling that the existence of a small board, usually of a public charity, is inherently provision of private benefit. This position soon morphed into the IRS’s position that, for tax exemption to be available, nonprofit boards have to be “representative of the community.” This in turn evolved into an ostensible requirement that boards of public charities, including churches, had to be subject to “private control.” The most recent iteration of this nonsense is that the governing board of an exempt organization must qualify as an “independent oversight board.”

It is likewise the view of the IRS that a board of a nonprofit organization consisting entirely or primarily of related individuals is per se evidence of violation of the private benefit doctrine, thus precluding tax exemption. Again, the IRS insists that there must be an “unrelated board” that provides “oversight” with respect to the organization. Oddly, the IRS has issued only a couple of rulings that correctly state that related boards do not automatically lead to denial of or loss of exemption but require a closer scrutiny of the underlying facts.

There is no credible law supporting these positions. Rather astonishingly, the IRS is taking this position with respect to churches, claiming that they must be subject to “public oversight.” (It is submitted that we can stipulate that this type of oversight never occurs.) Just a few years ago, the U.S. Supreme Court wrote that principles of noninterference in church affairs trace back to the “text of the First Amendment itself, which gives special solicitude to the rights of religious organizations,” and recognizes their “independence from secular control or manipulation—in short, [their] power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” Just recently, a federal court of appeals wrote of the “historic principle of respect for the autonomy of genuine religions.”

**Singular Governance Case**

There is only one case involving the issue of the scope of jurisdiction of a federal agency specifically in the context of nonprofit governance. That case, concerning overreach by the Federal Energy Regulatory Commission, has striking parallels to the IRS’s efforts to regulate nonprofit governance. An appellate court held that the FERC did not have the statutory authority to make or enforce its order endeavoring to dictate the composition of the board of a public benefit corporation, a form of nonprofit organization.

The court accused the FERC of “overreaching” and “stretching of the authority granted it by the statute.” It concluded that if it accepted the FERC’s “claimed authority to regulate all actions or activities” of the nonprofits within the ambit of its jurisdiction, the “implications would be staggering.” The court envisioned the FERC “dictat[ing] the choice of CEO, COO and the method of contracting for services, labor, office space, or whatever one might imagine.”

The court concluded that the FERC “does not have the authority to reform and regulate the governing body” of public utilities under its jurisdiction. Likewise, the IRS lacks the authority to reform and regulate the governing bodies of public charities and other tax-exempt organizations just because of its duty to enforce the tax law.

**Analysis of IRS’s Jurisdiction**

The typical approach to evaluating a governmental agency’s jurisdiction and/or authority—the *Chevron* analysis—is not available in this context because the IRS’s regulatory policies regarding nonprofit governance have never been made the subject of a tax regulation. Indeed, the IRS’s policies, based as they are only on a series of private letter rulings, are not entitled to any judicial deference, including the lower-tier deference. Still, *Skidmore* offers guidance.

Pursuant to *Skidmore*, the weight accorded an agency’s interpretation depends on five factors: (1) the degree of the agency’s care, (2) the agency’s consistency, (3) the agency’s formalities, (4) the agency’s “relative expertness,” and (5) the persuasiveness of the agency’s position. As to the IRS and nonprofit governance, the agency fails under each of these elements.

Concerning agency care and formality, the IRS should have elevated its policymaking on nonprofit governance to one
or more revenue rulings or even a notice. As to consistency, most of the IRS’s rulings have been consistent—consistently erroneous. Overall, however, the IRS’s rulings on governance have not been consistent. The IRS clearly is not an expert on the topic of nonprofit governance, as illustrated by its mistaken rulings position based on a distorted portrayal of the Bubbling Well Church opinion and its botched attempt to promulgate good governance standards. The IRS’s argument for its insertion of itself into nonprofit governance is not based on any statutory or regulatory set of standards and there is no meaningful data to back up its rationale. Also, the IRS’s policy is arbitrary and capricious under the Administrative Procedure Act’s standards.

Conclusions

The efforts of the IRS to regulate the governance of public charities and other types of tax-exempt organizations are what the Supreme Court has termed an “assertion of authority not conferred.” There is little in the way of a statutory framework by which to assess the IRS’s jurisdiction in this instance. Thus, it is difficult to apply the Court’s test in this context, which is “whether the agency has stayed within the bounds of its statutory authority.” Nonetheless, many Supreme Court and other court cases provide guidance on this point.

Collateral aspects of this type of analysis, derived from Supreme Court jurisprudence, include the enormity of the consequences of the IRS’s assertion of jurisdiction and the lack of expertise within the agency as to nonprofit governance. The IRS’s decision to base its ostensible regulatory authority on the private benefit doctrine is shaky, arbitrary, capricious, and otherwise contrary to law. The agency’s draft of good governance principles was poorly done and had to be tossed. Its training materials for agents manifest the IRS’s ignorance when it comes to nonprofit governance. The IRS’s effort to correlate “data” to prove that “well-governed” charities are more tax-law compliant is specious at best.

The IRS thus lacks any statute-based jurisdiction for its interventions in the realm of nonprofit governance, and it does not have the requisite authority to regulate in this area.

3. Id.
4. Id. at 1870.
5. Id. at 1874.
6. Id.
8. E.g., IRC §§ 6001, 6033(a), 7402(b), 7805(a).
12. Id., 74 T.C. at 535.
16. Id. at 402.
17. Id. at 403.
18. Id.
19. Id. at 404.

About the Author

Bruce Hopkins currently teaches as Professor from Practice at the University of Kansas School of Law. He has practiced in and chronicled the field of non-profit law for nearly 50 years, beginning in Washington D.C., shortly after the 1969 Tax Reform Act was passed. Since the 1970’s, Mr. Hopkins has written more than 30 books and a monthly newsletter that have documented the field of nonprofit law and are used in law schools throughout the country. His memoir, “SJD—What’s the Point of Three (Law Degrees)? – The Adventures of an Older Lawyer Who Returned to Law School for the Third Degree” was profiled in the May 2017 issue of The Journal of the KBA.
2017 Robert L. Gernon Award for Outstanding Service to Continuing Legal Education in Kansas

David E. Pierce, Topeka, Kansas, has been selected by the Kansas Continuing Legal Education Commission as the recipient of the 2017 Robert L. Gernon Award.

David E. Pierce is a Professor of Law at Washburn University School of Law in Topeka, Kansas. He currently teaches Oil and Gas Law, Advanced Oil and Gas Law, Energy Regulation, and Drafting Contracts and Conveyances. Professor Pierce received his B.A. from Kansas State College of Pittsburg in 1974 and his J.D. from Washburn University School of Law in 1977. Then in 1982, he received his LL.M. from University of Utah College of Law. He began his career as a solo practitioner in Neodesha, Kansas. He then worked in-house for Shell Oil Company in Houston Texas, Gable & Gotwals law firm in Tulsa, Oklahoma, and Shughart Thomson & Kilroy law firm in Kansas City, Missouri.

Professor Pierce was nominated by John W. Broomes of the Hinkle Law Firm, LLC, and Timothy E. McKee of the firm, Triplet Wolf Garretson, LLC. In their nomination letter, McKee and Broomes highlight the impact that Professor Pierce has had on the legal profession. “He has devoted innumerable hours to preparing and delivering continuing legal education through the Kansas Bar Association, The Rocky Mountain Mineral Law Foundation, the Energy and Mineral Law Foundation, Washburn University School of Law and many other schools and institutions.” The nomination package submitted for Professor Pierce supports this statement by including over 20 pages of publications, articles, and presentations where Professor Pierce has devoted his time and energy into educating groups about Oil, Gas, and Mineral Law.

Justice Robert Gernon worked tirelessly to improve the training, education and professionalism of attorneys in Kansas and across the nation. Professor Pierce is an outstanding representation of what it means to be a recipient of the Gernon award. On both a professional and personal level, Professor Pierce is viewed with utmost respect and affection by his peers, colleagues, and especially his former students. This was evident when the award was presented on October 6 in Wichita, Kansas, at the Kansas Bar Association luncheon during the annual Kansas Independent Oil and Gas Association meeting.

Professor Pierce is a past president of the Rocky Mountain Mineral Law Foundation and a member of the Kansas Bar Association and American Law Institute.

Established in 2005 and presented annually by the Kansas Continuing Legal Education Commission, the Robert L. Gernon Award for Outstanding Service to Continuing Legal Education in Kansas recognizes those individuals or organizations that have demonstrated a unique commitment to legal education for lawyers in Kansas and have provided outstanding service to continuing legal education.

The award is named for Kansas Supreme Court Justice Robert L. Gernon (1943 - 2005), whose career included tireless devotion to the training, education and professionalism of attorneys in Kansas and across the nation.

Previous award recipients include:
In the midst of looming deadlines and anxious clients, please take a moment to consider the import of vision and generosity.

Those two concepts are in my mind as I consider the newly named Robert L. Gernon Law Center in Topeka—headquarters of the Kansas Bar Association and Kansas Bar Foundation.

I had occasion to meet Justice Gernon, whom I knew primarily through his reputation as a man who was smart, likeable, humble…and generous. Through this spirit of generosity, the generosity he instilled in his family, and the generosity of others with that same spirit, we now have this wonderful center and no debt against it.

So many things require our attention. So many things get our attention. Our phones alone provide constant access and instant gratification. It’s difficult sometimes to get past the moment, let alone look up and out far enough to consider the impact we ourselves want to make when we, too, are remembered primarily by our reputations.

However, vision requires time and focus. It demands that we put the phone down, turn off the “noise,” think—while there is still time.

Generosity requires more than good intentions. It may, or may not, involve money. Act—while there is still time.

Thank you, Justice Gernon. Thank you to all those who have thought and acted for the benefit of us all. Thank you so much.
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Where Does the Money Go?
Our designated charities for 2018 are:
• CASA (Johnson/Wyandotte Counties)
• Safehome and Hope House (domestic violence programs)
• Metropolitan Organization to Counter Sexual Assault (MOCSA)
• Kansas Bar Foundation
• Midwest Foster Care and Adoption Association
• In addition, we will fund Ethics for Good Scholarships to each of the KU, Washburn and UMKC Law Schools and the Johnson County Community College paralegal program.

Who Are these Intrepid Presenters?
Stan Davis, Ethics for Good Elder Statesman
Jim Griffin, Scharnhorst Ast Kennard Griffin, P.C.
Mark Hinderks, Stinson Leonard Street L.L.P.
Todd LaSala, Stinson Leonard Street L.L.P.
Hon. Steve Leben, Kansas Court of Appeals
Jacy Hurst Moneymaker, Kutak Rock LLP
Todd Ruskamp, Shook, Hardy & Bacon L.L.P.
Hon. Melissa Standridge, Kansas Court of Appeals

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Wednesday, June 27, 2018, 2:30 – 4:10 p.m.
The Nelson-Atkins Museum of Art, Atkins Auditorium
4525 Oak St.
Kansas City, Mo.
Parking: $8 museum non-member parking fee; carpooling encouraged

Friday, June 29, 2018, 2:30 – 4:10 p.m.*
Polsky Theatre, JCCC Carlsen Center
12345 College Blvd. (College & Quivira)
Overland Park, Kan.
*Reception afterward sponsored by the JCCC Foundation

Questions?
Contact Deana Mead, KBA Associate Executive Director, at dmead@ksbar.org or at (785) 861-8839.

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Members in the News

New Positions

Cody C. Branham has joined Adams Jones Law Firm, PA, in Wichita, as an associate.

Hannah Brass, a 2017 graduate of the University of Kansas School of Law, has joined Robert Christensen in his law firm in Medicine Lodge.

John W. Broomes has been nominated by President Trump to become a district judge on the U.S. District Court for the District of Kansas, Wichita.

Ryan Brungardt has joined the law firm of Sloan, Eisenbarth, Glassman, McEntire & Jarboe, LLC, as an associate. Please see the display ad on page 40 of this issue of "The Journal."

Amy L. Durkin has joined Barber Emerson, L.C., Lawrence, Kansas.

Jacob Ediger has joined the Wichita office of the firm of Gilmore & Bell.

Andrew Foulston has joined the law firm of Hutton & Hutton in Wichita.

Susan Saper Galamba, formerly the managing member of the Law Office of Susan Saper Galamba, LC, a boutique law firm practicing family law and mediation, and her associate of the past four years, Kay L. McCarthy, have combined with the Family Law & Divorce Group with in the Law Firm of McDowell Rice Smith & Buchanan, PC. The expanded Family Law & Divorce Group will be co-chaired by Tiffany McFarland.

Jason Geier has been sworn in as a Shawnee County district judge, making the transition from Topeka Municipal Court. Geier graduated with a law degree from the Washburn University School of Law.

Marlea James has been hired by the Kansas Department of Labor to lead its new department overseeing amusement parks, carnivals and other recreational venues in Kansas. The position is new, created in response to the tragedy last year at the Schlitterbahn in Kansas City, Kan. in which the 10-year-old son of a state legislator was killed on the Verruckt, billed as the world’s largest water slide. James sees the position as an opportunity to use not only her law degree and experience, but also her undergraduate degree in engineering.

Brian K. Johnson has been named Labette Co. Counselor, following the resignation of his father, Fred W. Johnson. The younger Johnson has lived in Oswego since 2014 and began practicing law with his father there at the Johnson Law Firm, LLC.

Cherokee County District Judge Oliver Kent Lynch has been named chief judge in the 11th Judicial District. His two-year term will begin in 2018. Lynch has served the 11th District since 2005, presiding over cases in Cherokee, Crawford and Labette counties. Lynch, a graduate of The University of Kansas School of Law, will succeed Judge A.J. Wachter, who announced his retirement earlier in the Fall.

Stephen McAllister has been nominated to serve as the U.S. Attorney for the District of Kansas. McAllister is a distinguished professor at the University of Kansas School of Law. If confirmed, he would replace Tom Beall as the chief federal law enforcement officer in Kansas. McAllister would plan to return to KU at the end of his term.

Judge William R. Mott was appointed chief judge of the 30th Judicial District through the end of the year. Mott has served as a judge in the 30th District since 2007. He will complete the term of Judge Larry T. Solomon who retired at the end of August. Judge Mott received his law degree from the Washburn University School of Law.

Donald Snook has joined the Law Offices of Karstetter & Bina, L.L.C. (based in McPherson and Marion, Kan.) as an associate. Snook received his J.D. from the Washburn University School of Law.

Jennifer Stultz has joined Stinson Leonard Street as a partner in the Tax, Trust & Estates division.

Meghan Voracek has been appointed Brown County Attorney, replacing Andy Delaney who has been appointed Hiawatha City Attorney.

New Locations

Leah Boyd Davis has opened a new law office in the small Southwest Kansas town of Meade; the location is her second office, the first being in the Texas Panhandle town of Amarillo. Having graduated from high school in Meade, Davis knew there was a need for attorneys in the underserved area. She focuses her practice in the areas of estate planning and elder law.

Robert Ramsdell has opened Ramsdell Law Office in Lawrence, Kan. His practice will continue to focus on estate planning and administration. For more information, Bob can be contacted at Ramsdell-Law@att.net.
Notables

Municipal Judges Amie Bauer (Canton and Moundridge), Anthony Hafner (Oakley, Selden, Hoxie and Hill City), Katie McIlhenny (Olathe), Richard Ress (Colby, Atwood, Brewster and Rexford), and Brenda Stoss (Salina and New Cambria) were named by Kansas Supreme Court Chief Justice Lawton Nuss to serve on an ad hoc committee charged with reviewing bonding practices, fines and fees of Kansas’ municipal courts to compile a “best practices” model for the courts to follow.

Diane Bellquist of Joseph Hollander & Craft was elected President-Elect of the Topeka Bar Association. (The October issue of The Journal of the KBA mistakenly reported Bellquist had been elected President of the TBA. The editor regrets the error.)

The Overland Park firm of Bond, Schoeneck & King has been hired to help with an internal review of the University of Kansas Athletics Department after the NCAA Board of Directors requested that all Division-I institutions look at the conduct of their men’s basketball programs to ensure rules compliance.

Thomas R. Buchanan was recognized for successfully recertifying as a civil trial advocate with the National Board of Trial Advocacy. He has been certified and in good standing for seven years. Mr. Buchanan earned his J.D. at the University of Kansas School of Law and now works with McDowell-Rice-Smith & Buchanan, PC.

John J. Bukaty Jr., Wichita, has been selected to become a member of the Ethics Commission.

Todd Butler, an attorney with Butler & Associates, P.A. in Topeka served as a panelist for a discussion on medical debt held in October at the Topeka and Shawnee County Public Library. Butler discussed collection procedures and explained how a patient’s credit is impacted when medical debt goes into a court ordered judgement.

H. Hurst Coffman, S. Lucky DeFries and R. Austin Northern of the Topeka firm that bears their names, were recognized in “The Best Lawyers in America 2018.” Coffman was honored for Trusts & Estates Law; DeFries for both Litigation & Controversy Tax and Tax Law; and Northern for Tax Law and Trusts & Estates Law.

Jeff DeGraffenreid has joined Foulston Siefkin LLP as a partner.

Robert Eye (Topeka) was hired by the Tonganoxie group Citizens Against Project Sunset as part of its successful effort to oppose a proposed Tyson Foods poultry processing facility, should Tyson attempt to renew its proposal for Leavenworth County.

Amanda Christine Fleming, Formoso, was featured in the Beloit Call upon her swearing in on Sept. 29. Fleming graduated from the Washburn University School of Law in May, attended Officer Candidate School in Quantico, Va., with the U.S. Marine Corps, and will now receive officer training through a six-month Basic School in Quantico. Ultimately, she will become a licensed attorney with the Judge Advocate General’s Corps.

Chief Judge Phillip Fromme, who has served in the 4th Judicial District for 34 years, retired from the bench at the end of November. He has been chief judge since 2003 in the district which includes Anderson, Coffey, Franklin and Osage counties. A native of Hoxie, Fromme indicated he would keep active after retirement with hunting, fishing, gardening and travel.

Richard Hayse and Robert Walter, attorneys with the Topeka Law Offices of Morris, Laing, Evans, Brock & Kennedy, Chtd., were honored to be selected by their peers to be included in The Best Lawyers in America 2018®. Hayse was chosen in the areas of Corporate Law, Litigation—Banking and Finance, Real Estate Law and Trusts & Estates. Walter was chosen in the area of Securities/Capital Markets Law.

Cynthia Heath, a St. Louis attorney, Washburn University graduate and chair of the Washburn University Foundation’s Board of Trustees, has challenged the school’s alumni and community to match up to $1 million she is providing for a $40 million fund to build Washburn University’s new $40 million law school building.

MaKenzi D. Higgins of Olathe’s Higgins & Corder, LLC, was nominated as an Associate Judge for the American Bar Association YLD Awards and Subgrants Committee.

Melesa Johnson of the Baker Sterchi Cowden & Rice, LLC, was profiled in the Kansas City Star, crediting her success in life to her mother. Her mom worked three jobs and actively managed Melesa’s free time to keep her on a good path. Melesa is actively involved in the community and encouraged all young Kansas Citians to use their talents to positively affect the city.

Joseph, Hollander & Craft’s Wichita and Topeka offices were listed by U.S. News & World Report and Best Lawyers in America® in “Best Law Firms 2018 Metropolitan Tier 1” in these practice areas: Criminal Defense—General Practice, Topeka; Criminal Defense—White Collar, Topeka; Employment Law—Management, Wichita; Labor Law—Management, Wichita; and Litigation—Labor & Employment, Wichita.

Robert Kinsman of Krause and Kinsman Accident Lawyers in KCMO was briefly profiled in the Nov. 1 edition of the Kansas City Star. His advice to others? “Believe in yourself. Embrace the community around you. Take advice from people you trust. Love what you do.”
Dan Monnat (of Wichita’s Monnat & Spurrier, Chtd.) and Paige A. Nichols (formerly with Monnat/Spurrier, now involved as a contributor to the Federal Public Defender’s blog) were published in The Champion, a monthly publication of the National Association of Criminal Defense Lawyers. Their article, “From Cover to Content: Ten 21st Century Tips for Effective Appellate Briefing” is a fresh look at the most effective way to write and present appellate briefs. Monnat and Nichols have co-authored numerous articles for state and national legal journals for more than two decades. Monnat was also recently named as one of the world’s leading business crime defense attorneys for corporations and individuals by Who’s Who Legal: Business Crime Defense 2017.

Monnat & Spurrier, Chtd. of Wichita was also recognized by Best Law Firms 2018 (jointly produced with U.S. News & world Report) with three Tier 1 Rankings in the areas of General Practice Criminal Defense, White-Collar Criminal Defense and Appellate Practice.

Megan Monsour, an attorney specializing in adoption law at Martin Pringle Law Firm, was interviewed as a member Wichita Business Journal’s Career Women program, one of 10 women featured in the WBJ’s article.

Eric Namee, with the Hinkle Law Firm in Wichita, conducted an ERISA fiduciary training seminar to provide current, practical and detailed guidance to those who serve in a plan fiduciary capacity.

Jim Nelson, retired attorney with DLA Piper Rudnick Gray Cary US-LLP in Dallas, Tex., and his wife Charlotte, were prominently profiled in the McPherson Sentinel for their large gift to Kansas Wesleyan University in Salina.

Joe Norton, Gilmore & Bell (Wichita) shareholder, has been elected as a Regular Fellow to The American College of Bond Counsel.

James Oliver, a partner in the Foulston Siefkin firm, has been selected as a Fellow of the American Academy of Appellate Lawyers.

Gary Patterson has been nominated and accepted as a 2017 American Institute of Personal Injury Attorneys 10 Best in Kansas for Client Satisfaction.

Dave Rebein of Dodge City has been listed for the 12th year in a row with Best Lawyers in America. He was recognized for practice in three particular areas: personal injury, commercial litigation, and “bet the company” litigation.

F. James Robinson, of the Wichita firm of Hite, Fanning & Honeyman, was presented the 2017 Phil Lewis Medal of Distinction by the Kansas Bar Association.

Reno County District Attorney Keith Schroeder will ask to add to more attorneys in 2019 to his current staff of six. The current caseload per prosecutor stands at 1,272. The DA’s plan was covered by the Hutchinson News in October.

Mitchell Spencer of Wellington was sworn in as a Kansas attorney in September, an achievement that was featured in the Wellington News.

Holly Lou Teeter of Lenexa has been nominated to the federal court bench in Topeka. If confirmed, she would take the seat formerly held by Judge Kathryn Vratil who took senior state earlier this year. Teeter graduated first in her class from the University of Kansas School of Law and currently serves as an Assistant U.S. Attorney for the Western District of Missouri.

Thomas Warner, Jr., of Warner Law Offices in Wichita has been inducted into the International Academy of Trial Lawyers.
JOHN E. BOHANNON, 93, died peacefully on October 6, 2017.

John was born May 3, 1924, on a farm outside of Holton, Kan., and raised in the Pleasant Grove Community in Jackson County, Kan. He was born to John E. Bohannon, Sr. and Florence E. (Backman) Bohannon. He graduated from Wetmore High School in Wetmore, Kan., and after graduation joined the U.S. Army Air Corps and circled the world as an Aerial Gunner: Air Offense over Japan, Air Defense over India, Central Burma, and the Western Pacific for two years of active service from 1943-1945. This was the transformative experience of John’s life.

He was an attorney in solo practice in Topeka for over 50 years. He retired in 2001. The record attests that he had worked and served since age 6.

John married Grace M. Jorgensen on December 25, 1951. He is beloved and survived by his wife and two daughters, Martha (Mark) Underwood of Topeka, and Maria (Mike) Riddle of Boise, ID, and four grandchildren.

A Christian funeral service will be at 11:00 a.m. on Tuesday, October 10, 2017, at First Lutheran Church, 1234 SW Fairlawn Road, Topeka, KS. A committal with military honors will follow at Mount Hope Cemetery, Funeral Chapel and Reception Center, Topeka.

In lieu of flowers, memorial contributions may be made to First Lutheran Church or Beck-Bookman Library, 420 W 4th Street, Holton, KS 66436.

To leave a message for the family online, please visit www.Penwell-GabelTopeka.com.

IRIS (McAlpine) GREEN, 74, a resident of Broken Arrow, Okla., passed away in Wichita on October 5, 2017, after a brief illness. Iris was born on March 24, 1943, in Pittsburg, Kan., the fourth child of James Arnold and Carole McAlpine. Iris is preceded in death by her late husband, James Green, her parents, and her sister, Connie McAlpine Morgan.

The family moved to Wichita in 1953 where Iris attended Cathedral High School before enrolling in Pittsburg State University. Iris earned a Bachelor’s degree and spent the early years of her professional career at IBM. She later attended Howard University in Washington, DC, and earned her law degree. She was a corporate and real estate attorney at Santa Fe Railroad in Chicago and ultimately retired from the City of Chicago, where she was an attorney and was responsible for significant
JAMES G. KAHLER, 84, of Lyons, passed away Saturday, September 30, 2017 at Lyons Good Samaritan Society. He was born December 28, 1932 in Rutland, South Dakota, the son of Edwin and Marjorie Kahler. James graduated from Nevada, Mo. High School, and attended Cottey College in Nevada. He received his Bachelor’s Degree from Ottawa University and his Law Degree from the University of Kansas School of Law. (Rock Chalk Jayhawk.) He had resided in Lyons since 1968.

James was a longtime partner at Hodgson and Kahler Attorneys at Law in Lyons. He was a member of the United Methodist Church, Lyons; Lyons Rotary Club; President of the Kansas Bar Association; former member of the Lyons Town and Country Club; Lyons American Legion; Kansas County and District Attorney Association; Kansas Trial Lawyers Association; and former Hospital District 1 Board Member.

On July 12, 1953, James was united in marriage with JoAnn E. "Jody" Welch in Little River, Kan. She preceded him in death on December 14, 2004. He was also preceded in death by his parents. James is survived by his son, Kirk Kahler of Lawrence; daughter, Krysta and David Fischer of Salina, KS; two brothers, Bill and Jackie Kahler of Lancaster, TX, and Gregory McAlpine of Wichita. Iris also leaves a host of nieces, nephews, extended family members and friends. She will be remembered by her friends and family for her calm demeanor and wise advice. A Vigil/Rosary was held on Oct. 11, and a Funeral Mass was held Thursday, October 12, both at Holy Savior Catholic Church. Downing & Lahey East.

LAURINE R. KREIPE, 87, Topeka, passed away on September 24, 2017.

Laurine was born July 27, 1930, in Tipton, Kan., to Michael and Anna Kohn Riedel. She graduated from Tipton High School in Tipton, Kan., in 1947, and then attended the University of Denver, studying music until it became necessary to go to work. Laurine worked for many years as a legal secretary, paralegal and court reporter in Missouri, Kansas and North Carolina.

Laurine married Paul G. Kreipe on September 1, 1956, at Assumption Catholic Church, in Topeka, and he preceded her in death in 2009.

While working as a paralegal, Laurine completed her college education by attending night classes. She graduated with a B.A. in 1979 from Washburn University, then Washburn Law School and received her J.D. degree in 1981 and passed the Kansas Bar in 1982. Laurine was the first Program Director and associate professor of the paralegal program at Washburn University. Laurine was a member of the Kansas Bar Association. She retired from that position in 1992. Laurine practiced law on her own for a few years and retired completely...
in 2010. Laurine was a member of Christ the King Catholic Church. She enjoyed traveling and quilting.

Laurine is survived by her children, Lisa Kreipe, Karl Kreipe and Eric Kreipe (Keli); three grandchildren, Lauren, Weston and Kevin; and siblings, Michael Riedel (Jenneti) and Marc Riedel. Her sister, Alice Havel, preceded her in death in 2010.

Visitation with a rosary was held at Kevin Brennan Family Funeral Home. Mass of Christian Burial was celebrated at on Saturday, Sept. 30, 2017, at Christ the King Catholic Church, in Topeka. Burial followed in Mount Calvary Cemetery.

In lieu of flowers, memorial contributions may be sent to Disabled American Veterans, sent in care of the funeral home.

**BASIL C. MARHOFER** (Feb. 02, 1925 - Sept. 06, 2017)

Basil C. Marhofer passed away Wednesday, September 6, 2017 at the Ness County Hospital, Ness City. Basil was born on a farm in Arnold on February 2, 1925 to Olin and Marnie Keyser Marhofer. He graduated from Ness City High School and received his AB degree as well as his Juris Doctor Degree from the University of Kansas. He attended law school at the University of Colorado and was admitted to the Kansas and Colorado Bar.

Basil was in private practice of law since 1951; he was also County Attorney, City attorney, and Mayor, Past President of County Bar Association all in Ness City. He was Past President Judicial Bar Assoc., past member of Kansas Judicial Council Committee on Municipal Courts, past officer of Leagues of Kansas Municipalities, school attorney for Dist. #303 from 1962 – 1994, Secretary/Treasurer of Ness County Bank Building Foundation, and worked with the Ness County Community Concert Association. Basil served in the 61st Infantry Division of the US Army in Europe during WWII and was in the U.S. Army Band from 1945-1946.

Basil joined Rotary in 1954. He became District Governor in 1969, Director of Rotary International in 1987 and was Vice President of Rotary International 1988-89. He chaired many committees and represented the President of Rotary International around the world. He was a Paul Harris Fellow and a major donor to the Rotary Foundation.

He was a member of the First Church of Christ, Scientist, of Boston, Mass., and the Christian Science Society of Ness City. Basil was a member and Past Master of Walnut Valley Masonic Lodge #191, Ness City and Starlight Chapter #84 order of Eastern Star, Ness City. On September 5, 1987, he married Cecilia Lewand in Ness City.

He is survived by his wife, Cecilia; his sister, Betty Clark, Denver; nieces, Cheryl (Larry) Thomas, Houston; and Janet Clark, Colorado Springs; great niece and nephew, Nicholas (Ronda) Thomas, Denver; and Stephanie Green, Beaumont, Texas; five great great-nieces and nephews and one great great-niece; step-children, Tara (Chuck) Frey, Ellis, and Tony Lewand, Houston. He was preceded in death by his parents and brother-in-law, Charles Clark.

Funeral service was Saturday, September 9, 2017, at the United Methodist Church, Ness City, with burial in the Ness City Cemetery.

Memorial contributions may be given to the Ness City Rotary Scholarship Fund or Cedar Village.


Tom was born in Blue Springs, Mo., the fourth child in a family of six siblings. He attended St. John Lalande and St. Regis grade schools. He graduated from Archbishop O’Hara High School in 1996. In 2000, he graduated from University of Missouri-Kansas City with dual degrees in French and philosophy. During college, he spent seven months studying in France, including a semester at Le Sorbonne in Paris.

He attended the University of Kansas School of Law, graduating in 2004. While in law school, Tom participated in the Environmental Law Moot Court and was a member of the KU Law Review. He worked as a law clerk for two years before taking a position as an associate at Logan, Logan and Watson in Prairie Village, Kansas. After seven years, he and his law school classmate started their own law firm, Fowler Pickert, LLC. In 2017, they joined with a third partner to create Fowler Pickert, Eisenmenger, LLC. Tom has been named “Best of the Bar” by the Kansas City Business Journal. His commitment and dedication to his legal practice were well known and respected among those who knew him personally and professionally.

A lifelong athlete, Tom enjoyed a variety of athletic endeavors throughout his life, ranging from martial arts to yoga, and golf to rugby. His primary athletic interest was running; he completed numerous sub-3 hour marathons, and, on his first attempts at both, qualified for the Iron Man World Championships for half and full Iron Man competitions.

Aside from his academic, professional, and athletic achievements, Tom’s greatest achievement in life was the life he built with Emily, his wife of 16 years. Tom and Emily met early in college and married in 2001. They welcomed their sons over the subsequent years, and Tom’s devotion to his two young boys was beyond compare.

Tom is survived by his wife and two sons, parents, four sisters, one brother, his grandmother, 13 nieces and nephews, aunts, uncles, cousins, as well as his extended family of in-laws. He also leaves behind a large community of friends and colleagues across the city and throughout the country.

A public memorial was held on Thursday, November 9,
LARRY LEE SECKINGTON (1942 - 2017)

Larry Lee Seckington, 75, of Kansas City, Mo., died peacefully on October 27, 2017, surrounded by his family. He was born on January 10, 1942 to David and Vaughn (Fryar) Seckington in Rockport, Mo. Larry was raised in Creston, Iowa, graduating from Creston High School in 1960. He received his teaching and social studies degree from Iowa State Teachers College in Cedar Falls, Iowa in 1964, and earned his law degree from the University of Iowa in 1967.

Larry was appointed Assistant Attorney General in 1967 in Des Moines, Iowa, and went on to form his own law firm in 1970 in Des Moines. He joined the Brick Law Firm in Des Moines, Iowa in 1977 as a partner. He and his wife, Linda, moved to St. Joseph, Mo., in 1993 where Larry held the position of In House Counsel to Grace Entertainment, a St. Joseph based gaming company, until his retirement in 2009. Larry and Linda have lived in Parkway Towers on the Plaza in Kansas City for 14 years where Larry was a Board Member for six years and Board President for 2 years.

He is survived by his mother, Vaughn Seckington, of Creston, Iowa; wife, Linda, of Kansas City, Mo.; son, James, (Leaf) Seckington, daughters Neva and Tillie of Des Moines, Iowa.; daughter, Julie Zimmerman, (Parker), and daughter Coral of Des Moines, Iowa; two sisters, Carolyn Eaton, of Creston, Iowa; Norma Ramsey, of Mankato, Minn.; stepson, Tony McDaniel, of West Des Moines, Iowa; stepdaughter, Tina McDaniel-Talley, of Leon, Iowa; and step-granddaughter, Jazlyn Talley of Ames, Iowa. A memorial service was held at the Unity Temple on the Plaza on Saturday, November 4, 2017. In lieu of flowers, the family suggested that contributions be made to Hospice of St. Luke’s Hospital or the MS Achievement Center of Kansas City, Kansas.

ARTHUR H. STOUP was 92 years young when he died Wednesday, September 27, 2017. Art, as he was known by his many friends, will be remembered as an ardent patriot, a “lawyer’s lawyer”, a tireless community leader, a loving father—and admired by all he came into contact with. Funeral service was Tuesday, Oct. 3, at Louis Memorial Chapel, in KCMO. Burial was at Mt. Carmel Cemetery, Raytown, Mo., immediately following the service. A reception followed the burial. In lieu of flowers the family suggested that contributions be sent to the Kansas City Metropolitan Bar Foundation: Military Matters Program in memory of Arthur Stoup. https://donatenow.networkforgood.org/kclegalconnection

Art was born and lived his entire life in Kansas City. While he lived in a variety of modest residences early on, Art and his bride of 69 years - Katie - lived for the last 63 years at their beloved home in South Kansas City. Testimony to Art’s pride in his hometown was his uncanny ability to recall the history of streets and buildings and the people that built and inhabited them throughout the metro area. Art never needed and never bought a GPS. Art graduated from East High School in 1942. After enlisting in the Navy in 1942 at the age of 17, he saw active duty as a Quartermaster (navigation specialist) aboard the USS Mobile, CL 63, and took part in all major naval engagements and landings in the Pacific Theatre between April of 1943 and August of 1945, earning a variety of Ribbons and battle stars before being honorably discharged as a Senior Quartermaster at the end of the war. Interestingly, Art was one of the first American sailors to go ashore at Nagasaki, Japan, only a short time after the second atomic bomb was dropped. Following the war’s end, Art enrolled at Kansas City University where he graduated with both a Bachelor’s Degree and a Law Degree (JD) in 1950. Thereafter, he took up the practice of law as a civil litigator, and practiced his craft for the next 67 years until the time of his death.

During his distinguished career, Art tried cases and was admitted to practice in a variety of state and federal court jurisdictions. But simply practicing law was never enough for Art. In addition to advocating for his clients, he advocated for his chosen profession, serving as President of the Kansas City Metropolitan Bar Association, and in 1974 -75, as President of the Missouri Bar. A longtime member of the House of Delegates of the American Bar Association, Art was bestowed a variety of honors, including a number of lifetime achievement awards and membership into several prestigious legal societies such as the International Society of Barristers, where he was a proud member for the past 40 years. In addition, he found time to lecture on various legal topics around the country, typically focused on litigation matters.

Love of education and the state of Missouri caused Art to undertake a long term relationship with UMKC. From 1972 to 2006, Art served as a Trustee to the Law Foundation of the University of Missouri-Kansas City, where he was President from 1979-1982. In addition, Art was a Trustee at the University of Missouri-Kansas City from 1979-2000 and an Emeritus Trustee from 2000 to date. As important as his many awards and volunteer positions were to Art, they paled by comparison with his dedication to the belief that common men and women had the right to proper legal representation. Often acting on a pro-bono basis, Art took cases of needy clients right up until his passing for the simple reason he believed everyone must be treated equally in the eyes of the law.

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MAURICE BERNARD TOBIN  Jan. 23, 1933 - Sept. 17, 2017

Maurice Bernard Tobin, attorney, Congressional counsel, author and speaker, died in Naples, Fla., of complications following a heart attack. Born and raised in Kansas City, Mo., Mr. Tobin, then working with the assistant district attorney, came to Washington, DC in early 1962 with the wave of Kennedy enthusiasts, then worked first for Senator Edward V. Long (D-Missouri) and as a counsel to the Natural Resources Committee. Tobin next served as Counsel to the House Committee on Public Works (and Legislative Assistant to its Chair, John Blatnik). Because of its jurisdiction over rivers and harbors, he handled the first water pollution hearings throughout the country, and then helped write the legislation which, signed by President Johnson, became the foundation of the environmental movement. An acknowledged expert in water pollution and environmental issues, he is the author of Environmental Working Papers, based upon speeches he gave nationally and internationally, among them Puraqua in Rome and the Salzburg Seminar.

He left Congress to launch the law firm of Tobin, French and Dillon in the early 1970’s, specializing in environmental issues and later, some telecommunications matters. Mr. Tobin organized an international conference of 25 top world telecommunications leaders at Leeds Castle in the UK, which resulted in a report that was widely distributed and influential at the time. He was a delegate to the International Telecommunications Union Plenipotentiary Meeting in Nairobi, Kenya, in the early 80’s.

An accomplished speaker, Mr. Tobin directed and moderated hour-long documentaries (the first ever aired by C-Span) for Clemson University’s Strom Thurmond Institute on topics including Super Tuesday, the Federal Budget, Leveraged Buy-Outs, The Senate Machine, and Terrorism—a topic he addressed two decades before it escalated to a central issue. All the programs included multiple senators, judges and civic leaders, and are still requested, having become an important political historical resource.

He authored “Hidden Power: The Seniority System and Other Customs of Congress,” a book written with the input of many members of the Senate and the House, which is still used in universities. He was appointed by President Reagan to the Presidential Exchange Commission, a program under which industry heads and government officials exchange professions for one year.

Mr. Tobin has served on many boards and committees, including the Mayor’s Downtown Committee and the Council of the Folger Shakespeare Library, the Board of Columbia Hospital for Women, the Jelleff Boys and Girls Club and the Washington Chamber Symphony. He was an early chair of the Aspen Institute Fellows Program, and was on the Advisory Council of the MacDonald Laurier Institute, a Canadian-US organization dedicated to promoting the use of the most effective aspects of the two systems. He was a supporter of The Center for Strategic and International Studies, and was a member of the Circle of The National Gallery and The President’s Circle of the National Portrait Gallery. As its non-profit Chairman, Mr. Tobin led the successful effort to convince The Pennsylvania Avenue Development Commission to require that the city’s historic National Theatre (the oldest continuously operating theatre in the country) be saved as part of any redevelopment. He oversaw its renovation, its reopening, the world premiere of Amadeus with Ian McLellan, and its further success with first string productions.

Mr. Tobin graduated from Benedictine College in Atchison, Kan., and earned a JD from the University of Kansas School of Law and an LLM in Environmental Law from George Washington University. He served in the Army and then as a reservist in the 468th Strategic Intelligence Company.

Mr. Tobin was a member of The Spouting Rock Beach Association (Bailey’s Beach) in Newport, The Cosmos Club in Washington, DC, Rolling Rock in Ligonier, Penn., Port Royal Club in Naples, Fla., and Maroon Creek Club in Aspen, Colo.

Mr. Tobin loved his family first and foremost, and was a committed father and, hence, soccer coach, lacrosse parent and chauffeur. He was a tennis player, skier and hiker, loved Broadway musicals and other theatre, read voraciously and was immersed in current events and politics his entire life. His wit, warmth and his enthusiasm lifted any room he entered. He is survived by his wife of 45 years, Joan Fleischmann Tobin; their daughter, Alexis Dorette Tobin; and their son, Ian Maurice Tobin. He is also survived by his sister, Mary Tobin; his brothers Kelly Tobin and Father Charles Tobin; and many nephews and nieces The family asks that in lieu of flowers, contributions be given in honor of Mr. Tobin to The Aspen Institute, or to I-Civics founded by Justice Sandra Day O’Connor to teach civics to the next generations. Memorial services were held in early November.

As a result, Art won the admiration of his fellow practitioners as a “lawyer’s lawyer” and from his grateful clients as a tireless advocate of common people.

Above and beyond his dedication to community, education and the law, Art was a loving father and grandfather to his four children (David, Dan, Rebecca & Debi), three grandchildren (Phillip, Page & Pierson) and leaves behind his wife and greatest supporter, Katie, to whom he was a loving husband. The grateful son of an immigrant mother and a father who never had the opportunity to progress beyond the 8th grade, Art met and worked with three American Presidents and hundreds of people from all walks of life. He came to call each of them friends. Art respected everyone. He believed in the goodness of all, and his greatest legacy is his hundreds of friends as well as his grateful family. Arthur H. Stoup - a life very well lived. A "Celebration of Life" was held Friday, Nov. 3, at the Arthur H. Stoup Courtroom at the UMKC School of Law, Kansas City, Mo. Online condolences may be left for the family at www.louismemorialchapel.com

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Football season entered the political arena last year when San Francisco 49ers quarterback Colin Kaepernick kneeled during the national anthem in protest of racial inequality and police brutality, following a number of deaths of African Americans by police action. The protests continued throughout the 2016 season and recently became nationwide news as over 200 NFL players sat or kneeled during games in late September 2017 in response to President Donald Trump’s call for owners to fire or suspend players “disrespecting our Flag & Country” through a tweet.1

Kaepernick, along with his 49ers teammate Eric Reid, reported in a New York Times op-ed that they made the decision to kneel during the anthem after “careful consideration, and even a visit from Nate Boyer, a retired Green Beret and former NFL player…we should kneel, rather than sit…during the anthem as a peaceful protest…we chose to kneel because it’s a respectful gesture. I remember thinking our posture was like a flag flown at half-mast to mark a tragedy.”2

Since the late September influx of news coverage about the NFL kneeling controversy, Americans have been divided on the meaning behind kneeling, whether as a form of peaceful protest of racial injustice or as sheer disrespect to the U.S. flag and members of the military and law enforcement who have died in the line of duty.

League fans on both sides of the fence likely won’t see a resolution soon. During Week 3, 27 players from the Jacksonville Jaguars and the Baltimore Ravens took a knee at Wembley Stadium in London. Week 4 had the Ravens taking a knee before the anthem was played, but all players stood during the anthem at their game against the Steelers. In the Texans’ game against the Titans, Texans players linked arms as the anthem was played, but remained standing. Vice President Mike Pence left the 49ers-Colts game in Indianapolis in Week 5, after members of the 49ers took a knee. Following Week 5, NFL Commissioner Roger Goodell issued a memo to the NFL’s 32 teams stating that he had “met with leadership of the [National Football League Players Association] and more players to advance the dialogue. Like many of our fans, we believe that everyone should stand for the National Anthem.”3 The following day, the NFL and players’ union issued a joint statement that “there has been no change in the current policy regarding the anthem. The agenda will be a continuation of how to make progress on the important social issues that players have vocalized. Everyone who is a part of our NFL community has a tremendous respect for our country, our flag, our anthem, and our military, and we are coming to deal with the issues in a civil and constructive way.”4

Despite the Commissioner’s plea, Week 6 brought more protests as well as a filed grievance against the NFL by Colin Kaepernick, claiming that team owners colluded to keep him from being signed. The grievance was filed under the NFL’s collective bargaining agreement; Kaepernick has been a free agent since opting out of his contract with the 49ers back in March. Likely by the printing of this column, the National Football League will have decided whether to force players to stand for the national anthem. However, the legal community remains split on whether NFL players maintain First Amendment protections, and whether they would succeed in challenging decisions by the league on free-speech grounds.

A team that benches a player for taking a knee may find itself in the middle of a complicated First Amendment lawsuit, when public funds are used for the private business of pro-

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3 Goodell, Roger, NFL memo to teams, September 27, 2017.
4 NFL and players’ union joint statement, October 6, 2017.
fessional football. While the sport itself is a private business, substantial amounts of money have been exchanged between private NFL teams and government entities, as stadiums have been built and other agreements have been made using public funding. Teams have moved from one state to another based on the highest bidder, whether through tax breaks, tax-exempt municipal bonds, or fully-funded digs—like the Oakland Raiders’ decision to move to Las Vegas after Nevada offered a $750 million stadium. Even the U.S. military has used a portion of its defense budget to pay the NFL over a number of seasons for patriotic displays during pregame festivities (after Congressional disapproval, the NFL returned the $723,000 to the federal government for the sponsored military tributes during the 2012-2015 seasons).5

The First Amendment protects free speech abuses from the government. The central issue is whether a private football team that plays in a publicly-funded stadium is able to discipline a player for political action such as kneeling during the Star Spangled Banner. Certainly, public funds and subsidies received by a team could be found relevant by a judge in determining the adequacy of a free-speech complaint. The other side of the legal community completely dismisses the probability of a successful First Amendment lawsuit, since despite the funneling of public funding to the NFL, the entity imposing the rule (the League) is arguably not a government actor. Yet while a First Amendment argument construing NFL punishment for kneeling as “public” action is a high bar to meet, it may not be unheard of: In 1978, a federal district court saw NYC’s control of Yankee Stadium as an important factor in holding the MLB’s decision to prevent female reporters from accessing the Yankee’s clubhouse as public, not private action.6 Does this mean it isn’t out of the realm of possibility that the League’s use of public funding can transform NFL clubs to government actors?

Whatever the case may be, it is more likely that the NFL collective bargaining agreement will provide more insight to whether players have contractual free speech rights. Players are hired for a term, as opposed to being at-will employees. In 2013, former Pittsburgh Steelers running back Rashard Mendenhall was dropped by Hanes after a series of controversial 9/11 conspiracy tweets; a subsequent lawsuit found that the athlete, signed to a contract for a term, couldn’t be fired for his political speech unless the speech specifically violated the terms of his contract.7 Thus, in order to fire players for failing to stand during the national anthem, the players’ conduct would have to amount to a violation of the morals clause under the players’ contracts. Though Mendenhall later settled with Hanes, it is interesting that reports have surfaced about the NFL amending a rule about conduct during the national anthem, in the NFL game operations manual (formally entitled “Policy Manual for Member Clubs”), a publication difficult to find, unlike the NFL rulebook, which is easily accessible on the NFL website.8 The policy manual was made public through court records affiliated with the Tom Brady 2015 ‘Deflategate’ litigation, and stated that a player’s failure to be present on the football field by the start of the anthem could “result in disciplinary action from the League office.” The amended version revises this policy to “result in discipline, such as fines, suspensions, and/or the forfeiture of draft choice(s) for the violation of the above, including first offenses.”9

This rule change, if adopted by the NFL, could provide grounds for discipline and breach of contract for any athlete taking a knee. Further, players’ right to freedom of speech, arguably protected by the league’s collective bargaining agreement, could face punishment under article 46 of the League’s collective bargaining agreement (allowing for sanctions following “conduct detrimental to the integrity of, or public confidence in, the game of professional football.”) Commissioner Goodell also has broad authority to “impose discipline as warranted” under the NFL Personal Conduct Policy, in circumstances when a player does not conduct himself “in a way that is responsible, promotes values upon which the League is based, and is lawful.”10

A player fired under article 46 could turn to article 43 of the collective bargaining agreement to dispute his removal based on political expression; article 43 involves contractual disputes and provides players the opportunity for an arbitration hearing (where the arbitrator is chosen by both the League and the players’ union). Ultimately, the arbitrator would review briefs from both sides (the player arguing that peaceful protest does not disrespect the game or the public’s confidence and that the right to protest is critical to American democracy; and the NFL team arguing that contractually, no right to political protest exists, and that fans nationwide have certainly been impacted by players’ demonstrations). A decision would be made, construed as “full, final, and complete” under article 43. Then, the losing party would seek relief from the arbitration award in federal court, like all other aggrieved players (see also, Dallas Cowboys running back Ezekiel Elliott).

The Kansas City Chiefs’ Week 6 loss to the Pittsburgh Steelers had all Steelers standing for the national anthem, while Chiefs linebacker Ukeme Eligwe sat, and cornerback Marcus Peters kneeled. In an interview with the Kansas City Star in early October, Peters stated that “I’m an American, bruh. I’m an African-American that was born in this wonderful country that we all can live in. How about we start all protecting each…other and come together, you feel me? It will be better for it.”11 No matter what side of the political divide, the NFL and its fanbase cannot ignore the powerful display of kneeling, locking arms, sitting, and other player conduct during the national anthem. Certainly, Peters’ call to “come together” to have the difficult conversation about the purpose behind the Monday night, Thursday night, and Sunday night protests may be a high ask. But inevitably, the judiciary will have the last word.

Cont’d on Pg. 69
As I sat in Room 104 for orientation or “boot camp” I did not know what to expect. Like my peers, I had seen plenty of movies and shows about attending law school, and my father had shared all his law school stories with me while I was growing up. Still, none of that mattered as I sat there trying to absorb the enormous amount of information they throw at you those first few days.

Two years have passed since I sat there as a wide-eyed 1L not knowing what to expect. Have some of my fears been realized in this time? Yes. I, like many, have stared at a hypothetical on a final and thought “I’ve got nothing,” or shared an issue statement I spent an hour on only to have the professor shake their head in what can only be disappointment. These moments, and all the other sacrifices law school requires, are worth it because KU Law has given me access to a world of opportunities.

Law school gives you the opportunity to do anything you want. Since beginning my studies, I have clerked for a judge in Johnson County, interned at a civil defense firm in KCMO, been the Reader for the Kansas Senate, and worked for the In-House Counsel of the Prairie Band Potawatomi Nation. These opportunities have been rewarding, and all have made me a better student, person, and advocate.

One thing my dad always told me about college was to take advantage of the diverse range of activities and opportunities available. I could have done a better job of this in undergrad, and I came to law school determined to explore everything Green Hall had to offer. American Indian history has interested me since a young age, and I quickly learned KU Law offers a Tribal Law certificate. Fall of 2L year I took Federal Indian Law with Professor Kronk Warner which led to me trying out for our NNALSA Moot Court team. Trying out for the team was the best decision I have made in law school.

My time on the NNALSA Moot Court team and my Indian law studies allowed me to meet Vivien Olsen last April. Ms. Olsen is the In-House Counsel for the Prairie Band Potawatomi Nation and one of the finest attorneys I have ever met. I got to spend this past summer observing her and working side-by-side with her on a wide range of matters. During my time with her, I learned invaluable lessons I will always remember regardless of what I am practicing.

1. **Put the Client First.** During my time with the Nation, the Nation’s members were always the number one priority. Our office was often tasked with finding solutions to problems or making suggestions on a course of action. Sometimes we would find a solution or have a suggestion we thought was great but someone would ask “how will the members view this or feel about this.” It made me realize we were not just representing the Nation but we were representing the Nation’s members. Throughout the summer, I got in the habit of asking myself “is this what the Nation’s members want?” and allowing that to guide my actions.

2. **Do Your Research.** This seems obvious, but sadly, it is not. Most attorneys are not familiar with Indian law. Many of the ones who are familiar with Indian law have a surface level understanding at best. Indian law can be complex, as federal and state law often conflict with each other. Complexities such as these are exactly why case law exists. It was surprising how often we had difficulties in our ICWA cases with issues the United States or Kansas Supreme Court had
expressly addressed. This made me realize the importance of effective legal research. I never want to do a client a disservice by failing to conduct a decent LexisNexis or Westlaw search.

### 3. Get Out of Your Comfort Zone

This is the most important lesson I learned with the Prairie Band Potawatomi Nation. Working on the Reservation required me to commute daily from Lenexa to Mayetta where I did not know anyone. Immediately, I knew I made the right choice. Everyone was extremely welcoming and treated me like I had worked there for years. I got to work on cases and projects no other internship can offer. I developed a passion for Indian law that will stay with me for the rest of my career.

If I could go back in time to “boot camp,” I would slap myself and tell me not worry about a thing. The stress and the hard work are well worth the opportunities—opportunities to work for people and on projects you would have never imagined. The opportunity to learn from professors who are the most respected in their field. The opportunity to form relationships you will maintain for the rest of your life. Take advantage of these opportunities; you will not regret it.

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Katherine Lee Goyette is a 2010 graduate of Washburn Law (JD) and a 2012 graduate of the University of Kansas School of Law (LLM). She is currently the President-Elect of the Military Spouse J.D. Network, a military spouse bar association (www.msjdn.org). Formerly, Katherine prosecuted in southern Colorado, focused primarily on domestic violence and DUI/DUI-D cases. Katherine resides in Fort Sill, OK with her active-duty Army husband and infant daughter. Katherine has been a member of the KBA’s Diversity Committee since 2011, and served as co-chair from 2015-2016.

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Benjamin Stringer is a 3L at the University of Kansas School of Law. He received a Bachelor of Science in History and Political Science and a Master’s of Science in Political Science from Florida State University. He is currently pursuing a Tribal Law and Advocacy Skills certificate and serves as the President of the Native American Law Student Association and Vice President of the Federal Bar Association at KU Law. He would like to thank Professor Kronk Warner and Vivien Olsen for helping him realize his passion for Indian law.

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1. Donald J. Trump, Twitter, @realDonaldTrump (Sept. 24, 2017, 4:44AM EST) at https://twitter.com/realDonaldTrump/status/911904261553950720.
9. Id.
All KBA Handbooks are now available as eBooks through Casemaker!

Visit https://go.ksbar.org/CasemakerLibraJA2017 for more information.
About two years ago, the results of a survey of the legal profession conducted by the ABA Commission on Lawyer Assistance Programs and the Hazelden/Betty Ford Foundation were published. The survey asked about mental health conditions, substance use and obstacles to treatment – and the results were alarming. They indicated that over 1 in 5 members of the legal profession struggled with those issues and that the barriers to treatment were high. It was a short leap to the conclusion that too many lawyers were suffering, with alarming implications not only for clients, but the sustainability of the profession. This in turn cried out for action and several groups responded. The Conference of Chief Justices, the National Organization of Bar Counsel, the Association of Professional Responsibility Lawyers and the National Conference of Bar Examiners, along with the ABA, formed a coalition, created a task force and began to explore ways to improve the health and productivity of lawyers. Their report was released by the ABA at its annual meeting in August.

"The report, by the National Task Force on Lawyer Well-Being, includes several dozen recommendations and represents the most ambitious roadmap yet related to the well-being of lawyers. It is intended to spark a broader conversation in the legal profession regarding reasons behind substance use disorders as well as the effects of impairment to guide policy changes and to lead to a cultural shift within the profession." https://www.americanbar.org/news/abanews/aba-news-archives/2017/08/growing_concern_over.html

A cultural shift within the profession? What a fabulous opportunity! We, each of us individually and collectively can make a truly wonderful profession even better. And, we don’t even have to do anything just yet. The report is intended to spark a conversation first. A conversation about lawyer wellbeing, about how we can thrive, rather than just survive.

The Report had a number of recommendations which focused on five central themes:
- Identifying stakeholders and the role each can play in reducing the level of toxicity in the legal profession.
- Eliminating the stigma associated with help-seeking behaviors.
- Emphasizing that well-being is an indispensable part of a lawyer’s duty of competence.
- Educating lawyers, judges and law students on lawyer well-being issues.
- Taking small, incremental steps to change how law is practiced and how lawyers are regulated to instill greater well-being in the profession.

I like the third one the best and it bears repetition: Emphasizing that well-being is an indispensable part of a lawyer’s duty of competence.

• Educating lawyers, judges and law students on lawyer well-being issues.
• Taking small, incremental steps to change how law is practiced and how lawyers are regulated to instill greater well-being in the profession.

About CPR Rules 1.1 (Competence), 1.3 (Diligence) and 1.4...
About the Author

Anne McDonald was appointed to the Lawyers Assistance Program Commission at its inception in 2001 and has served as the Executive Director of KALAP since 2009. She graduated from the University of Kansas School of Law in 1982.

mcdonalda@kscourts.org

1. And in Kansas, as in most states, some type of impairment is a factor in over half of the disciplinary cases.
2. Mr. Krill, while at Hazelden/Betty Ford, was a co-author of the report on the original survey of the legal profession, which was published in the Journal of Addiction Medicine in February, 2016.
ATTORNEY DISCIPLINE

ORDER OF PROBATION
IN THE MATTER OF KURT L. JAMES
NO. 117,517—OCTOBER 20, 2017

FACTS: A hearing panel determined that James violated KRPC 1.3 (diligence), 1.4(a) (communication), 1.7(a)(2) (conflict of interest), 1.15(a) and (b) (safekeeping property), 1.16(a) (declining representation), 3.2 (expediting litigation), and 8.4(d) (engaging in conduct prejudicial to the administration of justice). The complaints arose after James took on several clients with the promise to file post-divorce modification motions but failed to do so.

HEARING PANEL: The hearing panel concluded that James’ lack of communication and diligence harmed his clients. James had a prior disciplinary record, but there was no evidence of dishonest motive, and James made his clients whole through refunds. Because of that fact, the disciplinary administrator recommended that James be suspended for 1 year but that the suspension be stayed while James served a period of probation. The hearing panel agreed, with the caution that James should serve a 2-year suspension, with that order stayed during a 3-year probation term.

HELD: The court adopted the hearing panel’s findings and conclusions. After reviewing the record, the court ordered that James be suspended for 1 year, with the imposition of the suspension stayed pending successful completion of a 3-year period of probation.

ORDER OF REINSTATEMENT
IN THE MATTER OF JOHN M. STUDTMANN
NO. 17,370—SEPTEMBER 29, 2017

FACTS: Studtmann was disbarred in November 2003. He filed a petition for reinstatement in March 2016. A hearing panel of the Kansas Board for Discipline of Attorneys conducted a hearing and recommended that the petition be granted, with the condition that Studtmann continued to receive treatment.

HELD: The petition for reinstatement is granted, subject to conditions. Studtmann must continue to receive treatment from Dr. Parker until Dr. Parker believes that treatment is no longer necessary. Studtmann must also complete a bar review course that has been approved by the court and must pay all outstanding fees.

ORDER OF REINSTATEMENT
IN THE MATTER OF EDWARD F. WALSH, IV
NO. 99,410—SEPTEMBER 29, 2017

FACTS: Walsh was indefinitely suspended from the practice of law in May 2008. He filed a petition for reinstatement in December 2016. After conducting a hearing, a hearing panel recommended that the petition be granted.

HELD: After considering the record, the court grants Walsh’s petition for reinstatement. The reinstatement is conditioned on Walsh’s compliance with the annual continuing legal education requirements and upon payment of all fees.

ORDER OF DISBARMENT
IN THE MATTER OF JEROME PATIENCE
NO. 22,022—NOVEMBER 1, 2017

FACTS: In a letter signed October 19, 2017, Jerome M. Patience, an attorney admitted to practice law in Kansas, voluntarily surrendered his law license. At the time of surrender, a disciplinary complaint was pending. The complaint was filed after Patience was charged with several felony offenses in Missouri.

HELD: The court found that the surrender of Patience’s license should be accepted and Patience is disbarred.

CIVIL

JURISDICTION—REAL PROPERTY
JENKINS V. CHICAGO PACIFIC CORPORATION
JACKSON DISTRICT COURT—COURT OF APPEALS IS AFFIRMED, DISTRICT COURT IS AFFIRMED
NO. 113,104—OCTOBER 27, 2017

FACTS: The Chicago Pacific Railway Company operated on the disputed property beginning in 1886. In 1985, Chicago Pacific quitclaimed its interests in the property to Dirt
& Gravel, Inc. Jenkins acquired her ownership interest via quitclaim deed from Dirt & Gravel. Jenkins later sued to quiet title, asking for a determination that she was a fee simple owner. Jenkins alternatively claimed that she acquired fee title through the quitclaim deed or that she acquired title through adverse possession. Chicago Pacific moved for summary judgment, claiming that the 1886 deed only allowed a right of way that would revert to abutting landowners when the property was abandoned by the railroad. The district court granted the motion, finding that Jenkins could not have acquired any title through a quitclaim deed. The district court granted Jenkins' K.S.A. 60-254(b) motion in order to allow an immediate appeal on the question of ownership.

ISSUES: (1) Jurisdiction; (2) real property acquisition from railroad; (3) the language of the 1886 deed

HELD: Jenkins filed her notice of appeal before the district court made the proper K.S.A. 2016 Supp. 60-254(b) certification. But subsequent certification cured this defect, rendering her notice of appeal timely. When a railroad acquires land for a right of way it generally obtains only an easement. When that easement is abandoned, the estate reverts to the original land owners. In this case, the 1886 deed described the subject property in a manner consistent with a right of way that would revert to abutting landowners when the property was abandoned by the railroad. The district court granted the motion, finding that Jenkins could not have acquired any title through a quitclaim deed. The district court granted Jenkins' K.S.A. 60-254(b) motion in order to allow an immediate appeal on the question of ownership.

STATUTE: K.S.A. 2016 Supp. 60-254(b), -2102, -2102(a), -2102(b), -2102(c)

CIVIL

SCHOOL FINANCE
GANNON V. STATE

SHAWNEE DISTRICT COURT—STATE FAILED TO SHOW THAT REMEDIAL LEGISLATION MEETS THE ADEQUACY AND EQUITY REQUIREMENTS OF ARTICLE 6
NO. 113,267—OCTOBER 2, 2017

FACTS: Article 6 of the Kansas Constitution requires the legislature to "make suitable provision for finance of the educational interests of the state." These plaintiffs filed suit in 2010, alleging both inequitable and inadequate funding of K-12 public education. In 2013, a three-judge panel agreed, finding that the State's school finance formula failed both equity and adequacy tests. After the legislature's CLASS legislation was struck as constitutionally insufficient, the legislature was tasked with bringing the state's education finance system into compliance with Article 6. The legislature responded with Senate Bill 19. The centerpiece of that legislation is the new Kansas School Equity and Enhancement Act, which established a new education funding formula under which some funds come from the State via an amount arrived at by formula, and some funds come from local option budgets. The base aid per student for year 2018-19 is $4,006; that amount increases to $4,128 in 2018-19. School districts may add on local funding up to 33% of the district's total foundation aid. Less wealthy districts may also qualify for supplemental state aid, in recognition of varying property wealth among districts. This appeal follows from the plaintiffs' challenge to the KSEEA.

ISSUES: (1) Adequacy requirements; (2) equity requirements; (3) equal access to substantially similar educational opportunity through similar tax effort; (4) effect of change to LOB equalization calculation; (5) at-risk funding procedures; (6) remedies

HELD: The State did not meet its burden to show that the public education financing system established by SB 19 is constitutionally adequate. Overreliance on local option budget (LOB)-generated funds tends to create an unconstitutional funding structure. Although the formula allocates additional funds to at-risk students, the State failed to prove that the additional funds were calculated to improve student performance. Similar outcomes were shown for funds allotted for full-day kindergarten and early childhood education programs. A school finance formula is equitable if it increases wealth-based disparities between districts. SB 19 allows school districts to use capital outlay funds to pay property and casualty insurance and utility expenses. This allows general funds or LOB funds to be used for other purposes, giving districts more flexibility in their spending, and this variable flexibility is tied to district wealth. A district's wealth is tied to its ability to gain voter approval of a proposed mill levy increase. For this reason, the provision in the school finance formula that allows some districts to impose a mill levy increase without facing either a protest-petition process or a mandatory election is inequitable. SB 19's lookback provision—which changes how supplemental aid is calculated relative to LOB funding—exacerbates the discrepancies caused by local funding that is tied to property values. As such, it is inequitable. SB 19 established a 10% floor for at-risk students in any given district. This provision uses a wealth-based standard and, as such, it is inequitable. The court declined to provide a specific dollar amount that would be constitutionally adequate. The state educational system has been more or less underfunded since the 2002-03 school year. The mandate in this case is stayed until June 30, 2018, but no longer.

CONCURRENCE AND DISSENT: (Johnson, J., joined by Rosen, J.) Justice Johnson agrees with the majority's rulings on adequacy and equity. But he disagrees that the State should be given additional time to come into compliance. He would have the State provide a proposed remedy by the end of this year.

CONCURRENCE AND DISSENT: (Biles, J.) Justice Biles agrees with the majority findings on adequacy and equity. But he would have immediately enjoined SB 19's inequitable features from being operational in the 2017-18 school year.

CRIMINAL

CRIMINAL PROCEDURE—EVIDENCE—STATUTES
STATE V. GRAY
HARVEY DISTRICT COURT—REVERSED ON ISSUES SUBJECT TO REVIEW
COURT OF APPEALS—REVERSED ON ISSUES SUBJECT TO REVIEW
NO. 11,2035—OCTOBER 27, 2017

FACTS: Officer followed and eventually stopped Gray’s car for failing to use turn signal. Gray filed motion to suppress evidence obtained in search of car, alleging the officer violated the biased-based policing statute, K.S.A. 2014 Supp. 22-4606 et seq. District court denied the motion, and in bench trial convicted Gray of charged offenses. Gray appealed, in part challenging the denial of his motion to suppress, and challenging the district court’s jurisdiction to convict Gray of felony possession of marijuana. Court of Appeals reversed or downgraded some conviction offenses but affirmed the district court’s suppression ruling, finding substantial competent evidence supported the determination that Gray was not actually stopped because of his race. 51 Kan.App.2d 1085 (2015). Review granted, in part, on this issue.

ISSUE: Remedy for violation of K.S.A. 2014 Supp. 22-4606(d) and 22-4609

HELD: Issue of first impression regarding test to be applied under Kansas’ biased-based policing statutes, the availability of a suppression remedy, and the test for determining whether a biased-based policing violation occurred. This appeal involves statutory, rather than constitutional, consideration. K.S.A. 22-3216(1), which permits a defendant aggrieved by an unlawful search and seizure to move to suppress evidence, provides a suppression remedy for violation of K.S.A. 2014 Supp. 22-4606 et seq. When considering such a motion, the district judge must examine more than the ultimate justification of a traffic stop and must consider whether the officer unreasonably used race or any other characteristic listed in K.S.A. 22-4606(d) in deciding to initiate the enforcement action. Unable to determine from the record in this case whether the district judge applied the correct test and evaluated whether the officer unreasonably used race in deciding to initiate the traffic stop. Convictions reversed and remanded for further action in accord with this decision.

STATUTES: K.S.A. 2014 Supp. 22-4606 et seq., -4606(d), -4607, -4609, -4609(d); K.S.A. 8-1548, 20-3018(b), 22-3216, -3216(1), -3216(2), -4609

APPEALS—CRIMINAL PROCEDURE—JURY INSTRUCTIONS—JURISDICTION
STATE V. SAYLER
KINGMAN DISTRICT COURT—AFFIRMED; COURT OF APPEALS—AFFIRMED
NO. 11,0048—OCTOBER 27, 2017

FACTS: Sayler convicted in Kingman county of failing to register under the Kansas Offender Registration Act (KORA). On appeal he argued for first time that the trial court lacked subject matter jurisdiction over the prosecution because the charging document failed to allege he resided in Kingman County, and similarly, that the jury instructions permitted the jury to convict him without finding this essential element of the offense. In unpublished opinion, the Court of Appeals rejected both arguments and affirmed the conviction. Review granted on both issues. Thereafter, State v. Dunn, 304 Kan. 773 (2016), significantly changed the law on charging document sufficiency, holding the sufficiency of the charging document does not implicate the state courts’ subject matter jurisdiction in criminal cases.

ISSUES: (1) Sufficiency of the charging document, (2) jury instructions

HELD: Issue considered for first time on appeal because the appeal straddled the period before and after Dunn and because parties were expressly asked to brief Dunn’s impact on the merits. The charging document in this case was sufficient under Dunn because it alleged facts that, if proved beyond a reasonable doubt, would constitute the crime of failing to register under KORA. No error found in the jury instructions.

STATUTES: K.S.A. 2016 Supp. 21-5108(a), 22-4905(b); K.S.A. 2011 Supp. 22-4903; K.S.A. 20-3018(b), 22-3201(f), 22-4901 et seq., 60-2101(b)

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—CRIMES AND PUNISHMENT—JURISDICTION
STATE V. SCUDERI
RENO DISTRICT COURT—AFFIRMED
COURT OF APPEALS—AFFIRMED ON ISSUES SUBJECT TO REVIEW
NO. 107,114—OCTOBER 27, 2017

FACTS: Officer followed and eventually stopped Gray’s car for failing to use turn signal. Gray filed motion to suppress evidence obtained in search of car, alleging the officer violated the biased-based policing statute, K.S.A. 2014 Supp. 22-4606 et seq. District court denied the motion, and in bench trial convicted Gray of charged offenses. Gray appealed, in part challenging the denial of his motion to suppress, and challenging the district court’s jurisdiction to convict Gray of felony possession of marijuana. Court of Appeals reversed or downgraded some conviction offenses but affirmed the district court’s suppression ruling, finding substantial competent evidence supported the determination that Gray was not actually stopped because of his race. 51 Kan.App.2d 1085 (2015). Review granted, in part, on this issue.

ISSUE: Remedy for violation of K.S.A. 2014 Supp. 22-4606(d) and 22-4609

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APPEALS—CRIMINAL PROCEDURE—JURY INSTRUCTIONS—JURISDICTION
STATE V. SAYLER
KINGMAN DISTRICT COURT—AFFIRMED; COURT OF APPEALS—AFFIRMED
NO. 11,0048—OCTOBER 27, 2017

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ISSUES: (1) Sufficiency of the charging document, (2) jury instructions

HELD: Issue considered for first time on appeal because the appeal straddled the period before and after Dunn and because parties were expressly asked to brief Dunn’s impact on the merits. The charging document in this case was sufficient under Dunn because it alleged facts that, if proved beyond a reasonable doubt, would constitute the crime of failing to register under KORA. No error found in the jury instructions.

STATUTES: K.S.A. 2016 Supp. 21-5108(a), 22-4905(b); K.S.A. 2011 Supp. 22-4903; K.S.A. 20-3018(b), 22-3201(f), 22-4901 et seq., 60-2101(b)

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—CRIMES AND PUNISHMENT—JURISDICTION
STATE V. SCUDERI
RENO DISTRICT COURT—AFFIRMED
COURT OF APPEALS—AFFIRMED ON ISSUES SUBJECT TO REVIEW
NO. 107,114—OCTOBER 27, 2017
FACTS: In unpublished opinion, Court of Appeals affirmed Scuderi’s two convictions and sentences for failing to register under the Kansas Offender Registration Act. Review granted on his claims that: (1) the registration requirements are ex post facto punishment for a drug offense committed before registration was required; (2) his criminal history was unconstitutionally used to calculate the sentences imposed; and (3) the complaint initiating one of his convictions was deficient because it failed to allege he resided in the county where the State alleged he failed to register.

ISSUES: (1) Ex post facto challenge, (2) criminal history score in sentencing, (3) sufficiency of the charging document

HELD: Scuderi’s ex post fact challenge is foreclosed by State v. Shaylor, 306 Kan. 1049 (2017)(retroactive imposition of registration requirement was not punishment). Scuderi failed to create a factual record in support of his claim that registration impacts drug offenders differently than sex offenders by making reintegration into society more difficult.

Kansas Supreme Court has repeatedly rejected Scuderi’s Apprendi claim.

Scuderi’s challenge to the sufficiency of the complaint was defeated by State v. Sayler, 306 Kan. ___ (2017)(decided this same date), applying State v. Dunn, 304 Kan. 773 (2016).


STATUTE: K.S.A. 20-3018(b), 22-4901 et seq., -4904, 60-2101(b), 65-4161

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FACTS: In 2014, the City of Maize passed an ordinance addressing certain issues found in mobile home parks. Huffman filed a petition for declaratory judgment and injunctive relief against the city, claiming that the ordinance exceeded the city’s police powers and violated his constitutional rights to due process. The district court granted the city’s motion for summary judgment and this appeal followed.

ISSUES: Constitutionality of the city’s ordinance

HELD: The court’s standard of review requires that it search for ways to uphold the ordinance as constitutional. Municipalities have police powers and the Home Rule Amendment gives municipalities broad powers to adopt ordinances on any subject not addressed by the state legislature. The subjects addressed by the disputed ordinance fall well within the city’s police powers, as the ordinance was enacted to serve the health, safety and welfare of the residents of the mobile home park. There is no equal protection violation, and the district court made adequate findings of fact and conclusions of law.

STATUTES: Kansas Constitution, article 12, § 5; K.S.A. 2016 Supp. 60-252(a)(1), -256(c)(2)

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FACTS: Moulden transferred title to two classic cars to his daughter, Hope Hundley, in 2005. The cars were stored in Moulden’s garage when she wasn’t using them, and they were in Moulden’s garage when Hope died in 2012. Hope’s widower, Dustin, transferred the car titles to his name in 2013. But when Dustin attempted to take possession of the cars, Moulden asked the court to determine the rightful owner of the cars. He claimed that he never meant for Hope to be a full owner of the cars. When filing suit, Moulden also sought the return of furniture that he loaned to Hope. Dustin countersued, claiming that Moulden waited too long to make any such claim and asking that he be declared the owner of the disputed furniture. The district court ruled that Hope – and subsequently Dustin – owned the cars but that Moulden owned the furniture.

ISSUE: Property ownership

HELD: K.S.A. 59-2239 operates as a special statute of limitations for claims against an estate. Moulden did not petition to have the cars returned within the 6 months allowed by the statute. Despite Moulden’s claims to the contrary, K.S.A. 59-2239 applies to the facts of this case. Mere possession of the cars did not change their ownership. A two-year statute
of limitations applied to Moulden’s attempt to reclaim the furniture. Hope used the furniture under a bailment, with Moulden being the bailor. After Hope died, Dustin continued to possess the property under a constructive bailment. Because the bailment existed, the statute of limitations clock did not begin to run until Dustin refused to return the furniture to Moulden. Moulden’s suit was not time-barred, and the district court’s ruling on ownership was correct.

STATUTE: K.S.A. 8-126(cc), 59-2239, 60-513(a), -513(b)

HEARSAY—INSURANCE—SUMMARY JUDGMENT
ALLEN V. MARYSVILLE MUTUAL INSURANCE CO.
MONTGOMERY DISTRICT COURT—REVERSED AND REMANDED
NO. 116,888—OCTOBER 20, 2017

FACTS: The Allens owned a rental home in Montgomery County. While their tenants were away from home, a two-state police chase ended at the property. Two of the suspects were quickly apprehended but one eluded capture. That man eventually ended up inside the home owned by the Allens. It is unclear how he gained entry, it was either through an unlocked door or by breaking a window. While officers attempted to have the suspect surrender, both the Allens and the tenants gave permission for officers to enter the home. But because the suspect was accused of attempted murder, the officers felt like that strategy was too dangerous. Instead, law enforcement opted to use tear gas and pepper spray to drive the suspect from the home. In addition, in an attempt to be careful, officers also received a search warrant for the home. The tear gas canisters fired into the home caused extensive damage to the property, but the suspect was captured without further incident. The repair estimates obtained by the Allens exceeded the insured value of the home. Marysville, their insurance company, denied the claim because of a policy exclusion that denied coverage for a "loss which results from order of civil authority." The district court found that since law enforcement did obtain a search warrant, the damage was covered by the exclusion. The district court granted Marysville’s motion for summary judgment, and the Allens appealed.

ISSUE: Whether the policy exclusion applied to this loss

HELD: The district court erred by finding that the order-of-civil-authority exclusion applied. Officers here did not need a warrant to enter the Allens’ property; there was clearly probable cause that the suspect had committed attempted murder, and the officers knew that the suspect was inside the home. The search warrant was obtained in an effort to forestall an expected motion to suppress by the suspect. The damage caused to the residence had nothing to do with the search warrant. The Allens believe that Marysville was obligated to reimburse them under a policy provision which provided coverage for damage caused by vandalism, since the extensive damage that occurred was a proximate cause of the suspect’s entry into the house. But there is no clear evidence to show whether the suspect entered the home by breaking a window (covered vandalism) or by walking through an unlocked door (not covered). More factual findings are necessary, so the case is remanded.

STATUTES: K.S.A. 2016 Supp. 60-256(e); K.S.A. 22-2401(c), -2405(3)

CRIMINAL

CONSTITUTIONAL LAW—CRIMES AND PUNISHMENT—EVIDENCE—FOURTH AMENDMENT
STATE V. CARR
SHAWNEE DISTRICT COURT—REVERSED AND REMANDED
NO. 116,228 - OCTOBER 27, 2017

FACTS: Officer stopped vehicle he associated with Carr, a suspect in a drive-by shooting. Officers found the driver of the car was Carr’s aunt, and Carr was a passenger. Officers arrested and searched Carr, finding a car key, a cell phone, and cash. Marijuana was found in Carr’s pocket during a subsequent search. Without a search warrant, police used Carr’s cell phone to determine its phone number. Then with search warrant, obtained phone records from cell phone provider to determine cell-tower information to locate Carr near the scene of the shooting. Carr filed motion to suppress all evidence obtained in an unlawful car stop. District court denied the motion, finding the stop was lawful. District court also found the officers unlawfully searched the phone, but police would have inevitably discovered the cell phone number by lawful means and used it to get a search warrant. Carr appealed the denial of his motion to suppress, and the admission of testimony by a cell phone provider employee about Carr’s cell phone records.

ISSUES: (1) Reasonable suspicion for vehicle stop, (2) suppression of cell phone records, (3) suppression of marijuana, (3) suppression of car key, (4) cell phone records

HELD: Officers lacked reasonable suspicion to believe Carr was in the vehicle they stopped. To stop a vehicle based on suspicion that a person subject to police investigatory detention is in it, an officer must have specific and articulable facts that the person is in the vehicle. If officer knows only that a relative of the suspect owns a similar car that had at some point been seen at the suspect’s residence, the officer does not have specific and articulable facts to support reasonable suspicion that the suspect is in the vehicle at the time. The key, the cash, and the marijuana should not have been admitted as evidence at trial.
Carr's cell phone was obtained through an unlawful car stop, and police then used Carr's cell phone number to obtain relevant phone records. Under facts in case, however, district court did not err in determining the cell phone records were admissible under the inevitable-discovery exception to the exclusionary rule.

Carr's conviction for possession of marijuana is reversed because the only evidence supporting this conviction stemmed from the unlawful stop.

Carr was connected to a vehicle used in a drive-by shooting in part because officers found car key in his pocket during an unlawful car stop the day after the shooting. Based on evidence in the case, court cannot say beyond a reasonable doubt that the admission of the key and other inadmissible evidence obtained through the unlawful car stop had no effect on the jury's verdict. Carr's conviction for aggravated battery was reversed and remanded for a new trial.

District court did not err in admitting cell phone records maintained in the ordinary course of business by a cell phone provider.

STATUTES: K.S.A. 2016 Supp. 60-460(m); K.S.A. 22-2402(1), -3216(2)

CONSTITUTIONAL LAW—CRIMES AND PUNISHMENT—FIFTH AMENDMENT—EVIDENCE—EXPERT TESTIMONY—JURY INSTRUCTIONS—STATUTES

STATE V CLAERHOUT
JOHNSON DISTRICT COURT—AFFIRMED NO. 115,227—OCTOBER 27, 2017

FACTS: Claerhout caused car crash while driving under the influence (DUI), which resulted in the death of another motorist. He was charged with reckless second-degree murder, or alternatively, involuntary manslaughter. Prior to jury trial he conceded guilt to involuntary manslaughter, and unsuccessfully challenged the admission of: expert witness testimony; statements Claerhout made to officers at the scene without Miranda warnings; and his prior DUI diversion agreement. District court also instructed jury over Claerhout's objection that voluntary intoxication was not a defense against the crime of reckless second-degree murder. On appeal Claerhout argued the district court erred by: (1) admitting Claerhout's prior DUI diversion agreement; (2) allowing police officer to testify as expert accident reconstructionist; (3) not suppressing statements made to an officer following the crash; and (4) not granting request for instruction on voluntary intoxication as a defense to reckless second-degree murder.

ISSUES: (1) Admission of prior DUI diversion agreement, (2) expert testimony, (3) admission of statements to officer, (4) jury instruction on voluntary intoxication

HELD: No abuse of district court's discretion in admitting the prior DUI diversion agreement for the stated purpose of showing Claerhout's state of mind. This evidence was relevant to prove that he acted recklessly under circumstances manifesting extreme indifference to the value of human life. Probative value of the exhibit outweighed its prejudicial effect where the court limited the purpose for which it could be used, and where Claerhout was permitted, but failed, to raise additional information about the diversion, including the underlying circumstances which did not include erratic driving. Even if abuse of the district court's discretion is assumed, the error was harmless. Statutory rather than constitutional analysis applies to the erroneous admission of 60-455 evidence, and overwhelming evidence supports Claerhout's conviction.

Any error resulting from trial court's determination that the officer was qualified to testify as an expert accident reconstructionist was harmless under facts in this case.

Any error resulting from the admission of statements Claerhout made at the scene of the crash about his previous consumption of alcohol was harmless under facts in this case.

District court appropriately instructed jury that voluntary intoxication is not a defense to the charged crimes. Reckless second-degree murder is not a specific intent crime, approving the rationale in State v. Spicer, 30 Kan. App. 2d 317 (2002), and two unpublished opinions. Claerhout's reliance on State v. Kernshaw, 302 Kan. 772 (2015), is criticized.

DISSENT (Green, J.): The admission of Claerhout's prior DUI diversion agreement was error, and unconstitutionally infringed on his right to a fair trial. Majority's decision that this evidence was relevant conflicts with safeguards mandated in State v. Gunby, 282 Kan. 39 (2006), regarding the admission of 60-455 evidence, and the holding in State v. Boggs, 287 Kan. 298 (2008). Claerhout's previous DUI was of no legal relevance as to whether his conduct showed an extremely reckless behavior. The probative value of this evidence was substantially outweighed by risk of prejudice, confusion, and distraction on that issue where the admission of this evidence shattered Claerhout's confession and avoidance defense, and the prosecutor's closing and rebuttal arguments improperly revolved around the propensity inference from the diversion agreement.

STATUTES: K.S.A. 2016 Supp. 21-5202(j), -5205(b), -5403(a)(2), -5405(a), 60-261, -455, -456(b); K.S.A. 2014 Supp. 21-5403(a)(2), -5403(a)(3); K.S.A. 8-1566, 60-455

CRIMINAL PROCEDURE—JURIES—PROSECUTORS

STATE V HIRSH
BARTON DISTRICT COURT: AFFIRMED IN PART; REVERSED IN PART, VACATED IN PART, REMANDED NO. 116356 - SEPTEMBER 29, 2017

FACTS: Hirsh convicted of aggravated assault, criminal threat, and domestic battery. During trial, jury asked if pil-
low over victim's head could be considered a deadly weapon for aggravated assault, same as a gun pointed at victim's pillow. In response over Hirsh's objection, district court told jury to refer to the instructions. On appeal Hirsh claimed: (1) district court's response to jury's question allowed jury to convict him of uncharged crime; (2) his two criminal threat convictions are multiplicitous; (3) prosecutor improperly commented that victim was telling the truth; (4) State violated Brady by not disclosing potential impeachment evidence that was disclosed when prosecutor cross examined Hirsh's witness on last day of trial; (5) jury should have been recalled to investigate alternate juror's claim that several jurors had not disclosed they were victims of domestic violence; (6) cumulative error denied him a fair trial; and (7) district court violated Apprendi by making “deadly weapon” finding to impose violent offender registration requirement.

ISSUES: (1) Response to jury question, (2) multiplicitous convictions, (3) comment on victim credibility, (4) Brady violation, (5) recall - jury misconduct, (6) cumulative error, (7) Apprendi violation - sentencing

HELD: On facts of this case, both a handgun and a pillow could be considered a deadly weapon to support the aggravated assault charge, but State charged Hirsh with committing the offense with a handgun. The legally appropriate response would have been to inform jury that based on the charge, it must find the deadly weapon was a handgun rather than a pillow. District court abused discretion by failing to provide a meaningful response, and the error was not harmless in this case. Aggravated assault conviction is reversed, sentence is vacated, and case is remanded for new trial on that charge.

Under the unit prosecution test, Hirsh's criminal threat convictions are not multiplicitous. He made one single communicated threat against his wife, and another single communicated threat against their children.

Prosecutor committed error by saying the victim was telling the truth, but under facts in case the error was harmless.

No Brady violation. Prosecutor did not suppress any evidence, and parties discovered the evidence at the same time while witness was on the stand. Even if inadvertent suppression of this evidence, the error would have been harmless in this case.

No abuse of district court's discretion in denying Hirsh's motion for recall. Counsel never asked any juror at issue whether they personally had experienced domestic violence or knew someone who had experienced it, and jurors were not required to volunteer this information.

Aggravated assault conviction was reversed due to district court error. Remaining error committed by prosecutor during closing argument does not merit reversal of the remaining convictions.

Apprendi claim not addressed because aggravated assault sentence, which included the violent offender registration, was vacated.

STATUTES: K.S.A. 2016 Supp. 21-5412(b)(1), -5415(a) (1); K.S.A. 22-3420(3), 60-261, -2105

Appellate Practice
Reminders
From the Appellate Court Clerk's Office

Ya Gotta Show Up!

Recently, a school administrator told me the primary factor in the success of any student is whether they attend class. He said that in order for most students to pass, they just "Gotta Show Up." The same can be said for many attorneys in Kansas.

We've had a string of oral arguments lately in the Court of Appeals where the attorneys failed to show up for oral argument. They claimed they never got notice. Yet, they received a Notice of Electronic Filing (NEF) telling there had been a filing in their appellate case, and if they would have checked their case, that filing was the notice of the time and place of their oral argument.

You must pay attention to your NEFs. There is a common misconception that the NEF will include either a copy of the court’s ruling or an indication of what has been filed-That isn't the case, all you get is something telling you to check your notifications. It is imperative that you log into the system and check the "Notifications" button on the home page.

So be ready to "Show Up" for your client on time and on the right date for your oral argument. The alternative is very embarrassing for you before the court and with your client.

For questions about these or other appellate procedures and practices, call the Office of the Clerk of the Appellate Courts. (785) 296-3229, Douglas T. Shima, Clerk.
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Scott Hill
IOLTA Committee Chair
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<th>Item</th>
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<tr>
<td>3526, July 2014</td>
<td>Page 1 of 4 (see instructions page 4)</td>
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**Statement of Ownership, Management, and Circulation**

**The Journal of the Kansas Bar Association**

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<td>a. Paid Electronic Copies</td>
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<td>b. Total Paid Print Copies (Line 15d) + Paid Electronic Copies (Line 16e)</td>
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<td>c. Total Paid Distribution (Line 15b) + Total Paid Electronic Copies (Line 16d)</td>
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**Publisher's Circulation Statement**

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**Publication is published on the following date:**

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<td>a. Print only</td>
<td>November/December 2017</td>
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<th>Item</th>
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<tr>
<td>a. Meg Wickham, KBA, 1200 Harrison St., Topeka, KS 66612</td>
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