Water Allocation Law and the Oil and Gas Industry in Kansas: An Update to the 1981 Neufeld Article
The Easiest Way to Get Paid!

- Accept Visa, MasterCard, Discover & Amex
- Save up to 25% off processing fees
- Control cash flow & increase business
- Accept credit cards for retainers
- Avoid commingling client funds

LawPay's unique processing program correctly separates earned and unearned transactions keeping your firm compliant. The process is simple. Begin accepting payments today!

LawPay.com
866.376.0950
Focus

Water Allocation
Law and the Oil and Gas Industry in Gas:
An Update to the 1981 Neufeld Article

By Eva N. Neufeld, John C. Peck, and Adam C. Dees

Regular Features

6 President’s Message
7 Young Lawyers Section News
9 Law Practice Management Tips & Tricks
10 Substance & Style
11 A Nostalgic Touch
14 Law Students’ Corner
16 Members in the News
38 Appellate Decisions
39 Appellate Practice Reminders
54 Classified Advertisements

Items of Interest

8 Can Kansas Experience a Tsunami?
17 2012 Outstanding Speakers Recognition
35 Water Rights Title Standard
36 Supreme Court Rule 504: District Judges Manual
36 Supreme Court Rule 607: Confidentiality
37 Supreme Court Rule 1501: Alternative Dispute Resolution Council

The Kansas Bar Association is dedicated to advancing the professionalism and legal skills of lawyers, providing services to its members, serving the community through advocacy of public policy issues, encouraging public understanding of the law, and promoting the effective administration of our system of justice.
# KBA Officers and Board of Governors

<table>
<thead>
<tr>
<th>Position</th>
<th>Name</th>
<th>Phone</th>
<th>City</th>
<th>Email Address</th>
</tr>
</thead>
<tbody>
<tr>
<td>President</td>
<td>Lee M. Smithyman</td>
<td>(913) 661-9800</td>
<td>Overland Park</td>
<td><a href="mailto:lsmithyman@ksbar.org">lsmithyman@ksbar.org</a></td>
</tr>
<tr>
<td>President-elect</td>
<td>Dennis D. Depew</td>
<td>(620) 325-2626</td>
<td>Neodesha</td>
<td><a href="mailto:dennis@depewlaw.biz">dennis@depewlaw.biz</a></td>
</tr>
<tr>
<td>Vice President</td>
<td>Gerald L. Green</td>
<td>(620) 662-0537</td>
<td>Hutchinson</td>
<td><a href="mailto:jgreen@gh-hutch.com">jgreen@gh-hutch.com</a></td>
</tr>
<tr>
<td>Secretary-Treasurer</td>
<td>Natalie G. Haag</td>
<td>(785) 438-3121</td>
<td>Topeka</td>
<td><a href="mailto:natalie.haag@securitybenefit.com">natalie.haag@securitybenefit.com</a></td>
</tr>
<tr>
<td>Immediate Past President</td>
<td>Rachael K. Pirner</td>
<td>(316) 630-8100</td>
<td>Wichita</td>
<td><a href="mailto:rkpirner@twgfirm.com">rkpirner@twgfirm.com</a></td>
</tr>
<tr>
<td>Young Lawyers Section President</td>
<td>Brooks G. Severson</td>
<td>(316) 267-7361</td>
<td>Wichita</td>
<td><a href="mailto:bseverson@fleeson.com">bseverson@fleeson.com</a></td>
</tr>
<tr>
<td>District 1</td>
<td>Toby J. Crouse</td>
<td>(913) 498-2100</td>
<td>Overland Park</td>
<td><a href="mailto:tcrouse@foulston.com">tcrouse@foulston.com</a></td>
</tr>
<tr>
<td></td>
<td>Gregory P. Goheen</td>
<td>(913) 371-3838</td>
<td>Kansas City, Kan.</td>
<td><a href="mailto:ggoheen@mvplaw.com">ggoheen@mvplaw.com</a></td>
</tr>
<tr>
<td></td>
<td>Kip A. Kubin</td>
<td>(816) 531-8188</td>
<td>Kansas City, Mo.</td>
<td><a href="mailto:kak@kc-lawyers.com">kak@kc-lawyers.com</a></td>
</tr>
<tr>
<td></td>
<td>Mira Mdivani</td>
<td>(913) 317-6200</td>
<td>Overland Park</td>
<td><a href="mailto:mmdivani@uslegalimmigration.com">mmdivani@uslegalimmigration.com</a></td>
</tr>
<tr>
<td>District 2</td>
<td>Charles E. Branson</td>
<td>(785) 841-0211</td>
<td>Lawrence</td>
<td><a href="mailto:cbranson@douglas-county.com">cbranson@douglas-county.com</a></td>
</tr>
<tr>
<td>District 2 (Cont'd.)</td>
<td>Rep. Paul T. Davis</td>
<td>(785) 331-0300</td>
<td>Lawrence</td>
<td><a href="mailto:pdavis@fed-firm.com">pdavis@fed-firm.com</a></td>
</tr>
<tr>
<td>District 3</td>
<td>Eric L. Rosenblad</td>
<td>(620) 232-1330</td>
<td>Pittsburg</td>
<td><a href="mailto:rosenblade@klslaw.org">rosenblade@klslaw.org</a></td>
</tr>
<tr>
<td>District 4</td>
<td>Chad D. Giles</td>
<td>(620) 221-1120</td>
<td>Arkansas City</td>
<td><a href="mailto:chadsglaw@gmail.com">chadsglaw@gmail.com</a></td>
</tr>
<tr>
<td>District 5</td>
<td>Terri S. Bezek</td>
<td>(785) 296-2639</td>
<td>Topeka</td>
<td><a href="mailto:bezekt@kscourts.org">bezekt@kscourts.org</a></td>
</tr>
<tr>
<td></td>
<td>Cheryl L. Whelan</td>
<td>(785) 296-3204</td>
<td>Topeka</td>
<td><a href="mailto:cwhelan@ksde.org">cwhelan@ksde.org</a></td>
</tr>
<tr>
<td>District 6</td>
<td>Bruce W. Kent</td>
<td>(785) 556-2019</td>
<td>Manhattan</td>
<td><a href="mailto:bruce.w.kent@gmail.com">bruce.w.kent@gmail.com</a></td>
</tr>
<tr>
<td>District 7</td>
<td>Matthew C. Hesse</td>
<td>(316) 858-4924</td>
<td>Wichita</td>
<td><a href="mailto:matthew_hesse@via-christi.org">matthew_hesse@via-christi.org</a></td>
</tr>
<tr>
<td></td>
<td>J. Michael Kennalley</td>
<td>(316) 268-7933</td>
<td>Wichita</td>
<td><a href="mailto:mkennalley@stinson.com">mkennalley@stinson.com</a></td>
</tr>
<tr>
<td></td>
<td>Calvin D. Rider</td>
<td>(316) 267-7361</td>
<td>Wichita</td>
<td><a href="mailto:crider@fleeson.com">crider@fleeson.com</a></td>
</tr>
<tr>
<td>District 8</td>
<td>John B. Swearer</td>
<td>(620) 662-3331</td>
<td>Hutchinson</td>
<td><a href="mailto:john.swearer@martindell.com">john.swearer@martindell.com</a></td>
</tr>
<tr>
<td>District 9</td>
<td>David J. Rebein</td>
<td>(620) 227-8126</td>
<td>Dodge City</td>
<td><a href="mailto:drebein@rbdodgecity.com">drebein@rbdodgecity.com</a></td>
</tr>
<tr>
<td>District 10</td>
<td>Jeffery A. Mason</td>
<td>(785) 890-6588</td>
<td>Goodland</td>
<td><a href="mailto:jamason@st-tel.net">jamason@st-tel.net</a></td>
</tr>
<tr>
<td>District 11</td>
<td>Nancy Morales Gonzalez</td>
<td>(816) 936-5788</td>
<td>Kansas City, Mo.</td>
<td><a href="mailto:nancy.gonzalez@ssa.gov">nancy.gonzalez@ssa.gov</a></td>
</tr>
<tr>
<td>At-Large Governor</td>
<td>Christi L. Bright</td>
<td>(913) 239-9966</td>
<td>Overland Park</td>
<td><a href="mailto:christi@thebrightfamilylawcenter.com">christi@thebrightfamilylawcenter.com</a></td>
</tr>
<tr>
<td>KDIA Representative</td>
<td>Hon. Mike Keeley</td>
<td>(620) 793-1863</td>
<td>Great Bend</td>
<td><a href="mailto:mkbtdist1046@cpcis.net">mkbtdist1046@cpcis.net</a></td>
</tr>
<tr>
<td>KBA Delegate to ABA</td>
<td>Sara S. Beezley</td>
<td>(620) 724-4111</td>
<td>Girard</td>
<td><a href="mailto:beezylaw@ckt.net">beezylaw@ckt.net</a></td>
</tr>
<tr>
<td>KBA Delegate to ABA</td>
<td>Linda S. Parks</td>
<td>(316) 265-7741</td>
<td>Wichita</td>
<td><a href="mailto:parks@hitefanning.com">parks@hitefanning.com</a></td>
</tr>
<tr>
<td>ABA Board of Governors</td>
<td>Thomas A. Hamill</td>
<td>(913) 491-5500</td>
<td>Overland Park</td>
<td><a href="mailto:tahamill@martinpringle-kc.com">tahamill@martinpringle-kc.com</a></td>
</tr>
<tr>
<td>ABA State Delegate</td>
<td>Hon. Christel E. Marquardt</td>
<td>(785) 296-6146</td>
<td>Topeka</td>
<td><a href="mailto:marquardtc@kscourts.org">marquardtc@kscourts.org</a></td>
</tr>
<tr>
<td>Executive Director</td>
<td>Jordan E. Yochim</td>
<td>(785) 234-5696</td>
<td>Topeka</td>
<td><a href="mailto:jeyochim@ksbar.org">jeyochim@ksbar.org</a></td>
</tr>
</tbody>
</table>

Let your VOICE be Heard!  

# Kansas Bar Association Districts

Out of State - 12
Bienvenidos a Cuba! (Part II): A Look Into an Unfamiliar Justice System

By Danielle M. Hall

Give a Hand Up to Those in Need

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

For more information or to volunteer, contact Kelsey Schrempp, KBA manager of public services, at (785) 234-5696 or at kschrempp@ksbar.org.
From the President

Lee M. Smithyman

Visits and Activities

Rachael Pirner told me that visiting local bar association meetings would be fun. I had no idea how much! My first visit was to the Crawford County Bar Association’s annual all-day event at the Crestwood Country Club in Pittsburg. What fun! The president, Steve Angermayer, started with two hours of humor and ethics (mostly humor) presented by Stan Hazlett. Then the Crawford County Golf Tournament began. Kurt Loy was kind enough to put me in his foursome with serious golfers (Leigh Hudson and Dave Brake). I was not prepared for Crawford County’s approach to a scramble tournament. Although sequential tee times were assigned to all foursomes, after about 15 or 20 minutes, the foursomes decided to play whatever holes were open on the golf course. Golf carts sprayed out in all four directions. In a Crawford County “scramble,” you scramble to find an open hole. My foursome played whatever holes were open until we had completed the 18. Unless I asked, I had no idea what hole I was playing at any given time. With enough adult beverages, it did not seem important.

Then the Crawford County “Banquet” began. Actually, it was as elaborate and funny a Roast as I have ever attended. The Crawford County Bar Association thoroughly and completely roasted every member of the visiting Cherokee County and Labette County bar associations who attended. Kip Sagehorn’s baby face belied his dry wit and deadpan delivery. With elaborate videotapes and skits, Joanna Derfelt and John Gutierrez, of Cherokee County, returned the favor with avid zeal. By the end of the evening, no lawyer or judge from either bar association remained unbesmirched.

Crawford County’s Banquet and Roast has a long and storied tradition. It attracts attorneys from great distances. Judge Dan Love traveled from Dodge City to attend. I can understand why. It was truly wonderful. I only hope that a bar association member will be kind enough to invite me for next year’s banquet. However, I fear that with a return visit, I too, will become a target.

In the January 2012 President’s Column, Rachael Pirner referred to the Marion County Bar Association members as “frugal children of unmarried parents” for failing to buy her lunch. After her comments, the Marion County Bar Association tendered her $5 meal reimbursement on a check signed by “Cheap Bastards.” (I note that the check was not cashed, but framed and placed on Rachael’s wall. Well done, Marion County – you saved another $5!) Because of her column, the “Cheap Bastards Cup” will be awarded annually to the winner of the Marion County tournament. The photograph of this very impressive trophy would appear to belie Rachael Pirner’s previous comments about the frugal nature of the Marion County Bar Association. In fairness to Rachael, however, this is a traveling trophy, akin to the Claret Jug of the British Open, such that the Marion County Bar will never again be required to purchase a trophy for their tournament. Again, well done, Marion County!

One of a president’s incoming duties is to appoint chairpersons for the various committees, panels, and task forces of the KBA. Having served a number of years on the Board of Governors, I thought I had a reasonable understanding of the good works and activities undertaken by our committees. I did not. I have learned much in the last two weeks about the committee and panel members who promote the KBA’s goals and create much good, in virtual anonymity. I hope to educate our membership on these committees in future columns, to highlight the very good things being done in the name of the KBA.

The KBA’s Ethics Grievance Panel is chaired by John D. Gatz. While larger counties, such as Johnson, Wyandotte, Sedgwick, and Douglas, have ethics committees to investigate grievances for the Kansas Office of the Disciplinary Administrator, there are no such committees in the smaller counties of Kansas. Almost 70 KBA members across our state provide pro bono service to investigate ethics complaints filed against Kansas attorneys. Our KBA panel members complete more than 65 investigations each year. The typical small investigation and report may require 10 to 15 hours. Investigations can require 100 hours of time or more. Casey Law, of McPherson, completed two such investigations in recent years. In this manner, approximately 30 percent of all Kansas investigated complaints are completed through the KBA Panel. Our KBA panel members annually contribute between 1,200 and 1,400 unpaid hours in their investigations.

Gatz also serves as a member of the Board for Discipline of Attorneys. In that role, he sits on three-member panels that make discipline recommendations to the Kansas Supreme Court. Between assigning investigations, monitoring them, reviewing completed investigations, and serving on the Panel, Gatz spends between 300 and 400 unpaid hours per year to better our profession in the state of Kansas. In the very near future, the KBA website will identify each of the attorneys who perform this very valuable service for the Ethics Grievance Panel. Hopefully, if you review that list and meet one or more of the Panel members, you will thank them for their service to our profession.
Keeping the Stress at Bay

By Brooks G. Severson, Fleeson, Gooing, Coulsen & Kitch LLC, Wichita, bseverson@fleeson.com

Stress. As attorneys, we’ve all experienced it, and we all have our methods of dealing with it, albeit some are better than others. Initially, I was hesitant to write on this topic, because I am by no means qualified to dole out advice. However, after recently going through a fairly stressful period in my life, I thought if nothing else, it was worth sharing what helped keep me sane.

About a year ago, my now husband and I became engaged. We decided almost immediately on a destination wedding that would take place in July of this year. Soon after our engagement, we also started the process of merging our respective homes into a single residence. Fast forward to May, and we had one home sold, we were in the process of buying a new house while trying to prepare the other house to be sold, and we were knee deep in finalizing wedding plans. Not to mention the fact that both of us have demanding careers, and I had a trial looming around the corner. Needless to say, there was more than one occasion where I was left feeling overwhelmed, anxious, stressed, and wishing there were more hours in the day.

Now that the wedding is over (and was fabulous!) and we are settled into the new house, I realize in hindsight that we actually managed to handle things very well, all things considered. Even though I felt stressed at times, I found ways to channel that stress so that it was not reflected onto my friends and family. Here are some things that I found particularly helpful in keeping the stress at bay:

1. **Whatever you do to unwind, keep doing it!** Often when people get overwhelmed or stressed, their hobbies or extracurricular activities are the first thing to go. In my experience, this alone can cause your stress level to increase. For me, my outlet is exercise. I get up around 4:30 every morning, so I can get in a good workout before I start my day. Despite being exhausted with everything going on these past few months, my exercise schedule never faltered. I truly believe this was a huge factor in my ability to manage so many things requiring my attention at the same time. I felt more calm, collected, and in control. Exercise may not be what works for you; it could be golf, reading, spending time with your children, or even playing intramural sports at the local YMCA. Whatever it is, DON’T STOP DOING IT!

2. **Work hard, and more importantly, work efficiently.** Despite the constant flow of things going through my head recently, there was always one constant and very important issue – my job. Making sure I remained productive, attentive to my clients, and up to date on my files was a top priority for me. I really think that much of this simply comes down to time management. For me, I made an effort to get in early, worked through lunch, and stayed until my to-do list was completed each day. This enabled me (most of the time) to actually “leave work at work” and kept my evenings free for more enjoyable things, like spending time with my friends and family, and relaxing. My efforts to stay on top of things at work was a major factor in keeping my stress level manageable during this time.

3. **Prioritize.** I will admit that this concept was initially difficult for me to grasp. I don’t generally like to set things aside when I know there is a task that needs to be accomplished; however, sometimes it is necessary. For example, when I had an upcoming jury trial in the middle of moving and finalizing wedding plans, there was only one option. For about two weeks, everything that was not related to my trial was put on the back burner. I quickly learned that whatever I had to set aside for the time being would still be there when I was ready to deal with it. You just have to determine what most needs your attention, and focus on it first. Trying to balance too many things at once can unfortunately lead to something important slipping through the cracks or not getting your best effort.

As I said, I don’t have any specialized training that qualifies me to give advice on dealing with stress. Truth be told, different things work for different people. These are just some tips of what I think helped make these past few months a bit more pleasant for me (and my patient husband). Now, the only thing remaining on the radar is getting our other house sold, but with everything we’ve already done in recent months, I think we’ll manage just fine.

**About the Author**

Brooks G. Severson is a member of Fleeson, Gooing, Coulsen & Kitch LLC in Wichita, where she practices in civil litigation. She currently serves as president of the KBA YLS. Severson can be reached at bseverson@fleeson.com.
Can Kansas Experience a Tsunami?

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

Actually, we can – many have termed it the “senior tsunami,” wherein millions of people in America turn 65 each day. Baby boomers, those born from 1946 to 1964, have just begun entering this age demographic and we know the numbers are going to swell significantly over the next decade.

The Census Bureau says the median age in the United States is about 37; half the population is older. By contrast, the median age of the country was 28 in 1970, about the time young people were told never to trust anyone over 30.

There are about 37 million Americans 65 years of age and older. That includes the first trickle of retiring Baby Boomers, people born between 1946 and 1964. As 79 million Boomers are set to reach retirement age in the next two decades, that trickle soon will turn into a tsunami.


This topic is most often discussed in terms of the effect it will have on Social Security and Medicare, but the American Bar Association and many state lawyer assistance programs (LAPs) are discussing it in terms of the effect it will have on the practice of law and potential disciplinary issues. To put it plainly, as we age, a certain percentage of us will suffer from medical and cognitive deficiencies that will affect our ability to successfully, and ethically, practice law. Some of us will recognize it in time to retire, and will have prepared for retirement and will actually retire from the practice of law. But many of us will either not recognize when the time has come, or will not be ready. We might not be ready financially, or it might be we haven’t prepared emotionally and socially. So we keep practicing. But once our ability to think and to remember becomes compromised, we endanger our clients, the justice system and ourselves. Judges are faced with a huge predicament: they have an obligation to clients and to the system to be sure counsel is competent, yet that may mean they have to stop appointing someone to cases, or tell them they can no longer practice law, or even as a last resort, report the lawyer to the disciplinary administrator.

Let me be clear here – many lawyers can and do practice well into old age; not all old people are infirm. But that is not the group I am talking about. No, the issue is the venerable lawyer whom everyone in town knows and respects, who is thought of with great affection and admiration, but who now no longer is able to practice law at the level of competence needed. Everyone wants to preserve this lawyer’s dignity and reputation yet protect clients.

This is a topic the Client Protection Forum, the National Association of Bar Counsel, and the Association of Professional Responsibility Lawyers tackled in 2007. Here’s the description of the session: Ethics for the Ages: Graceful Graying or Senior Tsunami (Joint Program with Client Protection Forum).

The panel discussed the aging of the legal profession and its impact on the lawyer regulatory system. What measures can be used to humanely and efficiently address the problems of age-related impairment and illness that are anticipated to arise with increasing frequency among practicing lawyers?

And there is much discussion today in 2012 among state lawyer assistance programs about how to work with such lawyers, and in some instances, with disciplinary staff, to safeguard the public while respecting the lawyer. The first step is talking with the lawyer, gently and respectfully. It is suggested that it is very important for the subject lawyer to visit a doctor and get a thorough check up and cognitive evaluation. As lawyers, we are used to dealing with facts and evidence. The evaluation report provides objective evidence about the lawyer’s capabilities at this stage.

If the evaluation does indicate deficiencies, then it is time to embark on a discovery mission: how to best deal with the situation as it is now. Consider talking about ways to help the lawyer structure his or her practice to minimize risk, by limiting the number or kind of cases accepted, or by associating co-counsel. Many LAPs, including ours, have a checklist for closing an office and some forms that can be adapted, and are happy to help should the decision be to close the practice.

Ideally, (in my opinion) one or two recent graduates who have passed the Kansas bar would be available and willing to transition the practice to them. The law schools have begun structuring programs to match young lawyers with practicing lawyers in small towns throughout Kansas, creating what seems to be a win-win situation for all.

About the Author

Anne McDonald graduated from University of Kansas School of Law in 1982 and spent most of her legal career as court trustee in Wyandotte County. After she retired in 2006, she served as a judge pro tem in Kansas City, Kan., Municipal Court and in Wyandotte County District Court. She is a member of four boards or commissions and three book clubs, along with the Sierra Club. She frequently hikes or backpacks with her husband and other Sierra Club members. She is a prior chair of the KBA Committee on Impaired Lawyers and has been a KALAP commissioner from its inception, and now serves as Executive Director.
The Kansas Supreme Court published its revised Supreme Court Rules, effective July 1, 2012, at www.kscourts.org. A redline and a clean copy are available and worth prompt review. One section for which I had high hopes was Rule 119, related to fax filing. Sadly, it remains largely unchanged. Fax filing holds a modest opportunity for a rudimentary electronic filing system on the cheap but is relegated to a one-trick tool to beat filing deadlines.

Why No Email?

Of course, the first question voiced about Rule 119 is why it exists at all. Why preserve an expensive system of limited value and significant flaws now that email is so widespread? When fax filing began, the email infrastructure throughout the courts (or even throughout law offices) was not fully developed and there was not even consensus about whether it was acceptable for legal purposes. That is history now and irrelevant to current practice. Email is a fundamental communication infrastructure available to every court in the state and in use everywhere. Any doubts about this matter are settled by Rule 111, which requires an email address on pleadings. Rule 119 probably should have been dumped altogether and replaced with a rule on email filing. For whatever reason, that did not happen but fax filing might still be adapted to an interim step toward e-filing.

Fax Filing – Poor State’s E-filing

The limitations of using fax as an e-filing system may not be readily apparent if dedicated fax machines communicating over phone lines are presumed. Common in the 1990s, that model is assumed in Rule 119. For example, fax machines are slow, require a dedicated phone line, and can only handle one connection at a time. To work around those shortcomings, Rule 119 imposes an arbitrary 10-page limit on fax filed pleadings. The page limit simply aims to minimize busy signals.

Fax filing looks more like e-filing when we kick fax machines to the curb in favor of internet fax solutions. Broadly speaking, the courts’ fax machines could be replaced with an internet service or server. Any party wanting to file a pleading could still connect with their own dedicated fax machine dialing into a fax gateway – change would be invisible to filers. The fax gateway receives the fax from the filer, converts it to an image document (compatible with the courts’ document imaging software), and delivers the pleading to the courts via email. Delivery could route according to court work flow rules similar to those available in e-filing systems.

Hobbled by Rule 119

The most egregious limitation of Rule 119 – the 10-page limit – would be obsolete. As it stands, the 10-page limit is a practical mess. Some pleadings and associated exhibits are simply impossible to fax file as they could never be condensed to 10 pages. Other seemingly qualified pleadings are excluded by combination with local rules; a one-page petition with two defendants can easily top 13 pages in some jurisdictions with unique requirements for cover sheets, service copies, and summons copies. The accommodation for such cases in Rule 119 is to mandate that service and summons copies be delivered by mail separately from the faxed petition! The clerk somehow has to reunite the petition with all its copies that might arrive by mail a week later.

The technology in place at the courts also restricts the value of fax filing and Rule 119. The busy signal is the frequent, noisy killer of fax filing. Because a fax machine can only connect to one filer at a time, a busy court can be impossible to reach. There simply becomes no way to get connected and get a time stamp required to prove filing under Rule 119. Similarly, the rule combines with Rule 111 to require a filer to have a fax number on pleadings and, where the filer does so, that fax machine must be on 24 hours a day. Many smaller offices do not have a dedicated line for their fax machines and cannot accommodate that requirement.

A genuine e-filing system still ought to be preferred over email or fax filing by everyone involved with the courts. However, so long as there is a rule on fax filing it ought to at least aim toward efficiency rather than institutionalizing weaknesses that technology solved a decade ago.

About the Author

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

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

When we advocate, we tell two stories: one about the client and one about the lawyer. As we focus on vigorously advocating for our client, on telling our client’s story, we must be sure to evaluate the other story we are telling – the lawyer’s story. We must tell the story of the professional lawyer.

Professionalism is a broad term, but I use it here to refer to civility. Incivility is difficult to define but has been described as “[a]ll manner of adversarial excess. Personal attacks on other lawyers, hostility, boorish behavior, rudeness, insulting behavior, and obstructionist conduct all fall under the general rubric of incivility.” Incivility rears its ugly head when lawyers take advocacy to an extreme and fail to act with courtesy and respect for others in the legal system.

The story of the unprofessional lawyer has many consequences: it can harm an individual client because it diminishes a lawyer’s effectiveness, it makes the practice of law more difficult and less enjoyable, it perpetuates our profession’s poor reputation, and it undermines public confidence in the legal system.

Discourteous and intemperate behaviors inevitably lessen a lawyer’s overall effectiveness. Sniping at opposing counsel removes the focus from the client’s case and puts it on the lawyer – the last place it should be. “Always remain cool, calm, and temperate – never agitated and never smug. Listen to opposing counsel with courtesy and respect ... An advocate who scoffs and harrumphs during an opponent’s presentation seems discourteous and unlikeable.” Acting with courtesy suggests confidence in one’s own position. On the other hand, unpleasantness prevents others from listening to an advocate with sympathy.

Extreme contentiousness makes the practice of law unnecessarily difficult. Objecting to opposing counsel’s reasonable requests for more time or reasonable discovery requests does not advance a client’s case but does make litigation more costly. Filing a motion that will be denied or objecting to one that will be granted will only frustrate the court forced to address it, eliminating any perceived strategic advantage to filing the document in the first place. Judge Melgren’s opinion granting a trial date continuance so that one of the lawyers seeking the continuance could be present for his child’s birth makes this point. Judge Melgren stated: “[L]awyers are trained to handle disputes skillfully but without the emotional rancor that will mask the actual parties’ reason and good sense. Regrettably, many attorneys ... personalize the dispute; converting the parties’ disagreement into a lawyers’ spat. This is unfortunate, and unprofessional, but sadly not uncommon.” Disappointed by the extreme opposition to the motion to continue, Judge Melgren encouraged opposing counsel “not to distort the priorities of his day job with his life’s role.”

Adversarial excess and obstructionist behaviors perpetuate lawyers’ poor reputation. Recently a court sanctioned a lawyer for deposition conduct that included interrupting the witness’s answers, conferring with his client while the witness was in mid-answer, making improper objections and speeches, and insulting plaintiff’s counsel. That kind of behavior perpetuates the distorted view that a lawyer must have a win-at-all-costs attitude and must take every opportunity to make life miserable for his or her opponent. A lawyer cannot, however, be a fanatic who will go to any length to accomplish an end. Zealous representation of a client is not an excuse for zealotry in the practice of law. Lawyers are not required to press for every advantage for a client. A lawyer is both an advocate for his client and an officer of the court. The professional advocate balances his duty to advocate vigorously for his or her client with concern for others in the legal system, and he or she recognizes that vigorous advocacy allows for cooperation among adversaries.

Incivility undermines public confidence in the legal system and erodes lawyers’ ability to protect the rule of law. “The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses, and jurors in particular cases, but to give the whole community a false notion of the purpose and end of law.” Dean Roscoe Pound made this observation more than one hundred years ago. The problem is acute now. When lawyers fail to act with respect for all persons involved in the legal system, they indicate a lack of respect for the system itself. If lawyers do not respect the legal system, we cannot expect the public to do so. And if the system is not respected, it cannot be effective. Thus, as lawyers, we must

(Con’t. on Page 15)

Footnotes
4. Id. at 101-02 (quoting Roberto Aron et al., Trial Communication Skills § 21.17, at 21-22-23 (1996)).
5. Id. at 103 (quoting Keith Evans, The Language of Advocacy 4 (1998)).
7. Id. at 3.
10. Kameen, supra note 8, at 4-8.
11. See id. at 4, 10.
12. KRPC 1.3 cmt. 1.
13. Kameen, supra note 8, at 6-8.
A Nostalgic Touch

Wilbur Geeding: A Life Well Lived
By Matthew Keenan, Shook, Hardy & Bacon LLP, Kansas City, Mo., mkeenan@shb.com

This forum has allowed me to profile a number of our fellow attorneys whose accomplishments outside the profession are worthy of discussion. This month we shine a light on Wilbur Geeding—well known to many from his days contributing to the Wichita bar. But Wilbur’s life story was Hollywood-worthy long before he passed the bar exam. Indeed, by the time Geeding had reached age 25 his life’s travels introduced him to some of the most iconic leaders in politics, music, and literature.

Wilbur D. Geeding, born and raised in Chanute in 1922, was destined to be a doctor. He had applied and been admitted to the KU med school class of 1943. But all that changed when his professor informed him he would never become a doctor. Wilbur learned, for the first time, that he was color blind. “In January of ’44, I had flunked biochemistry and the commanding major of the ASTP [Army Specialized Training Program] program up there told me I couldn’t continue to go on in the medical program because I was totally color blind. Red-green blind.”

There was no time to protest, appeal, or seek reconsideration. It was January of ’44, the Normandy Invasion was six months away, and the country had higher priorities. A week after receiving this news, he was shipped out of Lawrence on a train for Camp Grant, Ill.

Plan B

Wilbur went from wearing a white coat to green fatigues. But that’s getting ahead of our story just a bit. Wilbur’s real talent was not just a bright mind, but playing the trumpet and cornet, something he refined by the time he graduated from Chanute High School in 1940. That spring he earned a scholarship to Cincinnati Conservatory and while there, his path intersected with Claude Thornhill. Thornhill was one of the biggest musical names in the country in 1940, a pioneer in the big band sound. After the Japanese attacked Pearl Harbor, Thornhill enlisted in the Navy and later became the musical director at Pearl Harbor.

The New York Times would later credit him with introducing the trumpet to the swing band sound, “His arrangements, with their distinctive hanging sounds, paved the way, according to many, for cool jazz,” the Times said when he died in 1965.

“Thornhill had lost two trumpet players in his band because of injuries in an automobile accident, and he wanted to audition any of us trumpet players who wanted to go on the road with him,” Wilbur explained, “and three of us auditioned and two of us were picked. There were five trumpet players in that band.” Wilbur was touring the country at the ripe age of 18.

It was at basic training in 1944 at Camp Grant in the Medical Corps where his supervisors learned of his musical talent. “There were a number of other musicians there who played things other than bugles, and we formed about an 18-piece dance band. We had a drum and bugle corps that paraded at flag raisings and things like that. And some of us were designated buglers to open the day,” he said.

Her Name was Grace

But Wilbur found time away from the base. And there he met a young lady, Grace Meenen, on a blind date. “She was a junior at Rockford College and we fell in love that summer.” Grace’s mother was fond of him. “She was very good to me. I would stay at their house on some weekends. Early Monday mornings she would take me back to camp so I could blow first call at a quarter to six. And she had me on the way out there by 5:00,” he said.

That fall, however, he left Grace and Rockford, and headed to Fort Lewis, Wash. He later joined an Army concert band where he played an Eb alto horn and also the trumpet. Geeding was in a band of 52 musicians in Calcutta, India, that entertained more than 900,000 troops in 1945. He flew in a C-47; played in China at a B-29 Base; at two Flying Tiger bases; Northern Burma; at New Delhi; and at Agra, where the Taj Mahal is located.

Mohandas Karamchand Gandhi

Wilbur was stationed in India for 18 months. In 1945, his path would cross with another visionary. “There were only two of us in that band who played the alto horn and we were friends. His father was a publisher back in the United States. And the publisher was very interested in the poems of an Indian poet named Tagore.” Rabindranath Tagore, it’s worth noting, is India’s most recognized prophet and poet.

“Tagore couldn’t speak, write, or understand the English language. All of his poems were written in Indian language,

(Con’t. on next page)
and the publishing company wanted to get a contract with him to publish and transcribe his poems into English and publish them in the United States, which they eventually did. My friend’s father mailed him a contract which was very liberal for the Hindu or Indian poet. The amount of money that was going to be paid to Tagore was about 150 percent of what they would have paid a U.S. poet. My companion in the band said, ‘I have got to go see this fellow’s lawyer.’ I asked him, ‘Who is it?’ And he said, ‘Gandhi. Do you want to go with me?’ I said, ‘My god, I would jump at the chance.’”

And so they did.

In 1945 Gandhi had left a two-year imprisonment by the British government and was already an iconic leader on the worldwide political stage. But he also was a lawyer, schooled as an English barrister in London.

“We went to see him and he read through the contract and remarked how liberal it was for his client and he said, ‘Yes, we will get it executed and get it back to you.’ And he did.”

“We were probably there about 45 minutes in his office. He chatted with us. And then as we left, my companion commented to me and we agreed that as far as we were concerned, Mr. Gandhi’s attitude and everything—there were more ways to reach God than just Christianity. I mean that man was a man of God. There wasn’t any question in my mind about that.”

Eighteen months later Gandhi was assassinated.

Wilbur was discharged and returned to Rockford in 1946, hoping to marry Grace.

“I saw her again in ‘46 when I came back and wanted to marry and told her I was going back to school. She was in the teaching profession at that time. She wanted to pursue her career in speech pathology—a ‘new’ field at that time. So we went different ways from there.”

Marian and KU Law School

And so Wilbur eventually returned to law school, and met Marian Nelson. They were married in December 1949. In February 1950 he earned his law degree and settled in Columbus, Kan., to start his practice, but three years later he settled in Wichita.

They had three sons, including Martin who is also a Wichita attorney and practiced with his dad. Wilbur and Marian were married for 56 years when she died in October 2005.

A Reunion

Widowed and lonely, and now 83, Geeding’s thoughts turned to his lost friend.

“Six months to the date after Marian died, on April 6, 2006, I had two nights of dreams when I was staying by myself. I was very down and depressed, very depressed, and had two nights of dreams with Marian, and then Grace. The second night Grace alone was there in my dream and she said three words to me. She said, ‘come find me.’”

“And what I did the very next day—I communicated with the alumni office at Rockford College in an attempt to locate her, and the lady told me that she couldn’t give me her address or phone number because that was prohibited. But she said, ‘I will email her and see if she will call you.’”

“The following Wednesday evening, Grace called my home phone and I was not there. I was with a dance band opening up the Wichita Jazz Festival that night and I didn’t get home until close to midnight and found on my answering machine her call. I called her the very next morning and made arrangements to go to New York to see her.”

“Unfortunately, I fell and broke a hip in a parade playing the trumpet. I was to leave the following Monday. That was a Saturday that happened. Luckily my daughter-in-law, Doris, who is the wife of my son Martin here in Wichita, called Grace and told her what had happened. Grace told her that as soon as I got out of the hospital and was able to go home, that she would be here. Well, Grace was here the morning of June 1, 2006.”

They were married six months later, on Thanksgiving Day.

If you want to catch up with Wilbur these days, you need a car with a full tank. He plays the trumpet in the Midian Shrine concert band in Wichita, plus two other bands—the Dance Katz and the Polka Katz. He and his bandmates also have a fondness for playing in parades in the Hillbilly Band in which Wilbur and his seven other bandmates ride in an antique Ford, entertaining everyone along the route. That 1923 car is one year younger than the lead cornet player riding on the back. Both share a penchant for not staying in one place.

About the Author

Matthew Keenan has practiced with Shook, Hardy & Bacon since 1985. He may be reached at mkeenan@shb.com.
Is it your decision to evaluate the premium-marketing site for your law offices advertising dollar?

Look no more, the ‘BLUE BOOK’ combines statewide advertising exposure and efficient up-to-date resources for your daily office procedures, all in the ‘legal marketplace information provider’.

With over 70 years of publishing expertise the KANSAS LEGAL DIRECTORY offers each and every attorney an opportunity to notably increase your law office’s exposure in the legal profession, while maintaining minimal advertising expenditures.

The Blue Book
the legal marketplace information provider

To order your copy or to be included in the next edition contact us at 1-800-447-5375
Legal Directories Publishing Company, Inc. - www.LegalDirectories.com
Building a Summer Clerkship

By Phil Pemberton, University of Kansas School of Law, Lawrence

With another year of school beginning, on-campus interviews act as a reminder of the employment competition for the upcoming summer. As a result, this article offers my law school job search experience with the hope it will encourage, enlighten, or persuade those about to endeavor on their own law school summer employment journey. Clearly the most important component of a legal job search is to do well in school, but after that, I believe these next steps have helped pave the way for my successful summer search.

Pouring the Foundation: Find Passion in Learning, Especially About the Law

The most important component of any building is the foundation. Although typically unseen by the casual viewer, an improperly constructed foundation will compromise the entire building. On the other hand, if constructed properly, a solid foundation will allow a building to stand the test of time.

The foundation of any career is having a passion for the subject matter. Discovering new information has always been intriguing to me. I pursued law school because the depth of knowledge required to practice law would guarantee a constant discovery of new information.

Through my summer experiences, I have discovered I enjoy the challenge of composing the different pieces of a legal puzzle into one final product. To get to this enjoyment, however, I planted the seed through my time in class during the school year. I consistently try to remain engaged in classes not solely to perform well on exams but to refine my thinking process. Only through this hard work have I been able to grow as a prospective attorney and set the foundation for my future legal career.

Building the Walls: Develop Your Professional Story

A professional story is the second most important aspect in my job search because it is the protective structure within which everything is enclosed. How this story is told dictates which employers are solicited and what information prospective employers receive.

My story begins with my undergraduate degree in construction management. That degree marks the beginning of my professional career that I plan to expand upon. While admittedly more specialized than some, it has become the surrounding structure for my legal career search.

From that beginning point, I move to my years of work experience as a project manager and estimator in the construction industry in Las Vegas. That experience provided me with knowledge of a complex industry. That knowledge provides a distinction to future legal employers.

Some undergraduate degrees may not be in a specialized industry or may not provide a sharp distinction from other applicants. Despite this generalization, job seekers can still develop a story around interests or previous experiences. The key is to develop a narrative from which talking points can be created.

Installing the Roof: Create Your Documents to Garner Attention

This area is often hit hardest by career service offices and outside literature, so I will be brief on this point. Each author has a different opinion on what is the correct way of putting together these documents. Obviously, with such a wide variety of opinions, there is not one right way to do it.

In my documents, I focus on marketing the area of my professional story that (1) best coincides with the job I am trying to get and (2) reflects one of my biggest strengths. Just as a roof must fit the walls, here, the resume and additional application documentation must fit the applicant’s story. For me, my construction background is a unique feature; thus, I highlight information on my resume that would show my knowledge and experience in those areas.

Finishing the Interior: Practice, Sell, Connect

The creation of a strong resume gets you in the door, but the interview might be the most important factor to landing an offer. Employers will likely interview and call back applicants with very similar resume characteristics, such as GPA, class rank, etc. Therefore, to distinguish oneself from this similar pool, one has to perform well in the interview process.

In my opinion, like the interior of a building, the interview narrative should perform within the parameters set by the foundation (passion for the law), the walls (applicant’s story), and roof (resume, cover letter, etc.). If these earlier steps are well thought out, answering questions should naturally fall within the story without sounding artificial and forced.

In my case, the questions around a challenging experience were answered by referencing a challenging construction project I had managed. My future career goals were answered based on my passion for learning about the law. Ultimately, because I had thought through my past experiences and desired career path, I was better able to sell my expertise in the construction industry and ensure I stayed on point in the interview process.

Moving In: Work Hard and Have Fun

My summer experiences have each been unique and fantastic. This past summer I clerked for Foulston Siefkin in Wichita. My summer was filled with challenging and incredibly relevant work. While at Foulston, I prepared all kinds of legal documents, from research memos to legal briefs to contract documents. This diverse exposure to different types of legal
writing was extremely valuable and highlighted areas of improvement for my 3L year.

Despite the challenging work, summer clerkships are also filled with numerous social events. One personal favorite with Foulston was softball, where most firms participate in a summer slow pitch softball league. Foulston hosts numerous events inside the firm to meet partners, associates and staff. Beyond the firm events, other summer events included bar association socials and open doors at the federal courthouse.

Summer clerkships provide an excellent opportunity to discover what it is like to be a lawyer. I encourage all to pursue an opportunity to clerk, and wish my fellow law students good luck when constructing their own successful job search process.

About the Author

Phil Pemberton is a third-year student at the University of Kansas. He received his degree in construction management from Brigham Young University in Provo, Utah. Pemberton worked in the construction industry in Las Vegas for three years following his time at Brigham Young. As a 1L, he clerked for Ogletree Deakins and as a 2L, he clerked for Foulston Siefkin.

Tell the Story of the Professional Lawyer

(Con't. from Page 10)

balance our duty to advocate with our role as “public citizen[s] having special responsibility for the quality of justice.”

If the only lawyer story being told were the one of the professional lawyer, we would go a long way in improving our legal system. Some help for all of us is on the way. In the next few months, look for a document called the Pillars of Professionalism put together by the KBA’s Commission on Professionalism, a group of experienced Kansas lawyers and judges who are committed to preserving, among other things, the Kansas tradition of civility and courtesy in law practice. The Pillars are a set of aspirational goals that, if followed, will help us all make professionalism a habit and prevent us from falling down the slippery slope of adversarial excess.

About the Author

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

16. See KRPC Preamble: A Lawyer’s Responsibilities.

In the State of Kansas

Workers’ Compensation insurance is mandatory when an employer’s gross annual payroll exceeds $20,000.

As a business owner...

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

Highlights of the Workers’ Compensation policy:

• Automatic $100,000/$500,000/$100,000 Employers Liability Coverage (can be increased)
• Choice of Payment Plans
• Cost-saving services which include Loss Control Advice, Medical Bill Review, Fraud Services, and Fast and Efficient Claim Service
• Low Affordable Rates

If you would like a quick quote, contact Annette Hilyard at 800-843-2277 x 126 or email at ahilyard@thebarplan.com.
Members in the News

Changing Positions

Joshua J. Boehm has joined Brookens Law Office, Marion, as an associate.

Michael J. Book has joined Duggan, Shadwick, Doerr & Kurlbaum P.C., Overland Park.

Jordan A. Brewer has joined the Sedgwick County District Attorney’s Office, Wichita.

Scott R. Burrus and Robert Moody have joined Martin, Pringle, Oliver, Wallace, & Bauer LLP, Wichita, as summer law clerks. Douglas D. Silvius has joined the firm’s Kansas City, Mo., office.

Jacob M. Cunningham has joined Doerger & Grissell P.A., Garden City, as an associate.

Kristi C. Hartmann has joined Barnes Law Firm LLC, Kansas City, Mo.

C. William Ossmann has been appointed by Gov. Sam Brownback to the 3rd Judicial District of Kansas, Topeka.

Robert D. Overman has joined Stinson Morrison Hecker LLP, Kansas City, Mo., as partner and Michael P. Winkler has joined as an associate.

John G. Peryam has joined Seigfreid, Bingham, Lev, Selzer & Gee P.C., Kansas City, Mo.

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

Changing Locations

Julie Ariagno-Moore has moved to 129 E. 2nd St., Wichita, KS 67202.

Christopher A. Brackman has moved to 8900 Ward Parkway, Kansas City, MO 64114.

Christopher M. Brennan, Attorney at Law, has moved to 7930 Santa Fe Drive, Ste. 100, Overland Park, KS 66204.

Douthit Frets Rouse Gentile & Rhodes, LLC has moved to 5250 W. 116th Place, Ste. 400, Leawood, KS 66211.

David W. Edgar Law Firm LLC has moved to The Spectrum Building, 1518 Lincoln St., Ste. 1100, Denver CO 80203.

Henson & Jorns LLC has moved to 321 S. Ninnescah, Pratt, KS 67124.

The Law Office of Linda L. Small has moved to 727 N. Waco St., Ste. 550, Wichita, KS 67203.

Christopher J. Stucky has started his own firm, The Stucky Law Firm LLC, 1100 Main St., Ste. 2550, Kansas City, MO 64105.

Zuspann & Zuspann has moved to 1002 Broadway, Ste. B, Goodland, KS 67735.

Miscellaneous

Nola Tedesco Foulston, Wichita, was this year’s recipient of the Norm Maleng Minister of Justice Award from the American Bar Association.

Stinson Morrison Hecker LLP has been awarded the Gold Standard Certification by the Women in Law Empowerment Forum, a designation for law firms that have integrated women in top leadership positions.

The Wichita Bar Association has installed new officers and board members and they include: Hugh W. Gill IV as president; Salvatore D. Intagliata vice president; and Jennifer M. Hill as secretary/treasurer. Board members include: Suzanne R. Dwyer, Kellie E. Hogan, Brooks G. Kancel, Jeff Kennedy, and Sylvia Penner.

Correction: In the July/August issue of the Journal, we incorrectly listed Carol M. Park, of Hays, as city attorney; she was named city prosecutor. We sincerely apologize for this error.

Editor’s note: It is the policy of the Journal of the Kansas Bar Association to include only persons who are members of the Kansas Bar Association in its Members in the News section.

TWG

TRIPLETT, WOOLF & GARRETSON, LLC

LAW FIRM

DEREK S. CASEY HAS JOINED TRIPLETT, WOOLF & GARRETSON, LLC LAW FIRM

TWG is pleased to announce that Derek S. Casey has joined the firm. Mr. Casey is a 1991 graduate of the University of Oklahoma College of Law - Juris Doctorate with Distinction, and has practiced law in Wichita, Kansas since graduation. Derek is a member of the American Bar Association, Kansas Bar Association, Wichita Bar Association, American Association for Justice and Kansas Association for Justice, and is admitted to practice in the States of Kansas and Oklahoma.

Derek has published numerous articles on various legal topics and is a frequent speaker at legal seminars. He is also involved in several community organizations.

At TWG, Derek will continue his representation of clients in a variety of litigation matters. TWG’s litigation practitioners possess the experience and expertise to represent persons or business entities in a variety of simple and complex litigation, in state and federal courts. You may email Derek at dcasey@twgfirm.com.

2959 N. Rock Road, Suite 300 Wichita, KS 67226 • 316-630-8100
www.twgfirm.com
2012 Outstanding Speakers Recognition

The Kansas Bar Association would like to extend a special thank you to and recognition of the following individuals who gave so generously of their time and expertise in speaking at our Continuing Legal Education seminars for April through June 2012.

Your commitment and invaluable contribution is truly appreciated.

Thomas A. Adrian, Adrian & Pankratz, Attorneys at Law, Newton
John J. Ambrosio, Ambrosio & Ambrosio Chtd., Topeka
Patrick M. Arenz Robins, Kaplan, Miller & Ciresi LLP, Minneapolis, Minn.
Hon. Don R. Ash, 16th Judicial District, Murfreesboro, Tenn.
Jeffrey L. Ashton, Winter Park, Fla.
Hon. G. Gordon Acheson, Kansas Court of Appeals, Overland Park
Jack T. Bangert, Kutak Rock LLP, Kansas City, Mo.
Thomas J. Bath Jr., Bath & Edmonds P.A., Overland Park
Gregory T. Benefiel, Douglas County District Attorney’s Office, Lawrence
Hon. William D. “Dan” Biles, Kansas Supreme Court, Topeka
Matthew E. Birch, Shamberg Johnson & Bergman Chtd., Kansas City, Mo.
Carol Ruth Bonebrake, Holbrook & Osborn P.A., Topeka
Hon. Edward E. Bouker, 23rd Judicial District, Hays
Rusell A. Brien, Brien Law LLC, Oskaloosa
Hon. David E. Brun, Kansas Court of Appeals, Topeka
Mert F. Buckley, Adams Jones Law Firm P.A., Wichita
Hon. Daniel Cahill, District Court Judge, Kansas City, Kan.
Neil Chanter, Strong, Garner, Bauer P.C., Springfield, Mo.
Hon. Robert L. Childers, 30th Judicial District, Memphis, Tenn.
Jan M. Conlin, Robins, Kaplan, Miller & Ciresi LLP, Minneapolis, Minn.
Thomas A. Cox, Law Offices of Thomas A. Cox, Portland, Maine
Robert W. Coykendall, Morris Laing Evans Brock & Kennedy Chtd., Wichita
Hon. Daniel D. Creitz, 31st Judicial District, Iola
Toby J. Crouse, Foulston Siefkin LLP, Overland Park
David Danielson, JD, CPA, Sanford Health, Sioux Falls, S.D.
Carl B. Davis, Davis & Jack LLC, Wichita
Brian K. Dempsey, Kansas Department of Social & Rehabilitation Services, Topeka
Dennis D. Depew, Depew Law Firm, Neodesha
Patrick H. Donahue, Disability Professionals, Lawrence
Tara Sue Eberline, Foulston Siefkin LLP, Overland Park
Diana Edmiston, Glaves, Irby & Rhoads, Wichita
Hon. Robert W. Fairchild, 7th Judicial District, Lawrence
Evan Fitts, Polsinelli Shughart P.C., Overland Park
Linda M. Franklin, Casemaker, Columbia, S.C.
Webster L. Golden, Stevens & Brand LLP, Lawrence
Kirk J. Goza, Goza & Hollold LLC, Leawood
Hon. Henry W. Green Jr., Kansas Court of Appeals, Topeka
William H. Griffin II, Chapter 13 Trustee, Overland Park
Danielle M. Hall, Kansas Bar Association, Topeka
Jan Hamilton, Chapter 13 Trustee, Topeka
Patricia E. Hamilton, Stevens & Brand LLP, Topeka
Stacy N. Harper, JD, MHSA, CPC, Forbes Law Group LLC, Overland Park
Jerry D. Hawkins, Hite Fanning & Hennessee LLP, Wichita
Reese H. Hays, Kansas State Board of Healing Arts, Topeka
Stanton A. Hazlett, Disciplinary Administrator for the State of Kansas, Topeka
Prof. Edwin W. “Webb” Hecker, University of Kansas School of Law, Lawrence
Wm. Scott Hesse, Newman Reynolds & Riffel P.A., Topeka
John R. Hicks, Norris & Keplinge LLC, Overland Park
Tiffany D. Hogan, Coronado Katz LLC, Kansas City, Kan.
John R. Hooge, Attorney at Law P.A., Lawrence
Patrick Hughes, Adams Jones Law Firm P.A., Wichita
Don W. Hymer Jr., Johnson County District Attorney's Office, Olathe
Thomas L. Irving, Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, Washington, D.C.
Hon. Jeffry L. Jack, 11th Judicial District, Parsons
Prof. Janet Thompson Jackson, Washburn University School of Law, Topeka
Sarah E. Johnson, Lawrence
Jeffery A. Jordan, Foulston Siefkin LLP, Wichita
Hon. Phillip B. Journey, 18th Judicial District, Wichita
Patricia Judd, Washburn University School of Law, Topeka
Siegrun D. Kane, Kane Advisors LLP, Briarcliff Manor, N.Y.
Hon. Janice M. Karlin, U.S. Bankruptcy Court, Topeka
Matthew D. Keenan, Shook Hardy & Bacon LLP, Kansas City, Mo.
Hon. David J. King, 1st Judicial District, Leavenworth
Douglas A. Laird, Polsinelli Shughart P.C., Kansas City, Mo.
Gregory A. Lee, Cooper & Lee LLC, Topeka
David P. Leibowitz, LakeLaw, Waukegan, Ill.
Kristine C. Lizzas, Battered Women’s Justice Project, Minneapolis, Minn.
Jared S. Maag, U.S. Attorney’s Office, Topeka
John Mallery, Mallery Technical Training and Consulting Inc., Overland Park
Hon. Thomas E. Malone, Kansas Court of Appeals, Topeka
T. Brad Manson, Manson & Karbank, Overland Park
Hon. J. Thomas Marten, U.S. District Court, Wichita
Prof. Joseph P. Mastrosimone, Washburn University School of Law, Topeka
William P. “Bill” Matthews, Foulston Siefkin LLP, Wichita
Michael J. Mayans, Intrust Bank N.A., Wichita
Prof. Stephen R. McAllister, University of Kansas School of Law, Lawrence
Deborah “Debs” Melhenny, Hutton & Hutton Law Firm LLC, Wichita
Jack Scott, McInteer Depew Gillen Rathburn & McInteer L.C., Wichita
2012 Outstanding Speakers Recognition con’t.

Matthew C. Miller, Social Security Administration, Kansas City, Mo.
Joseph N. Molina III, Kansas Bar Association, Topeka
Hon. Marshall B. Murray, Milwaukee County Circuit Court, Milwaukee, Wis.
Patrick A. Nance, CPA, Butler County Community College, El Dorado
Scott Nehrbass, Foulston Siefkin LLP, Overland Park
Hon. Robert E. Nugent, Chief Judge, U.S. Bankruptcy Court, Wichita
Steven J. Obermeier, Johnson County District Attorney’s Office, Olathe
Glenn Opie, Connor & Opie, Great Bend
Sen. Thomas C. (Tim) Owens, Overland Park
Jerry R. Palmer, Palmer Mediation LLC, Topeka
Craig Paschang, Kansas Corporation Commission, Topeka
Ryan Peck, Morris Laing Evans Brock & Kennedy Chtd., Wichita
Patti Petersen-Klein, Kansas Corporation Commission, Topeka
Hon. G. Joseph Pierron Jr., Kansas Court of Appeals, Topeka
Hon. Tony Powell, 18th Judicial District, Wichita
William E. “Bill” Quick, Polsinelli Shughart P.C., Kansas City, Mo.
Andrew R. Ramirez, Lathrop & Gage, Overland Park
David M. Rapp, Hinkle Law Firm LLC, Wichita
Miguel Rivera, Collective Brands, Lean Six Sigma Black Belt, Topeka
Bethany J. Roberts, Kansas Legal Services, Topeka
Jennifer C. Roth, 3rd Judicial District Public Defender, Topeka
Hon. Peter V. Ruddick, 10th Judicial District, Olathe
Alan Rupe, Kutak Rock LLP, Wichita
Mark A. Scott, The Law Office of Roger A. Riedmiller, Wichita
Bradley D. Serafine, Foulston Siefkin LLP, Wichita
W. Michael Sharma-Crawford, Sharma-Crawford Attorneys at Law LLC, Kansas City, Mo.
Trip Shawver, The Law Office Of N. Trip Shawver, Wichita
Hon. Dale M. Somers, U.S. Bankruptcy Court, Topeka
Katherine C. Spelman, Cobalt LLC, Berkeley, Calif.
Hon. Melissa Taylor Standridge, Kansas Court of Appeals, Topeka
Matthew Stromberg, Foulston Siefkin LLP, Overland Park
Charles R. Svoboda, Svoboda & Mitts, Kansas City, Mo.
Todd N. Thompson, Thompson Ransdell & Qualseth P.A., Lawrence
Tai J. Vokins, Vokins Law Office LLC, Olathe

Doug Von Feldt, Lean Six Sigma Black Belt, Topeka
Dr. Page Walley, Casey Family Programs, Seattle
T. Lynn Ward, Ward Law Offices LLC, Wichita
Teresa L. Watson, Fisher Patterson Sayler & Smith LLP, Topeka
Douglas E. Wells, Attorney at Law, Topeka
Kristen Wheeler, Morris Laing Evans Brock & Kennedy Chtd., Wichita
Cheryl L. Whelan, Kansas Department of Education, Topeka
Meg Wickham, Kansas Bar Association, Topeka
Calvin Williams, Calvin Williams Law Office, Colby
Laurie B. Williams, Chapter 13 Trustee, Wichita
Darcy D. Williamson, Williamson Law Office, Topeka
Molly M. Wood, Stevens & Brand LLP, Lawrence
Wyatt Wright, Foulston Siefkin LLP, Overland Park
Angel R. Zimmerman, Valentine Zimmerman & Zimmerman P.A., Topeka
Larry N. Zimmerman, Valentine Zimmerman & Zimmerman P.A., Topeka
Theresa “Terie” Zimmerman, Forbes Law Group LLC, Overland Park
William H. Zimmerman Jr., Case Moses Zimmerman & Martin P.A., Wichita

The Law Firm of
Gyllenborg & Dunn, P.A.
has changed its name to
Gyllenborg & Brown, P.A.
upon the appointment and commission of its former partner
Christina Dunn Gyllenborg
as District Judge of the
Tenth Judicial District of Kansas

GYYLENBORG & BROWN, P.A.
SCOTT C. GYYLENBORG • CHRISTOPHER T. BROWN
111 South Kansas, Olathe, Kansas 66061 • www.gyllenborglaw.com
The choice of a lawyer is an important decision and should not be based solely on advertisements.
Bienvenidos a Cuba! (Part II): A Look Into an Unfamiliar Justice System

By Danielle M. Hall, Kansas Bar Association, Topeka, dhall@ksbar.org

Just this past May, myself and six other Kansas Bar members had the opportunity to visit Cuba to embark on a journey where we had the opportunity to study the Cuban legal system. We had the unique opportunity to do this by obtaining special permission with a professional research license from the U.S. Treasury Department. We were in Cuba for seven days, and during that time we had the opportunity to meet with Cuban judges, law professors, and lawyers. Below is a summary of the insights we were given into a system we knew little about before we arrived.

Lawyers in Cuba

We quickly learned that the private practice of law does not exist in Cuba and, in fact, it was abolished in Cuba in 1973. The legal profession of today serves both individuals and enterprises, as well as providing counsel to the government. The Bufetes Colectivos are collective law offices, first established by the Ministry of Justice after the private practice of law was abolished, and currently are under the oversight of the National Organization of Bufetes Colectivos (ONBC).

In order to practice in a bufete, one must graduate from law school and pass an exam. Lawyers in bufetes typically have large caseloads and work under difficult conditions. When a lawyer receives a case, a percentage of the fee goes to the lawyer and the rest to the organization (the government). The fees that are charged are approved by the Ministry of Justice. The alternative to the Bufetes Colectivos is to work in state job such as an advisor to the state institutions and enterprises or as a prosecutor. Those lawyers receive a lower salary, but may receive additional to their salary. For example, they could receive a car from the state. Regardless of the route a lawyer may choose to take, they are required to practice for three years upon graduation in a social services area to repay their free education.

The Cuban Judiciary

A notable difference between the Cuban legal system and ours is that their judiciary is not an equal third branch of government. Judges do not have the constitutional power to overrule statutes and are subordinate to the executive branch. Another major difference is the principle of stare decisis which does not exist. The courts do not abide by precedent. Instead, they simply apply the applicable statute to the facts presented. In fact, both trial and appellate courts hear each case de novo.

Within the Cuban judiciary, 60 percent of judges are women. Additionally, there are two types of judges: professional and lay. Persons seeking to become a professional judge are required to pass an examination given by the Ministry of Justice. The requirements to be a judge include age, citizenship, and a requisite amount of legal experience that varies depending upon which court one serves on. Professional judges have a life term, serving until they are no longer capable or until removed by the electoral body. Lay judges serve alongside professional judges in all levels of the judicial system. Candidates for the position of lay judge are nominated in workplace assemblies and are screened by the Ministry of Justice to ensure they meet the age and citizenship requirements to be a judge. Lay judges serve one month per year for a term of five years. It was noted in our session that at times corruption within this lay system is seen. Despite the noted corruption, under Cuban law, judges are required to be independent in their judgment and free from the influence of government in their deliberations.

Cuba’s Bar Association – The National Association of Cuban Jurists

The National Association of Cuban Jurists (UNJC) is the equivalent to our bar association. It is a union made up of judges, law professors, advisors, and attorneys. It is a voluntary bar, and each member must be registered at the Administration of Justice and provided an attorney registration number similar to our attorney registration. There are 20,000 registered jurists in Cuba and 1,600 are members of the bar association. The UNJC happened to be the host to our delegation and it is where we spent most of our time in Cuba.

Much like other bar associations, the UNJC provides comments on proposed legislation, publishes a law review (Revista Cubana de Derecho), and organizes various national and international legal conferences and symposia. Within the bar, there are 11 scientific societies: International Law, Labor and Social Law, Criminal Law, Notary, Procedural, Civil Law, Family Law, Agrarian Law, Financial Law, Commercial Law, and Constitutional Law. Every year each society has a national meeting to create new standards for presentations and proposals at international meetings. For instance, the family law society is currently...
Criminal Law

Cuban penal law is more similar to the laws of most countries of the world than it is to the laws of the United States. It derives its procedures from civil law, generally finding its roots in Spanish law. Cuba emphasizes written codes rather than precedent as the source of law, and utilizes an inquisitorial system of criminal procedure similar to that of Spain and France. At the outset of our visit, it became apparent that there are several fundamental distinctions between the Cuban system and that of the United States: There is no plea bargaining, there is a period of pre-trial confinement for investigative purposes when the accused is not entitled to counsel or bail, and there is no right to counsel until the investigation is complete.

When someone is arrested for a crime in Cuba they receive no Miranda-type warning and can be questioned for up to eight days before seeing a court or a lawyer. Once the accused is arrested, the police have 24 hours to determine what happened. They can then either release the person or hand them over to a researcher at a separate investigative institution. The researcher operates under the supervision of a prosecutor who reviews the report presented by the researcher. The prosecutor then determines whether the case should go forward and, if it does, whether bail or confinement is appropriate. In recent years it has been debated whether or not this decision should be up to the prosecutor or left to the courts to decide. To date, no determination has been reached.

Pre-trial confinement must be no less than eight days during which the investigation and interrogation of the accused can be conducted. After the eighth day, the attorney for the accused can become involved. The defendant can hire an attorney or use a public defender, who then has ten days to file a rebuttal. The prosecutor then commences a pretrial proceeding that continues the investigation. The prosecutor then issues an analysis of the case and the applicable law. In addition, the prosecutor gives the court a recommendation for sentencing. The defense then receives this information and files another rebuttal. At this point, the defendant can then plead guilty or go to trial.

Family Law

The Cuban Family Code was passed in 1975 and covers marriage, divorce, marital property relationship, paternity, adoption, and parental responsibilities for the care and education of children. The code gave men and women equal rights and equal responsibilities in the home and increased state social services. The Code was officially published on March 8, 1975 and marks the international Women’s Day in Cuba.

In our discussion of the Cuban Family Code, we found that because divorce laws are liberal and the process inexpensive (costing less than $5) in Cuba, the divorce rate is high, ranging from 60 to 70 percent. Because most couples have little property to dispute, due to few rights of ownership, most divorces are uncontested. Uncontested divorces are typically handled by a notary public who is a trained lawyer. However, contested matters including issues of custody, parenting time, child support, and spousal support are handled in courts. Contested custody matters are addressed by a group that can include social workers, psychologists, and extended family members. In custody cases the law has a preference for the child to go with the mother and almost always ends that way. A parent’s contribution to a child’s support is based on the ability to pay. In addition to child support, spousal support...
can be granted to an unemployed spouse if the couple was married for at least one year. The spousal support is limited to six months to a year. As mentioned earlier, the Family Law society of the UNJC is currently looking into the family code to determine what changes need to be made. One area that our panelist was hopeful to see a change in is for more authority and tutelage for grandparents so that they have rights to see grandchildren in cases of divorce.

Two other areas that may see change are domestic abuse law and lesbian, gay, bisexual, and transgender (LGBT) rights. Domestic abuse is a crime in Cuba; however, there is no civil law equivalent to a domestic abuse statute and there is no ability to seek protection from domestic violence in family court. The Federation of Cuban Women is taking a role in making sure there is a change in this area of the law. Another area of concern under women’s issues is that of prostitution, which is prevalent in the country. Due to the economic hardships of women, some see prostitution as their way out. As a result, pimping was introduced as a crime and includes punishment for taxi drivers and hotel managers who willing allow women to use their vehicles and rooms for prostitution. Our panelist indicated that she hopes to empower women to see the dangers and to find a better way.

While amendments to the Family Code are pending and the issue of domestic violence is under discussion, the same can be said of the issue of same-sex marriage. Mariela Castro (daughter of Raúl Castro), the director of the Cuban National Center for Sex Education (CENESEX) in Havana, has been a long-time activist for LGBT rights. She led the passage of a law in 2008 that provides sex-reassignment surgery for transgendered Cubans at no charge. Mariela and CENESEX are promoting legislative initiatives that support the same rights for homosexuals and transgender people, so that the family code recognizes their rights and also their possibilities as couples, including the legalization of their union as a couple.

Cuban Economy

“We are living during times of changes.” That is how our presenters opened our session on the economic conditions in Cuba. With the fall of the Soviet Union, the Cuban economy that has always been troubled began to fall apart. As economic times are changing in many other countries, the Cuban government has realized that it must diversify Cuba’s economy and trade with the rest of the world in order to survive. Last year, current president, Raúl Castro, Fidel’s brother, signed off on a five-year economic plan to overhaul the Cuban economy. This plan has already legalized the sale of homes and cars, and has allowed many Cubans to finally go into areas of private business.

The Cuban Constitution explains that all property is “socialist state property which is the property of the entire people.” However, just recently, Cubans were finally allowed to own their homes, but still not their land. Despite not being able to own their land, the Cuban people are allowed by the reforms to sell their houses (and cars) to individuals or even rent their homes to a third party. This new personal freedom is one that comes with the new wave of changes that are positive for the people and the economy. However this new measure is just a first step in solving the country’s housing crises. The housing stock, which was already run down before the revolution, continues to deteriorate. The U.S. embargo cut off the supply of building materials, and new construction has failed to keep pace with demand. Additionally, cyclones and salty air have destroyed rural houses and older areas of Havana. The goal of legalizing the sale of houses is to bring an informal market of high prices and under the table deals out of the shadows in order to ease the housing crisis, stimulate construction employment and generate tax revenue.

One of the most notable changes in the economic structure of Cuba is the introduction of free enterprise activities in 178 fields. It is estimated that there are now 400,000 private workers in Cuba since the reform was introduced two years ago. The jurists who led this discussion hope that at least 50 percent of the workforce will not have to rely on state enterprise for work within the next few years. For the Cuban people the change is one that is embraced. The average income for a state worker in Cuba is equivalent to 20 U.S. dollars per month. The new system allows someone to rent out private rooms in their home to travelers for the going rate of 30 U.S. dollars per night, making income potential much higher than relying on a state job even though they are paying $200 a month in taxes. The list of 178 jobs also includes construction laborers, used book sellers, hairdressers, taxi drivers, and family-run restaurants out of homes just to name a few. The family-run restaurants in Cuba are called paladares. The paladares are flourishing in different areas of Havana, and we had the privilege of eating at two of them. We found that the newly empowered entrepreneurs all speak excitedly of changes that will allow them to buy and sell their homes and cars, and run their own small businesses.

With reform to the economy come new challenges for Cuba. Cubans are finding the need to look at areas of the law that will need to be updated because of the changes. For instances, they have started drafting changes to the workforce code and the environmental code. Despite the significant changes that the government has made, it is apparent that Cuba still has a long way to go in order to sustain its economy and keep up with the world market. Many hope that the U.S. embargo will soon be lifted to make the process easier for the country.

About the Author

Danielle M. Hall is the publications administrator for the Kansas Bar Association. She received a B.A. in political science in 2006 and a J.D. in 2009 from Washburn University. Prior to joining the KBA her primary legal practice was in civil litigation. Hall is also an adjunct professor at Washburn, teaching trial advocacy and coaching the advocacy competition teams.

www.ksbar.org

The Journal of the Kansas Bar Association | September 2012 21
Water Allocation Law and the Oil and Gas Industry in Kansas:
An Update to the 1981 Neufeld Article

By Eva N. Neufeld, John C. Peck, and Adam C. Dees

(Endnotes begin on page 30)
The Spring 1981 issue of the Journal of the Kansas Bar Association contained Eva Neufeld’s article “The Kansas Water Appropriation Statutes and Their Effect Upon the Oil and Gas Industry in Kansas” (the 1981 Article). We are updating the 1981 Article because in the intervening 30 years great changes have occurred in Kansas law and in oil and gas recovery methods, particularly in coalbed methane (CBM) production and fracturing. The 1981 Article focused on the Kansas Water Appropriation Act (KWAA) administered by the chief engineer of the Division of Water Resources (DWR) of the Kansas Department of Agriculture (KDA). The 1981 Article cited other non-KWAA statutes, including sections dealing with the Kansas Corporation Commission (KCC), civil procedure, and taxation. Over the last 30 years, the Kansas legislature has made numerous additions and amendments to the KWAA and other relevant statutes, and we analyze the effect of these changes on the oil and gas industry.

The 1981 Article began with a brief history of the KWAA and the KWAA’s initial impact on oil and gas production. The 1981 Article then covered (1) water use in the initial drilling operation, (2) water as a by-product of oil and gas production, and (3) water use in secondary or enhanced oil and gas recovery. The final three sections dealt with the question of attachment of water rights to land in Oklahoma, Colorado, and Kansas; discussed policy issues and made suggestions; and advised on obtaining a water appropriation permit. This article updates and supplements the 1981 Article, but does not replace it; so, the articles should be read together. We use the same 1981 Article format and subtitles, but in some cases add sub-subsections, and we do not discuss Oklahoma and Colorado law. Like the 1981 Article, this article focuses primarily, but not exclusively, on water allocation. Several developments in legislation, administrative regulations, and in methods of oil and gas recovery necessitate mentioning several water quality concerns as they relate to allocation, but we do not discuss water quality concerns in detail. This article summarizes changes in the KWAA and the other related statutes and in DWR since 1981, and it ties them to recent advancements in oil and gas recovery methods. We deal with attachment of water rights, but only in Kansas and not in Colorado or Oklahoma. The section describing policy issues and making suggestions is reviewed as to current applicability. The final section on obtaining a water appropriation permit is updated and expanded.

History

The 1981 Article summarized the history of prior appropriation in Kansas, a system based on “first in time, first in right.” Since 1981 numerous changes in Kansas water allocation legislation and administrative regulations have occurred, DWR personnel have changed, and judicial decisions have been rendered. Guy Gibson, appointed chief engineer in 1972, retired in 1983. David Pope succeeded him, having served as assistant chief engineer since 1978. Legal counsel Leland Rolfs had joined the DWR staff in 1978. Pope retired in 2007, Rolfs in 2008. In the last 30 years, most of the legal changes in Kansas water allocation law occurred under Pope’s and Rolfs’ leadership.

The following are a few changes in the KWAA and related statutes since 1981. In 1983, the legislature enacted, and in 1993 amended, the Water Transfer Act to regulate movement of large quantities of water (2,000 acre feet per year) over distances exceeding 35 miles; in 1984, it added minimum desirable streamflow legislation; in 1988, it required annual use reports; in 1995, it enacted a change in the process for appointing the chief engineer; in 1999, it changed the forfeiture period for non-use of a water right from three years to five years; in 2001, it provided for “multi-year flex accounts,” enacted water banking legislation, and enabled the chief engineer to suspend a water use for failure to comply with provisions of the KWAA; and in 2009, it enabled issuance of “term permits,” which had until that time been allowed by regulation only (“temporary permits” have been permitted by statute since 1977). Those changes do not count the numerous other examples of the legislature’s tweaking other sections of the KWAA, leaving few current sections in their 1981 form. The legislature also abolished the Kansas Water Resources Board and replaced it with the Kansas Water Authority and the Kansas Water Office headed by a director, and it amended the water planning statutes to provide a continuously modifiable State Water Plan, giving Kansas a dynamic water resources planning capability.

In 1981, DWR had published few administrative regulations, but it was producing in-house “administrative policies and procedures.” Over the next decade, DWR produced even more policies that filled two large three-ring notebooks and, although not necessarily having the force and effect of law, guided DWR staff and lawyers dealing with DWR. In 1999 the legislature mandated that the chief engineer turn the administrative policies and procedures into full-fledged administrative regulations. Found under K.A.R. Agency 5, DWR regulations contain 35 separate articles. In addition to its usual duties of issuing original permits and change orders, DWR has established several intensive groundwater use control areas (IGUCAs) and held many water rights abandonment hearings.

Prior to 1981, Kansas had only a few appellate court cases dealing with the KWAA, most of them examining its constitutionality. Since then, including still one more constitutional case, the Kansas appellate courts have decided several cases that clarify various issues regarding abandonment of water rights, standing to contest DWR decisions regarding issuance of permits, condemnation powers of special water districts, and changes in vested rights. In addition, Kansas has been a plaintiff in two U.S. Supreme Court cases, one regarding allocation of the Arkansas River and one regarding the Republican River.

Initial Impact

As stated in the 1981 Article, it is common practice to include a clause in an oil and gas lease in which the lessor grants the lessee the right to use water. Most lease forms in Kansas, including the so-called Producers 88 form lease, contain a “free use” clause granting the lessee the right to use water for its development and operations, except from existing wells of the lessor. While an implied right to use water has been recognized in some states, including West Virginia and Texas, Kansas water rights may be obtained only with a permit from DWR, and, as discussed below, temporary permits are allow-
able and may suffice for initial operations. The landowner must have a water right before the landowner can allow a lessee to use water in the production of oil and gas under the authority of the landowner’s water right. Even then, the owner’s water right is limited to a particular type of use, such as domestic or irrigation, and to divert and use water for any other purpose requires prior permission from DWR. Even if DWR approves changing the use of the water right, DWR must ensure that the consumptive use remains the same. If oil and gas producers plan to utilize a landowner’s water right, the oil and gas producer must carefully evaluate the water right’s current consumptive use and the prospect that a change may increase or decrease the consumptive use. Moreover, KWAA’s Section 728 makes the diversion of water without a permit a criminal offense. That section contains several exceptions that could apply, but the operator needs to confirm that it either has a permit or meets one of the exceptions.

Any version of an oil and gas lease proffered by a producer may be modified by the parties, including an addendum providing that the lessee is not entitled to use any water from the leased premises whatsoever without first obtaining the written consent and approval of the lessor. Lawyers should carefully review any proposed lease for such provisions affecting water. Professor Pierce makes the following comment and recommendation regarding addressing water use to avoid disputes:

Although the lease purports to grant lessee the right to use water, in most cases the landowner will not have any sort of vested right in water on or in his land. Instead, the lessee must obtain a permit to appropriate water from the Chief Engineer of the Division of Water Resources. K.S.A. § 82a-711 (1984). [cites 1981 Article].

* * *

Today, it would seem prudent to address the use of water in detail to avoid later disputes. For example, rights to water from ponds, streams, and wells should be specified. Rights to salt and fresh water produced from oil and gas wells should be granted to the lessee. The scope of “use” should be addressed. For example, can the lessee use water from the lease to conduct enhanced recovery operations? ...

He further recommends that the landowner carefully scrutinize the granting clause “to determine the activities which lessee can conduct on the lease land” because the parties’ rights may conflict. “If the lessor is using water from a pond on the leased land to water cattle, can the lessee use the water to conduct drilling or secondary recovery operations?” he asks. He cites the 1932 pre-KWAA case of Wyckoff v. Brown, which allowed the lessee to use water from a pond on the leased land to support drilling operations, because the lease gave the lessee the right to use water “produced on said land ... except water from wells of lessor.” With the requirement now under Section 1078b of the KWAA that a water right holder may not change the use of a water right without prior permission of DWR, use of that case as justification is no longer valid. If a temporary permit is used, as described in the next section of this article, the need for DWR’s approving the change would be obviated.

According to Professor Pierce, because an oil and gas lease is a profit (the right to enter the land, sever, and take oil and gas) with a number of express and implied easements that facilitate development, and since the water use is coextensive with the development rights, the lessee should have the requisite right of access or control over the water’s point of diversion. Instead of relying upon an implied easement, it may be preferable to state in the lease that such a right is being given. Thus, a lessee may want a lease clause expressly supporting the lessee’s unilateral application for an appropriation permit and explicit access to the permit’s point of diversion. For example, the following clause might be considered:

Lessor gives Lessee permission to apply for a temporary, term, or regular water appropriation right from the Division of Water Resources, for the use of water in Lessee’s oil and gas production, and to use any such water obtained under the authority of such right so long as such use is lawful and within the conditions of the permit and so long as it does not interfere with or impair any water rights held by Lessor, either presently existing or obtained in the future. Lessor hereby gives Lessee access to Lessor’s land for the purpose of supporting any application for such water right, and for drilling, operating, and using any such water well or wells needed under any water rights obtained by Lessee.

**Water Use in Initial Drilling Operation**

As stated in the 1981 Article, for the initial drilling operation, use and installation of equipment, and work by the operator’s employees, a temporary permit and not a full-fledged water right is sufficient. However, temporary rights are subject to curtailment by an impaired senior appropriator. The following comments about temporary permits describe some changes since the 1981 Article.

Section 727 of the KWAA allows temporary permits. DWR regulations provide the details. The DWR website contains a form permit application for temporary permits. The chief engineer may refuse to issue a temporary permit for fresh water if other water is available and its use is technologically and economically feasible. The permit may not be granted for a quantity in excess of 4 million gallons, except for dewatering purposes or water that is to be diverted from a construction site and used on that construction site; it may not be granted for more than one place of use or point of diversion; it may contain conditions necessary to protect the “public interest”; it is limited to a term of six months, but may be extended for good cause shown; it is not transferable or a permanent right; and it has a priority based on the date and time of receipt of the application, that priority terminating on the date set out in the application or any extension of the time authorized. Access to the water supply is required, and DWR’s form application for a temporary permit contains the following admonition:

You must provide evidence of legal access to, or control of, the point of diversion of water, from the landowner.
or the landowner’s authorized representative. Provide a copy of a recorded deed, lease, easement, or other document with this application. In lieu thereof, you may sign the following sworn statement: ... 60

The form also requires the applicant to provide information on the location of the point of diversion, type of use, and place of use.

The 1981 Article stated that groundwater management district (GMD) well-spacing requirements were not applicable to temporary permits. The language in the regulations for GMD No. 1, 51 GMD No. 2, 62 and GMD No. 5 63 refers to well-spacing requirements for a well in a location described in an application for a “permit to appropriate water,” which is understood to be permits for regular water rights. The well-spacing regulations for GMD No. 3 refer to the “minimum horizontal distance between each proposed nontemporary ... well.” 64 However, the well spacing for GMD No. 4, 65 effective first in 1983, seems to cover temporary wells. While the regulation sets out well-spacing distances to be followed for nondomestic, nontemporary wells, 66 it also sets forth a minimum of 800 feet requirement for “each nondomestic well ... from each domestic well” with exceptions empowering the chief engineer to waive the requirement. 67 One ground for such waiver is a case in which “a Theis analysis ... shows that the domestic well is not likely to be impaired by the proposed well.” 68 The small quantities involved in temporary permits would arguably be a reason to dispense with the requirement in these cases. The same might also be said about the 2,640 feet spacing requirement for withdrawals from cretaceous aquifers, found in the same regulation. 69

**Water as a By-Product of Oil and Gas Production**

While generally water diversions require prior permitting in Kansas, the exception described in the 1981 Article found at Section 728 of the KWAA is still applicable. That exception is the production and return of salt water in connection with the operation of oil and gas wells permitted by the Kansas Corporation Commission (KCC) under K.S.A. 55-901. Section 728 still defines salt water as water containing more than 5,000 milligrams per liter chlorides. 70 A KCC permit under K.S.A. 55-901(a) is required to give an operator the right to dispose of the salt water “or waters containing minerals to an appreciable degree” by returning such waters “to any horizon from which such salt water may have been produced or to other horizon which contains or had previously produced” such waters. 71 The two technical amendments to K.S.A. 55-901 since 1981 have not altered its main language.

As stated in the 1981 Article, groundwater was then protected under K.S.A. 55-115 et seq., from salt water leaking through the well casing, but in 1982 the legislature repealed those sections and replaced them with K.S.A. 55-150 et seq. The purpose of the legislation was “improved protection of surface water and groundwater from pollution resulting from oil and gas exploration, production, and well plugging activities.” 72 Prior to drilling “any well,” the operator is required to file an “application of intent to drill” with the KCC, a notice of which is sent to the surface owner. 73 To approve the application, the agent of the KCC must determine “that the proposed construction of the well will protect all usable waters.” 74 The legislation empowered the KCC to adopt rules and regulations to implement the statute for “the protection of the usable water of this state from any actual or potential pollution from any well ... ” 75

The 1981 Article noted “[s]alt water is returned to the ground for two different reasons” – (i) disposal in underground disposal wells and (ii) use in enhanced recovery procedures 76 and that “[b]oth of these procedures are governed by the Kansas Corporation Commission.” 77 The 1981 Article discussed the question of whether these procedures were in accordance with and pursuant to K.S.A. 55-901 because the statute did not specifically refer to either procedure. 78 Neufeld concluded that both the disposal into underground disposal wells and the use of water for enhanced recovery were included within the purview of K.S.A. 55-901. 79 Another issue discussed in the 1981 Article was whether the KWAA Section 728 exception from water permitting extended to additional wells necessary for the production of salt water for fluid repressuring. 80 Neufeld concluded that while the same policy arguments existed for the exclusion, the chief engineer would have the authority under KWAA Section 711 to require an appropriation permit for water other than fresh water. 81

The 1981 Article did not discuss a further ambiguity relating to the KWAA Section 728 exception for an appropriation permit. Such ambiguity deals with salt water produced that is not returned directly or immediately to the ground and whether this water falls under the exception. This ambiguity arises from the language of Section 728 “the production and return” and whether the exception applies only in cases in which the salt water both comes to the surface and is then returned, either for storage or enhanced recovery. Generally, salt water is injected back into the subsurface. 82 The question is whether salt water produced as a by-product that is not returned to the subsurface requires an appropriation permit. One example would be brine used in road construction and maintenance. K.S.A. 55-904, the penalties section for salt water disposal, states that the section does not “prohibit the spreading of salt water on road beds under construction or maintenance if such spreading” complies with Kansas Department of Health and Environment (KDHE) regulations. KDHE has regulated such use since 1982. 83 Another example would be use of the salt water to extract valuable chemicals, such as iodine, if they could be extracted economically. 84 But even after use of such saltwater, the residual would likely have to be injected into the subsurface. 85 As fresh water resources have dwindled, “reuse” of water from municipalities, irrigation, and industry has become increasingly important, and oil field brine could be sufficiently cleaned up for some uses. 86 The “reuse” of water (i.e., using the water again after a first use for the same purpose or for a different purpose) has become an important topic in Western water law, because reusing water can increase the consumptive use to the detriment of other appropriators. 87 Oilfield brine used for road construction and maintenance or desalinated for beneficial use would not fit the “production and return” exception of KWAA Section 728. K.A.R. 5-1-1(fff) addresses some of these issues because it limits the definition of “the production and return of saltwater” to “saltwater actually produced during the pri-
mary production of oil and gas wells.”88 The definition does not include saltwater produced and used in the initial drilling of the well and saltwater injected into an enhanced recovery injection well unless the saltwater was produced during the primary production of the well.89 Although this regulation limits the exception regarding the production of saltwater, the regulation does not limit the reuse or return of that water. The water can still be returned to the same horizon.90

Coalbed Methane. A related topic not discussed in the “Water as a By-Product of Oil and Gas Production” section of the 1981 Article is coalbed methane (CBM) production. Like fracing, discussed in the next section, these subjects have become extremely important and controversial in the last few decades, and legal aspects of these subjects deserve much detailed and critical analysis. Our coverage is narrowly focused on the water allocation aspects in Kansas, and is superficial, generally only suggesting the issues and not analyzing them in depth.

The U.S. Geological Survey (USGS) states:

Methane (natural gas) ... occurs in association with coal, ... and ... [b]ecause coal has such a large internal surface area, it can store surprisingly large volumes of methane-rich gas ... [much of which] ... lies at shallow depths. ... To produce methane from coal beds, water must be drawn off first ... [and] ... [t]his water, which is commonly saline but in some areas can be potable, must be disposed of in an environmentally acceptable manner.”91

In Kansas, the number of CBM wells increased from a total of five in 1981 to more than 1,300 in 2004 with most activity confined to the eastern third of the state and predominantly in five counties in the southeast.92 The peak year for CBM drilling was 2006 and for CBM production was 2008.93

The same issues and concerns discussed above, and others, are applicable to water produced as a by-product of CBM production. Four issues are briefly addressed regarding the permitting requirements under KWAA Section 728: (1) If the exceptions to Section 728 were deemed not to excuse this diversion of water from permitting requirements, could a producer successfully argue that an appropriation permit is not necessary anyway because this water is diverted only as an incidental part of the process and not for beneficial use of the water itself? If a permit is required because DWR deems this process to be a beneficial use of water, then three additional issues are raised: (2) What if the water is not “produced and returned” to the subsurface? (3) Is coalbed methane the same as the “gas” mentioned in Section 728? and (4) What if the water is not salt water as defined in Section 728?

(1) Is permitting required for water diverted that is only incidental to the ultimate object of the project (methane production)? Even if the requirements for an exception on Section 728 were not met, a CBM producer might argue that DWR should not require a permit because the water diverted is only incidental to the process, that the diverted water is in fact only a nuisance, and that such diversion is therefore not a “beneficial use” of water, which is a basic underlying premise of the KWAA. This argument arose in Colorado in 2009 in Vance v. Wolfe.94 The Colorado Supreme Court determined that extracting and storing the water to accomplish the specific purpose of retrieving CBM was a beneficial use under the Colorado Ground Water Management Act, because “the use of water in the CBM production is an integral part of the CBM process itself,”95 and although the purpose of CBM production is not obtaining water, it is the “inevitable result.”96 The Court based its decision in part on the fact that Colorado has determined that gravel pits that create ponds constitute “wells’ for the purpose of obtaining water by appropriation for the ‘beneficial use’” even though the purpose of the gravel pits is not to obtain water.97 In Kansas, the KWAA requires an appropriation permit for water evaporated from sand and gravel pits if the pit is opened in an area of high “average annual potential net evaporation.”98 A separate regulation defines “substantially adverse impact on the area groundwater supply,” based on average annual potential net evaporation, which varies across the state.99 Thus, Kansas does recognize the need to obtain an appropriation permit in some cases involving diversions or extractions of water that are only incidental to the main objective of the project. A Kansas court could potentially follow the Vance rationale and require a permit for CBM, but it is not clear whether such use would constitute an “industrial” use as currently defined by DWR regulations.100

If not, DWR might have to create and define a new beneficial use in K.A.R. 5-1-1.

(2) Water produced but not returned: While some CBM producers would generally view the water as a nuisance, in some places in the United States, water is not returned to the ground, and indeed is put to beneficial use.101 In Kansas, the failure to return the water to the ground would arguably give rise to an appropriation permit requirement, as discussed above.

If the CBM water is deemed an exception to appropriation right permitting requirements pursuant to KWAA Section 728, K.S.A. 55-901 referenced therein requires the water to be returned “to any horizon from which such salt waters may have been produced, or to any other horizon which contains or had previously produced salt water ... in an appreciable degree ....” Over the life of a well, the amount of water produced can be large,102 and in some places, re-injection requires finding a geologic area large enough to store the water.103 Section 55-901 contains no geographical restriction on the location of the reinjection, just the requirement of a horizon previously containing salt water. However, if the water were to be disposed of across state lines,104 K.S.A. 82a-726 would come into play, requiring prior DWR approval if anyone intends to “divert and transport water produced from a point or points of diversion located in this state for use in another state ...”105

(3) Methane the same as KWAA Section 728 “gas?” While methane is the main component of natural gas,107 “coalbed methane can be distinguished from traditional natural gas in a number of ways ...,”108 so the legal question is whether coalbed methane is the same as the gas referred to in KWAA Section 728. The KWAA and accompanying regulations do not define oil and gas. One non-KWAA statute defines “oil and gas” as “crude oil, natural gas, casinghead gas, condensate, or any combination thereof,”109 while another defines “natural gas” as “gas either while in its original state or after the same has been processed by removal therefrom of component parts not essen-
tial to its use for light and fuel.” Regulations accompanying these statutes define “coalbed natural gas” to mean “natural gas produced from either coal seams or associated shale.” A regulation defines “gas” as “the gas obtained from gas or combination wells, regardless of the chemical analysis.” The Kansas Supreme Court in Central Nat. Res. v. Davis Operating Co. defined CBM as a “gas” and not as “coal.” Reading these definitions harmoniously and concurrently with Central Nat. Res., one may conclude that CBM is a natural gas that falls under the terms “oil and gas” in KWAA Section 728 and accompanying regulations. Although unlikely, if coalbed methane were not deemed to be “gas” within the meaning of KWAA Section 728, then coalbed methane producers would need to follow the KWAA and its rules and regulations.

(4) Is saltwater, as by-product of CBM, “saltwater” as defined in KWAA Section 728? To meet the definition of Section 728 and qualify as an exception to appropriation permitting, the water must contain more than 5,000 milligrams per liter chlorides. Although not potable in Kansas, much of the water produced during CBM extraction in other states is “drinkable, irrigable, or usable for stock watering.” The salinity determination would have to be made on a well-by-well basis. Salinity can vary by basin and depth. The salt content of the produced water can change during CBM production. Sometimes a well might begin producing water that does not meet the Section 728 exemption, but the salinity might increase as drilling continues. If Kansas CBM production involves water at lower chloride levels, the water would not fall within the Section 728 exception.

Water Use in Secondary or Enhanced Oil and Gas Recovery

This section of the 1981 Article dealt with two topics – (i) the need for an appropriation permit for such activity and (ii) the attachment of the water right to real estate interests. It began with a brief description of enhanced recovery and the need in many enhanced oil recovery techniques for the use of fresh water. That description has not changed, with the exception of one cited statute. When fresh water is needed, an appropriation permit is required, and this process is described in more detail in the last section of this article.

Fracturing. What was not mentioned in the 1981 Article was the subject of “fracturing” or “fracking,” often spelled “fracing,” which is increasingly important in Kansas and elsewhere. A USGS publication states the following:

To produce commercial amounts of natural gas from such fine-grained rock, higher permeability flowpaths must be intercepted or created in the formation. This is generally done using a technique called hydraulic fracturing or a hydrofrac, where water under high pressure forms fractures in the rock which are propped open by sand or other materials to provide pathways for gas to move to the well. Petroleum engineers refer to this fracturing process as stimulation.

Public interest issues associated with obtaining a water appropriation permit for fracking activities are discussed below in the last section of the article.

Even though the water requirements for single fracking projects are relatively small, compared, for example, to irrigation, a water appropriation permit of some kind (regular, temporary, or term) would be required for fracking, with two exceptions: (1) salt water used under the exception noted above in Section 728 of the KWAA; and (2) small amounts used from a public water supply. Moreover, a well may be fraced multiple times over its life. If the time intervals between fracing exceed five years, issues of abandonment of an appropriation right would arise, which is another reason temporary or term permits are generally more appropriate, and obtained in succession if necessary for multiple fracking situations.

Attachment of Water Right to Real Estate Interest. This section on enhanced recovery in the 1981 Article dealt in large part with the question of attachment of a water right to land. Because the oil and gas lessee would be applying for a water appropriation permit for this recovery process and using the water on lands of another, and because Kansas water rights “attach to the land on or in connection with which the water is used and ... remain subject to the control of the owners of the lands ...,” the 1981 Article discussed the various interests in land to which such an appropriation right could attach—the surface estate, the severed mineral estate, and the oil and gas leasehold. It noted that the definitions in the KWAA do not define land, but that the Groundwater Management District Act does. The article then states: “To which lands the rights to the beneficial use of water attach will be of crucial importance to the oil and gas lessee, as the owner of such land shall control the right to use the water.” Control of the water right could also include the power to transfer: KWAA Section 701(g) states that the water right “passes as an appurtenance with a conveyance of the land by deed, lease, mortgage, will or other disposal, or by inheritance.” Thus, if the water right were deemed appurtenant to, say, the mineral rights as opposed to the surface right, a transfer of the mineral rights would include the water right.

The KWAA is not clear on the attachment issue. However, the arguments made in the 1981 Article that “the legislature contemplated the attachment of the right ... to only the surface estate” are still valid, even though the Article’s supporting statutes and regulations cited have been amended. Section 709 of the KWAA still requires the permit applicant to show the “location of the ... use of the water,” and Section 710, unchanged since 1945, pertains mainly to DWR’s return of the application for correction, but requires maps to show the location of pipe lines and other physical structures used to convey water. K.A.R. 5-3-4 has been amended in other respects since 1981, but still requires “an aerial photograph or a detailed plat ... [showing] ... the location of the place of [water] use ... identified by crosshatching or by some other appropriate method.”

On the question of whether a water right could conceivably attach to a severed mineral estate, the 1981 Article aver that because KWAA Section 708a stated (and still does) that the right to use water “shall attach to the lands on or in connection with which the water is used,” an oil and gas lessee could argue that “the water is not being used either on or in connection with the surface estate but in connection with the
mineral estate.”134 Supporting the notion of separate surface and mineral estates, the 1981 Article cited the 1977 version of K.S.A. 79-420, which required mineral interests to be taxed separately from the “fee of such land.” Although the legislature amended that section in 1982, the relevant language is the same. Thus, the remaining arguments for recognizing the possible attachment of the water right to the mineral interest are as valid today as in 1981.

The same is also true with possible attachment of the water right to the oil and gas leasehold. The statutes cited on venue in actions concerning real property,135 on actions for possession of real property,136 and on writs of execution137 have not changed since 1981 and still indicate that oil and gas leases are treated as real property in those cases. The Kansas appellate court cases cited in the 1981 Article have not been overruled, even though the cited case law indicates that the leasehold is for some purposes to be considered as personal property and in others as real property.138 And, as concluded in the 1981 Article, if the water right were considered to be attached to the leasehold interest, the “parties to the lease would then be analogous to the owners of the lands” [citing KWAA Section 708a] and would thereby control the beneficial use of the water perfected under such an application.139 The final paragraph of this section of the 1981 Article makes several arguments as to why such attachment would be desirable, but, as discussed in the Policy and Suggestions section below, the 1981 Article did not recommend a statutory change to effect that result, but instead suggested a practical solution to aid the holder of the leasehold.

Policy and Suggestions

The Policy and Suggestions section in the 1981 Article stated that Kansas “allows any person to appropriate water on any land.”140 Section 708a of the KWAA states that any person “may apply for a permit to appropriate water ... notwithstanding that the application pertains to the use of water ... upon or in connection with the lands of another.”141 But 2010 amendments to Section 709 now require a “sworn statement or evidence of legal access to or control of the point of diversion from the landowner ....”142 DWR regulations require an applicant for an appropriation permit to have legal access to both the point of diversion and the place of use.143 And, as noted above, temporary permits require access to the source of water supply.144

On the question of whether the water right attaches to the surface interest, the mineral interest, or the leasehold interest, the Policy and Suggestions section of the 1981 Article said that the answer is “unknown” and that at that time there had been no court interpretations of KWAA Section 708a. That is still the case. The 1981 Article made the following suggestion:

... [T]he oil and gas lessee can be protected from the loss of the right to use the water. While the owner of the land to which the water right attaches has the right to control the use of the water, he or she also may transfer that right to the oil and gas lessee. [citing KWAA Section 701(g)] By agreement with surface and mineral estate owners the oil and gas lessee can obtain the control of the water right and, subject to the rights of prior appropriators, insure his or her right to use water in enhanced oil recovery operations.145

While the 1981 Article questioned the rationale for attaching the water right to the surface interest,146 it made no policy recommendations, such as proposing a change in the KWAA to state clearly that a water right for industrial use (enhanced production) would attach either to the mineral interest or the leasehold. We likewise affirm the notion that the KWAA should not be amended to clarify the issue, but that this issue should be left to contract among the parties.

Obtaining an Appropriation Permit

The essence of obtaining an appropriation permit detailed in the last section of the 1981 Article has not changed over the years. This section described the core of water allocation law set in place in the original KWAA in 1945. We quote below the entire section, only to add legal authority in footnotes to the statements in the text, as the 1981 Article omitted those references. In three places shown in italics, we also note additions to the law and provide an amplification to a statement. These references would hopefully aid a reader conducting legal research on related issues. Finally, at the end of the quoted material we add a paragraph on term permits (as an alternative to a temporary or regular permit) and some thoughts about the public interest element required of the chief engineer when assessing an application for an appropriation right or a change in the type of use, place of use, or point of diversion.

From the 1981 Article:

With the exception of the production and return of salt water, no oil and gas operator or lessee may acquire an appropriation right to the use of water without first filing an application for a permit to appropriate water with the Chief Engineer of the Division of Water Resources.147 If the proposed use of water meets the criteria established by statute, the Chief Engineer must approve the application for a permit.148 Such approval constitutes a permit for the applicant to proceed with construction of diversion works and to take other steps necessary to put the amount of water specified in the application to the beneficial use specified in the application.149 Upon completion of the diversion works, the applicant notifies the Chief Engineer who, after inspection and a determination that the water has actually been put to a use conforming to the application, issues a certificate of appropriation.150

The certificate of appropriation represents an appropriation right to divert a specified amount of water151 from a definite water supply at a specified rate of diversion and to apply such water to a specified beneficial use or uses.152 Such appropriation right is subject to all vested or prior appropriation rights to divert and use water from the same source of supply,153 and is also subject to minimum desirable streamflow requirements.154 The priority of an appropriation right except for domestic use is based on the time of filing an application for a permit to appropriate water.155
A water right includes both vested rights and appropriation rights.\textsuperscript{156} It is a real property right appurtenant to and severable from the land on or in connection with which the water is used.\textsuperscript{157} Such rights, unless severed, pass with conveyance of the land.\textsuperscript{158}

Even though the oil and gas operator may feel that he or she is currently drowning in a flood of governmental regulations and paperwork, the benefits accruing from an appropriation right for the use of water far outweigh the burden of applying for and perfecting such a right. First, appropriating water without a permit is unlawful and punishable as a class C misdemeanor.\textsuperscript{159} Moreover, the potential value of a right to use water in an agricultural state with diminishing water supplies is inestimable. A water right may be leased, sold, assigned or otherwise transferred,\textsuperscript{160} and the intended use to be made of the water may be changed upon approval from the Chief Engineer. \textsuperscript{161} “Temporary permits, however, are not transferable.”\textsuperscript{162} A wise oil and gas operator will recognize the value of such a right and take all steps necessary to properly obtain and perfect a right to appropriate water in Kansas.

Temporary permits were discussed in the 1981 Article, and the changes in the law since then are shown in some detail above.\textsuperscript{163} Term permits were not discussed in the 1981 Article. While temporary permits would generally be appropriate for the initial drilling operation, term permits would likely be more appropriate for CBM production and fracing.\textsuperscript{164} K.S.A. 82a-708c, enacted in 2009, allows term permits, defined as a “permit to appropriate water for a limited specified period of time in excess of six months,” at which time it is automatically dismissed unless the chief engineer extends the time.\textsuperscript{165} Further definition is given in the regulations: “‘Term permit’ means a permit to appropriate water that is issued for a specific period of time and exceeds the criteria for a temporary permit specified in K.S.A. 82a-727.”\textsuperscript{166} Term permits in general are limited to five years, but may be extended by the chief engineer.\textsuperscript{167} But term permits “for the use of water containing more than 5,000 milligrams of chlorides per liter of water may be initially issued for not more than 10 years and may be extended in increments of not more than 10 years, for a total period not to exceed 20 years.”\textsuperscript{168} As in the case of temporary permits,\textsuperscript{169} no water right is perfected pursuant to a term permit.\textsuperscript{170} Thus, a term permit for the oil and gas producer would be an alternative to a temporary permit, especially in cases of the need to use more than 4 million gallons or the need to exceed six months in operation.

The Public Interest

An element in the consideration of the chief engineer in deciding whether to grant a permit for an appropriation right under KWAA Section 711 or for a change in the type of use, place of use, or point of diversion of Section 708b is the public interest.\textsuperscript{171} Public interest analysis becomes more important as water resources dwindle and climate change manifests itself. If appropriation rights are required for CBM or for fracing, as discussed above, other water right holders and the public will have the opportunity to object to the approval of appropriation rights by the chief engineer.\textsuperscript{172} Neither Section 711 nor 708b defines the public interest. The definition found in K.A.R. 5-3-9 seems to focus only on the public interest aspects of protecting water users and aquifers.\textsuperscript{173} Other, broader conceptions of the public interest exist in the vernacular,\textsuperscript{174} statutes,\textsuperscript{175} and regulations.\textsuperscript{176} Courts have had to construe and apply statutory public interest language to specific project proposals.\textsuperscript{177} Scholars have made proposals concerning public interest analysis.\textsuperscript{178} Professor Grant noted that public interest reviews through the 1960s were primarily for the purpose of maximizing economic development.\textsuperscript{179} Then, states began enacting statutes that balanced economic values with other considerations like recreation, flood damage, cultural values, aesthetics, water quality, and fish and wildlife benefits.\textsuperscript{180} Grant suggests other variations, including the consideration of secondary project effects and externalities; maximization of benefits to the community considering all effects, not just policy found expressly in statutory laws; and the consideration of a broader view of the community, both geographical (local and regional) and temporal (present as well as future residents).\textsuperscript{181}

The Kansas definition of public interest in the DWR regulation is very narrow compared to definitions from other states. Issues raised in both water allocation and water quality under CBM and fracing and other oil and gas recovery methods could raise the importance of the public interest and suggest a broader view.

Conclusion

Kansas water allocation law has changed immensely over the last 30 years. But the core principles of the law, “first in time, first in right” and “use it or lose it,” remain intact. The system governing application and enforcement of those principles has led to more regulations and abandonment hearings. These changes impact oil and gas producers as they impact all water users. In the future, the legislature, DWR, and the courts will need to clarify some of the issues raised in this article, such as whether water derived incidentally from oil and gas production is a beneficial use of water, whether CBM is included in the definition of oil and gas, and to what extent they should limit reusing water produced during oil and gas recovery. Regardless of whether these issues are resolved, over the next 30 years oil and gas producers will need to adjust to changes in the water allocation system and wider application of public interest analyses in regulatory decision making.

About the Authors

Eva N. Neufeld is associate general counsel with TransCanada Corp. Located in Houston, she and her staff provide legal counsel in the areas of commercial and regulatory law for five of TransCanada’s interstate natural gas pipelines located in the United States. She obtained a Bachelor of Arts in history from Kansas State University in 1977 and a Juris Doctor from the University of Kansas School of Law in 1981. A proud Kansan, each January 29th she drafts and distributes “The Kansas Quiz,” sharing the wonders of Kansas and its people with friends and colleagues worldwide.
Adam C. Dees is an associate attorney with Vignery & Mason LLC in Goodland. Vignery & Mason is a small-town, general practice law firm that provides legal counsel on land transactions, water law, estate planning and probate, criminal law, family law, and litigation. Dees obtained a Bachelor of Arts in communications from Southwestern College in Winfield in 2008 and a Juris Doctor from the University of Kansas School of Law in 2011.

John C. Peck is a Connell Teaching Professor of Law at the University of Kansas School of Law, where he has taught since 1978. A native Kansan, he obtained a Bachelor of Science in civil engineering from Kansas State University in 1968 and a Juris Doctor from the University of Kansas School of Law in 1974. From 1974-78, he was a partner in the law firm of Everett, Seaton & Peck in Manhattan. At KU, he teaches courses in water law, land transactions, contracts, and family law, and he writes and lectures on water law issues. He has served as special counsel to Foulston Siefkin LLP since 1996.
47. Email from Professor David E. Pierce to John C. Peck, March 25, 2012 (on file with John C. Peck).
48. K.A.R. 5-9-1 through 5-9-11. Section 5-1-1 contains a definition of “term permit” (5-1-1(ceee)), but not “temporary permit.” Several other DWR regulations refer to temporary permits, mostly excluding them from strictures limiting regular water rights, such as a stratigraphic log for a test hole (5-3-4d); a water level measurement tube (5-3-53); various closings of areas to new permits (5-3-11(d)(5), 5-3-26, 5-3-29, and 5-25-4(4)); groundwater management district (GMD) regulations relating to safe yield (5-21-4(c)(2) and 5-24-2(b)(5)); GMD review of permit and change applications (5-22-12(c)(8)); and GMD water flow meter requirements (5-25-5).
54. K.A.R. 5-9-6. For a definition of “public interest,” see K.A.R. 5-3-9. See also discussion below in the section on Obtaining an Appropriation Permit.
57. K.S.A. 2010 Supp. 82a-727(c).
60. “Application for Temporary Permit.” Form provided on website at note 49, supra [emphasis in original].
61. K.A.R. 5-21-3(a).
64. K.A.R. 5-23-3 (high plains aquifer), and 5-23-31 (confined aquifers).
69. K.A.R. 5-24-3(a)(6).
70. K.S.A. 82a-728.
71. K.S.A. 55-901(a).
72. Kansas Legislature Summary of Legislation 1981. Leg. Res. Dept., at p. 45 (June 1981). K.S.A. 55-150(c) defines “fresh water” as “water containing not more than 1,000 milligrams per liter, total dissolved solids,” and K.S.A. 55-150(t) defines “usable water” as “water containing not more than 10,000 milligrams per liter, total dissolved solids.”
73. K.S.A. 55-151(a). K.S.A. 55-151(b) also states that no change in the use of a well may be made without the approval of the KCC.
74. K.S.A. 55-151(b).
75. K.S.A. 55-152(a). However, for regulations relating to “wells providing catastrophic protection to prevent corrosion to lines” these rules are not permitted to “preempt existing standards and policies adopted by ... groundwater management district[s] if such standards and policies provide protection of fresh water to a degree equal to or greater than that provided by such rules and regulations.” K.S.A. 2010 Supp. 55-153 established a 12-member advisory committee, to include one member representing GMDs. The committee is charged with meeting quarterly and making recommendations on oil and gas activities including “all matters pertaining to the protection of waters of the state from pollution relating to oil and gas activities.” K.S.A. 55-154 requires the operator to certify compliance with K.S.A. 55-151 and the regulations. K.S.A. 2010 Supp. 55-155 requires licensure of operators. K.S.A. Supp. 2010 55-156 sets forth requirement for protection of usable groundwater when wells are plugged. K.S.A. 55-157 requires cementing of all wells below the fresh water strata, as well as “additional pipe ... necessary to protect from pollution and from loss through downward drainage any usable water.” K.S.A. 55-158 requires submission of “bond logs or other surveys for surface casing” upon request of the KCC. And K.S.A. 55-159 and -160 require notification prior to setting surface casing, plugging, or re-entering plugged wells. Other sections pertain to KCC powers regarding investigation of abandoned wells (K.S.A. 55-161); hearing procedures on perceived violations (K.S.A. 55-162); interagency agreements (K.S.A. 55-163); and administrative penalties (K.S.A. 2010 Supp. 55-164) (up to $10,000 per day). Legislative additions after 1982 provide for creation of a KCC database of all oil and gas wells in the state (K.S.A. 55-165); a well-plugging assurance fund (K.S.A. 55-166 to -168); requirements and rules governing the storage, disposal, and escape of salt water (K.S.A. 55-171 to -173 and -175 to -184, and K.S.A. 55-2010 Supp. 173), spill notification (K.S.A. 2010 Supp. 55-193), and pollution remediation (K.S.A. 55-191 & -192, and K.S.A. 2010 Supp. 55-193).
76. 1981 Article, at 47-48. Footnote 18 cites K.S.A. 55-133, which was repealed in 1982. That section had provided that the well operators could introduce water under pressure for the purpose of recovering oil and gas, but only with the prior approval of the KCC. Enhanced oil recovery refers to methods of extracting oil beyond primary and secondary methods, and it includes any process involving the injection of fluids into an oil pool to increase the recovery of oil or gas. See K.A.R. 82-3-101(a)(29).
77. Id. 78. Id. at 48.
79. This conclusion on enhanced recovery was based on a statement made in a special committee report to the legislature in 1976. See footnotes 10 and 19 in the 1981 Article. The conclusion on disposal wells was based on the 1977 version of K.S.A. 55-1003, which although amended twice since 1981 remains essentially the same. It empowers companies to own and maintain facilities for brine disposal, and it requires prior approval by the KCC for the plans and specifications for such works.
81. Since 1977, K.S.A. 82a-711 has stated that “the chief engineer shall approve all applications ... made in good faith ... except that the chief engineer shall not approve any application submitted for the proposed use of fresh water in any case where other waters are available for such proposed use and the use thereof is technologically and economically feasible” (emphasis added). As discussed below in the text at notes 99-100, in a related but not identical situation, Colorado seems to have done just what Neufeld concluded the Kansas chief engineer would have the power to do – require a permit when water is incidentally extracted in CBM production. See Vance v. Wolfe, 205 P.3d 1165 (Colo. 2009); cf. William F. West Ranch LLC v. Tyrrell, 206 P.3d 722 (Wyo. 2009).
82. See “Petroleum: a primer for Kansas,” KGS Education, at 13 (on-line at http://www.kgs.ku.edu/Publications/Oil/primer13.html), which states: “After the oil, gas, and water have flowed ... to the surface ... [and the oil is separated from the water] ... [the] water is either put into a saltwater-handling facility such as a lined pit or tank, or into a flow line to a disposal well where it will be disposed of underground.” Dr. Don Whittemore, Senior Scientific Fellow, Environmental Geochemistry, KGS, provided the following information:
Saltwater was stored in on-ground lagoons in the early days of the oil fields. Unfortunately, although some operators might have thought that these were ‘evaporation’ pits that would allow the water to be evaporated and the salt retained in the surface pits, most soon realized that they were actually recharge lagoons. Sometimes the berms around a lagoon would be breached (either accidentally or on purpose) and the saltwater would flow across the land (which can be seen as saltwater scars emanating from old pit locations in old aerial photos). As a result, fresh ground water became contaminated, especially where the pits overlay shallow aquifers such as the Equus Beds aquifer in Harvey, Reno, McPherson, and Sedgwick counties. The Burtrton Intensive Groundwater Use Control Area in GMD2 was formed as a result of this contamination. ... Some cement-lined lagoons were later used, but these were also found to leak and are no longer allowed.
In the current operation of oil and gas wells, the saltwater is separated from the oil and gas and then injected into the subsurface ... Sometimes the saltwater is stored in a tank and then trucked to a site with a disposal well and injected into the subsurface.
* * *
Temporary surface pits are allowed for storing saltwater produced during the drilling of an oil and/or gas well, the workover of an existing well, an emergency, and other instances. ...
Email from Don Whitemore to John Peck, December 30, 2011 (copy on file with John Peck).

K.S.A. 55-901 allows the saltwater to be returned either to “any horizon from which such salt waters may have been produced, or to any other horizon which contains or had previously produced salt water or waters containing minerals in the appreciable degree ... .”


84. According to Dr. Whitemore: “Starting in 1977, saltwater has been pumped from a particular subsurface formation in northern Woodward County and southern Harper County, Oklahoma (the latter county borders Clark County in Kansas) for the extraction of iodine.” Email from Don Whitemore to John Peck, December 30, 2011 (copy on file with John Peck).

85. “The processed brine is reinjected into the same formation from which it was pumped to maintain reservoir pressure.” Id.

86. See http://www.pc.tamu.edu/gpri-new/home/BrineDesal/MembraneWkshpAug06/Burnett8-06.pdf (discusses Texas A&M study on desalinating oilfield brine for beneficial use). For Clean Water Act implications of discharging into navigable waters such produced water that has a use in agriculture or wildlife, see 40 C.F.R. Part 435, especially 435.50 & 435.51.


88. K.A.R. 5-1-1(ff).

89. Id.

90. See K.S.A. 82a-728 and K.S.A. 55-901.


93. “The peak year for drilling CBM wells in Kansas was 2006 when 1,598 wells were drilled, but in 2010 only about 30 wells were drilled.” “Kansas Oil Production Rises, Gas Production Declines in 2010,” News Release, Kansas Geological Survey, June 30, 2011, at http://www.kgs.ku.edu/General/News/2011/oil_gas.html.

94. 205 P3d 1165 (Colo. 2009). At the same time, the Wyoming Supreme Court decided William F. West Ranch LLC v. Tyrrell, 206 P3d 722 (2009), holding that objectors to a CBM project did not have standing in a declaratory judgment action because they had failed to allege a connection between a state obligation and a particular harm suffered.

95. Id. at 1167.

96. Id. at 1170.

97. Id.

98. K.S.A. 2010 Supp. 82a-734(b) (high “average annual potential net evaporation” means greater than 18 inches per year). Similar requirements exist for “hydraulic dredging.” See K.A.R. 5-1-1(a) (hydraulic dredging listed as a “beneficial use”); K.A.R. 5-1-1(l) (defines hydraulic dredging); K.A.R. 5-1-1(q) (“industrial use” does not include hydraulic dredging, but includes evaporation from sand and gravel pits if the evaporation has a substantially adverse impact on the area groundwater supply); K.A.R. 5-9-1b(b)(2) (term permits for hydraulic dredging); and K.A.R. 5-13-4 (exemptions from safe yield regulations).


100. CBM water production does not neatly fit the definition of either “industrial use” or “dewatering.” “Industrial use” under K.A.R. 5-1-1 (qq) includes use of water in connection with “secondary and tertiary oil recovery,” but CBM removal is not secondary or tertiary recovery. CBM, however, may fit the broad definition of that section: “use of water in connection with ... production ... of products ... .” The process is referred to in the industry as “dewatering.” Robert S. Sawin and Lawrence L. Brady, “Natural Gas from Coal in Eastern Kansas,” KGS, Public Information Circular (PIC) 19, at 1 (Nov. 2001), available at http://www.kgs.ku.edu/Publications/pic19/pic19_1.html (hereinafter “Sawin and Brady”). However, K.A.R. 5-1-1(a) limits “dewatering” to construction activities or protection of buildings or mining activity.

101. “CBM-produced water is also disposed of on the surface. Typical disposal methods include placement in lined pits (to allow for evaporation), unlined pits (to allow the water to seep into shallow aquifers), dust suppression, air spraying (which allows for evaporation), or traditional beneficial uses, such as irrigation, stock watering, wildlife habitat enhancement, and even use as municipal drinking water.” C. Barrett, Fitting a Square Peg in a Round (Drill) Hole: The Evolving Legal Treatment of Coalbed Methane-Produced Water in the Intermountain West, Environmental Law Reporter News & Analysis (Sept. 2008), at 9 (citing the brief for Defendant-Intervenor BP America at 22-23, from Vance v. Wolfe, 205 P3d 1165 (Colo. 2009)).

102. See text at notes 82-90, supra.


106. K.S.A. 2010 Supp. 82a-726.

107. “Methane, the main component of natural gas, has been a product of the petroleum industry for years ... Coalbed gas is mainly composed of methane (CH4), the principal constituent of natural gas.” See Sawin and Brady, supra note 100, at 1, 3.


110. K.S.A. 55-1201(b).


115. “Unlike western states’ CBM water, Kansas CBM water is salin and not potable.” Email from Dave Newell (KGS) to John C. Peck, March 22, 2012 (on file with John Peck).


117. Id. at 544. “Water quality indicators vary across and even within basins, depending on the depth of the methane, geology, and environment of the deposition.” (citing Vito Nuccio, “Geological Overview of Coalbed Methane,” presentation at the U.S. Geological Survey Coalbed Methane Field Conference (May 9-10, 2001)).

118. See id. “In general, the deeper the coalbed, the less the volume of water in the fractures, but the more saline it becomes.” (citing Nuccio)

119. Some of the discussion above in the section on water as a by-product is also germane to enhanced recovery.

120. See K.S.A. 55-133, cited in footnote 24 to the 1981 Article, which provided expressly for the KCC approval of applications for the injection of water or other fluids into formations for the purpose of recovering oil and gas. That section was repealed in 1982 and replaced by K.S.A. 55-151, which is broader in scope and covers approval of “any well,” with “well” defined in K.S.A. 55-150 to include “a hole drilled ... for the purpose of (1) producing oil or gas; (2) injecting fluid, air or gas in the ground in connection with the ... production of oil or gas.” See also K.A.R. 82-3-400 to -412 regarding disposal and enhanced recovery well rules.

121. “It has been used for up to 60 years but is attracting new attention because of increased use in northwest Kansas, where analysts


126. See K.S.A. 82a-1021(f), which defines "land" as "real property as that term is defined by the laws of the state of Kansas." The rules of construction found in K.S.A. 2010 Supp. 77-201 Eighth states that "land," "real estate," and "real property" together include "lands, tenements and hereditaments, and all rights to them and interest in them, equitable as well as legal"; Tenth states that "property" includes personal and real property; and Ninth states that "personal property" includes "money, goods, chattels, evidences of debt and things in action."

127. 1981 Article, at 50.

128. K.S.A. 2010 Supp. 82a-701(g).

129. 1981 Article, at 50.


131. Id.

132. K.A.R. 5-3-4.


134. 1981 Article, at 50.


137. K.S.A. 60-2401.

138. See cases cited in 1981 Article, at 51.

139. 1981 Article, at 51.

140. Id. at 53. That section also stated that "Oklahoma still requires ownership of the land or a valid lease from such owner for certain appropriations of water," and that "Colorado imposes no requirement that the appropriator own the land or attach the right to use such water to a particular interest in land." Id. We state no opinion on the current validity of those statements.

141. K.S.A. 2010 Supp. 82a-708a(a).

142. K.S.A. 2010 Supp. 82a-709(g).

143. K.A.R. 5-3-3a states that "[i]f the chief engineer is aware, or becomes aware, that the applicant does not have legal access to either the appropriation body, or to a sufficient supply of water to meet the need."

144. See text at notes 59 and 60, supra. K.A.R. 5-9-11.


146. The following statements are found in the section on Water Use in Secondary or Enhanced Oil and Gas Recovery in the 1981 Article: "The water used in enhanced recovery techniques is intended to increase the production of oil and gas and thereby benefit both the mineral estate owner and the oil and gas lessee. One could certainly question the rationale for attaching the right to this use of water to the surface estate. Moreover, this attachment would posit the control of such use of water with the surface estate owner, a party foreign to both the oil and gas lease and its purpose." 1981 Article, at 50. The surface owner would counter that he or she certainly has an interest in the effects of the water use on the surface or on the groundwater, to which the surface owner might hold domestic or other water rights.

147. K.S.A. 82a-728.


149. K.S.A. 82a-712.


151. See K.S.A. 82a-711a.

152. K.S.A. 2010 Supp. 82a-701(f) & -711; K.S.A. 82a-712; and K.S.A. 2010 Supp. 82a-714.

153. K.S.A. 2010 Supp. 82a-707(b) & (c) and K.S.A. 82a-717a.

154. K.S.A. 82a-703a to -703c.

155. K.S.A. 2010 Supp. 82a-707(c). That section states that the "priority ... to use water for domestic purposes shall date from the time of the filing of the application therefor ... or from the time the user makes actual use of water for domestic purposes, whichever is earlier."

156. K.S.A. 2010 Supp. 82a-701(d) & (f). See also K.S.A. 82a-703, -704a, and -717a.

157. K.S.A. 2010 Supp. 82a-701(g).

158. Id.

159. K.S.A. 82a-728.

160. The KWAA is silent on the details of these transactions, except for K.S.A. 2010 Supp. 82a-701(g) (defines "water right" and states that "such water right passes as an appurtenance with a conveyance of the land by deed, lease, mortgage, will, or other disposal or by inheritance") and K.S.A. 2010 Supp. 82a-708b (permits changes in type of use, place of use, and point of diversion). See gen. John C. Peck, Leland E. Rolfs, Michael K. Ramsey, & Donald L. Pitts, Kansas Water Rights: Changes and Transfers, 57 J. Kan. Bar Ass'n 21 (July, 1988), and John C. Peck, Title and Related Considerations in Conveying Kansas Water Rights, 66 J. Kan. Bar Ass'n 38 (Nov. 1997).

161. K.S.A. 2010 Supp. 82a-708b. See also K.A.R. 5-5-1 to 5-5-16.


163. See section on Water Use in Initial Drilling Operation, supra.


166. K.A.R. 5-1-1(seece).


168. K.S.A. 2010 Supp. 82a-727 (c) states that a temporary permit does not vest the holder with a permanent right to appropriate water.

170. K.A.R. 5-9-1d.

171. These are not the only statutes mentioning public interest. See also KWAA Sections 712 (conditions on permits), 726 (diversions of water to other states), 727 (temporary permits), 733 (conservation plans), and 767 (evaluation of water banks), as well as K.S.A. 82a-1020, et seq. (GMDs), K.S.A. 82a-1301 et seq. (water storage), and K.S.A. 82a-1501, et seq. (water transfers).

172. K.S.A. 2010 Supp. 82a-711 does not require a hearing, but K.A.R. 5-3-4a states that "[a] hearing may be held ... if ... the chief engineer finds it to be in the public interest ... [a] hearing has been requested by a person who shows ... approval of the application could cause impairment of senior water rights or ... [t]he chief engineer desires public input on the matter." K.S.A. 82a-711(c) limits the persons allowed to petition for judicial review of the chief engineer's decision to persons aggrieved by any order of the chief engineer "relating to that person's application for a permit to appropriate water. However, Cochran v. Kansas Dept of Agric. and the City of Wichita, 291 Kan. 898, 249 P.3d 434 (2011), held that notwithstanding the limits of Section 711(c), senior water right holders objecting to a new application have standing to appeal, thus potentially opening the door to wider public objection to new permit applications.

Moreover, when reviewing applications for water permits, the chief engineer is required by K.S.A. 82a-711(g) to examine whether granting the permit will impair existing water rights, which includes both quantity impairment and the unreasonable deterioration of the other water user's water quality beyond a reasonable economic limit. An existing water right...
holder could object to the granting of the new permit on the ground that the permit would decrease its water quality, and the chief engineer’s determination is then reviewable by the courts. See id., Cochran, 291 Kan. 898, 249 P.3d 434.

173. "Public Interest. (a) ... [I]n ascertaining whether a proposed use will prejudicially and unreasonably affect the public interest, the chief engineer shall also take into consideration the quantity, rate and availability of water necessary to: (1) satisfy senior domestic water rights from the stream; (2) protect senior water rights from being impaired by the unreasonable concentration of naturally occurring contaminants; and (3) over the long term reasonably recharge the alluvium or other aquifers hydraulically connected to the stream. (b) Unless otherwise provided by regulation, it shall be considered to be in the public interest that only safe yield of any source of water supply, including hydraulically connected sources of water supply, shall be appropriated.” K.A.R. 5-3-9.

174. “Public Interest. 1. The general welfare of the public that warrants recognition and protection. 2. Something in which the public as a whole has a stake; esp., an interest that justifies governmental regulation.” Black’s Law Dictionary, 9th ed. (2009), at 1350.

175. See, e.g., Alaska. Stat. 46.15.080(b) (expressly includes effect on economic activity, fish and game resources, public health, and harm to other persons). Idaho Code 42-203A(5)(e) defines the “local public interest” as “the affairs of the people in the area directly affected,” and “the public interest” to include, inter alia, environmental protection, recreation, aesthetic beauty, transportation, and water quality.

176. See, e.g., Idaho Dept. of Water Resources, Water Appropriation Rules § 37.03.08.03 Evaluation Criteria for Appropriation Rights (for proposed use of trust water, public interest evaluation includes consideration of factors such as the state and local economy, electric utility rates, the family farming tradition, water quality, fish, wildlife, recreation, and aesthetic values) (available at http://adm.idaho.gov/adminrules/rules/idapa37/0308.pdf).

177. See Shokal v. Dunn, 707 P.2d 441 (Idaho 1985) (court read two separate statutes together, and required inclusion of statutory factors detailed under “the public interest” when applying another statute on “the local public interest”); and Stempel v. Dept. of Water Res., 208 P.2d 166 (Wash. 1973) (department must consider water quality impact of proposed diversion despite no such statutory mandate in water permit statute, because state also had environmental policy act and a water resources act that requires protection of the natural environment).


180. Id. at 495-508.

181. Id. at 508-17.
Water Rights Title Standard

**Problem:** Buyer seeks to purchase a quarter section of land irrigated by a center pivot irrigation system; alternatively, a municipality or an industrial concern seeks to purchase a water right intending to sever it from the authorized place of use and convert it from one kind of use to another. Who must join the conveyance of the water right to the Buyer?¹

**Standard: 24.1:** The examiner must be sure that the seller has good title to all of the land to which the water right is appurtenant – that is, to the entire authorized place of use. All of the owners of all or of any portion of the authorized place of use must join in the conveyance of the water right.

**Comment:** According to K.S.A. 82a-701(g), a water right is a “real property right” that is “appurtenant to and severable from the land on or in connection with which the water is used and such water right passes as an appurtenance with a conveyance of the land by deed, lease, mortgage, will, or other disposal, or by inheritance.”² To prevent an automatic passing of title to the water right, the grantor may reserve the water right unto the grantor in the deed. See also K.S.A. 82a-708a(a), which provides that, “Any rights to the beneficial use of water perfected under such application shall attach to the lands on or in connection with which the water is used and shall remain subject to the control of the owners of the lands as in other cases provided by law.”

Records concerning water rights such as water rights certificates (see K.S.A. 82a-714) and change orders (see K.S.A. 82a-708b) are sometimes found in the office of the register of deeds where the land or the point of diversion is located. Most of the records concerning a water right are found in the regional field offices of the Division of Water Resources (DWR) of the State Department of Agriculture (Topeka, Parsons, Stafford, Garden City and Stockton). DWR files are the only reliable source of records to determine the location of the authorized place of use and must be consulted whether there are records in the office of the register of deeds or not.

A title examiner should obtain and examine all of the records that identify the land on or in connection with which the water right may be lawfully used. If the authorized place of use is larger than the tract being acquired or otherwise includes any tract of land that is not being conveyed, the examiner must require that the owners of any tracts not being conveyed join in the conveyance of the water right. For example, if the original water right allowed flood irrigation of the entire quarter section, and no change was made on conversion to center-pivot irrigation, the water right will likely be appurtenant to the entire quarter section. If a land owner in the chain of title has sold a portion of the authorized place of use to another party without expressly reserving the water right unto the seller in the deed, or never owned a portion of the authorized place of use in the first place, that grantee will likely own a portion of the water right.

Or, if the original water right was designated to be used on the entire quarter section and the owner obtained both an order from DWR and permission from a neighbor to irrigate an additional 10-acre tract on a neighboring quarter section, that 10-acre tract would have a portion of the water right appurtenant to it, notwithstanding the absence of a deed conveying a portion of the water right to the neighbor.

Footnotes

1. While the title examiner is concerned with the quality of the title of the water right, the Buyer will also be interested in the quality of the water right itself. See J. Peck, *Title and Related Considerations in Conveying Kansas Water Rights*, 66 J. Kan. Bar Ass’n 38 (Nov. 1997); J. Peck, *Assessing the Quality of a Water Right*, 70 J. Kan. Bar Ass’n 26 (May 2001).

2. In certain cases, title to a water right may be expressly or impliedly severed from the land on or in connection with which the water is used. An express severance will be apparent in the documents found in the chain of title. An implied severance may be less obvious. For example, even though K.S.A. 82a-701(g) and K.S.A. 82a-708a(a) state that the owner of a water right is the owner of the authorized place of use, DWR regulations provide that a water right developed by a municipality or rural water district is subject to the ownership and control of the municipality or water district rather than the water customers. K.A.R. 5-5-14(b)(2). Likewise, an irrigation company may exert corporate control over a water right developed by the company.

New Immigration Options for Undocumented “Childhood Arrivals” CLE

September 19, 2012, 12 – 12:50 p.m.

Speakers Kathleen Harvey and Michael Shrama-Crawford present a webinar on the U.S. Department of Homeland Security’s two new options to stay legally in the United States for a limited time. Attorneys and advocates practicing in any area, such as family, juvenile, criminal, GAL, and foster care, as well as employers who would like to help their workers gain lawful employment under the new guidelines, and dealing with persons who may benefit from the changes should attend this seminar.

The KBA has applied for 1.0 hour CLE credit. Register online at www.ksbar.org or by phone at (785) 234-5696.
IN THE SUPREME COURT OF THE STATE OF KANSAS
RULES RELATING TO JUDICIAL CONDUCT
RULE 607
CONFIDENTIALITY

Rule 607(e) is hereby amended, effective July 10, 2012.
(e) The commission or panel is authorized, in its discretion, to disclose relevant information and to submit all or any part of its files:

(1) to the Disciplinary Administrator for his or her use and consideration in investigating alleged violations of the Supreme Court Rules Relating to Discipline of Attorneys;

(2) to the Impaired Judges Assistance Committee; and

(3) to the Supreme Court Nominating Commission, District Judicial Nominating Commissions, and the Governor for use and consideration in evaluating any prospective nominee for judicial appointment.

BY ORDER OF THE COURT this 10th day of July, 2012.

FOR THE COURT
Lawton R. Nuss
Chief Justice

2012 SC 67

---

IN THE SUPREME COURT OF THE STATE OF KANSAS
ORDER
RULES RELATING TO REQUIRED CONTINUING JUDICIAL EDUCATION

The following Rule 504 relating to the District Judges Manual Committee is hereby adopted, effective July 1, 2012.

RULE 504
DISTRICT JUDGES MANUAL

A District Judges Manual Committee is hereby established for the purpose of composing and updating a manual for Kansas district judges and district magistrate judges.

The membership of the District Judges Manual Committee shall be composed of four district court judges, four district magistrate judges, and one nonvoting representative of the Office of Judicial Administration.

All members of the District Judges Manual Committee shall be appointed by the Supreme Court. The terms of the inaugural members of the Committee shall be staggered: The terms of two district judges and two district magistrate judges shall be two years, and the terms of two district judges and two district magistrate judges shall be one year. At the expiration of the terms of these inaugural members, the term of each succeeding member of the Committee shall be two years. With the exception of the representative of the Office of Judicial Administration and a member whose service on the Committee begins with completion of another’s unexpired term, no member of the Committee shall be eligible for more than two consecutive terms. Should a district judge or district magistrate judge not complete a term for any reason, a new member shall be appointed to complete the unexpired term. The new member shall be eligible to serve two more consecutive terms. A district judge or district magistrate judge may serve one or more additional terms after a break in service.

In addition to the membership described above, the nonvoting Chair of the District Judges Manual Committee shall be the Supreme Court Justice who serves as liaison to the Committee, as designated by the Chief Justice of the Supreme Court. The Chair shall not be subject to a term limit.

BY ORDER OF THE COURT this 19th day of June, 2012.

FOR THE COURT
Lawton R. Nuss
Chief Justice

2012 SC 37
IN THE SUPREME COURT OF THE STATE OF KANSAS

ORDER

RULE RELATING TO ALTERNATIVE DISPUTE RESOLUTION COUNCIL

The following Rule 1501 relating to the Alternative Dispute Resolution Council is hereby adopted, effective July 1, 2012.

RULE 1501

ALTERNATIVE DISPUTE RESOLUTION COUNCIL

(a) Council Established Under K.S.A. 5-504.

The Alternative Dispute Resolution Council is established in accordance with K.S.A. 5-504 to:

(1) advise the director of dispute resolution on the administration of the dispute resolution act and on policy development for the act;

(2) assist the director of dispute resolution in providing technical assistance to programs, individuals, courts, and other entities requesting the study and development of dispute resolution programs;

(3) consult with appropriate and necessary state agencies and offices to promote a cooperative and comprehensive implementation of the dispute resolution act;

(4) advise the director of dispute resolution with respect to the awarding of grants or any other financial assistance program which is administered under the dispute resolution act;

(5) advise the director of dispute resolution with respect to applications submitted by programs and individuals for approval under K.S.A. 1998 Supp. 5-507, and amendments thereto;

(6) assist the director of dispute resolution with the review, supervision and evaluation of dispute resolution programs; and

(7) make recommendations to the director of dispute resolution about legislation affecting dispute resolution.

(b) Membership.

The Council will be composed of no more than nineteen members.

(c) Appointment.

The Supreme Court will appoint the members of the Council.

(d) Terms. Each member of the Council is appointed for a three-year term. No member of the Council will be eligible for more than two consecutive three-year terms. A member appointed to complete an unexpired term is eligible to serve two more consecutive three-year terms. A member may serve one or more additional terms after a break in service.

(e) OJA Representative and Liaison Justice.

(1) In addition to the members described in subsection (b):

(A) there will be a permanent, nonvoting seat on the committee for a representative of the Office of Judicial Administration; and

(B) the Chief Justice of the Supreme Court will designate a Supreme Court Justice to serve as liaison to the Committee.

(2) The persons serving the Committee under paragraph (1) are nonvoting and not subject to a term limit under subsection (d).

BY ORDER OF THE COURT this 29th day of July, 2012.

FOR THE COURT

Lawton R. Nuss
Chief Justice
ATTORNEY DISCIPLINE

SIX-MONTH SUSPENSION
IN RE STEPHEN W. FREED

ORIGINAL PROCEEDING IN DISCIPLINE
NO. 107,314 – JUNE 29, 2012

FACTS: This an original proceeding in discipline filed by the office of the disciplinary administrator against the respondent, Stephen W. Freed, of Manhattan, an attorney admitted to the practice of law in Kansas in 1985. Freed’s unethical conduct involved his appointment as executor of a will and subsequent conduct.

DISCIPLINARY ADMINISTRATOR: On June 23, 2011, the office of the disciplinary administrator filed a formal complaint against respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC). The disciplinary administrator recommended that respondent be suspended for three months.


HELD: Court found hearing panel’s findings were supported by clear and convincing evidence. Court held that after thoroughly reviewing the hearing panel proceedings, a six-month suspension was more appropriate and based further on respondent’s continued procrastination in his dealings with this court and the disciplinary administrator following the hearing panel’s report. The court noted respondent failed to provide the disciplinary administrator with the results of his psychological evaluation until just shortly before the oral argument, even though the report had been prepared months earlier. In addition, respondent submitted a proposed revised probation plan just minutes before the court convened to consider his case. These acts underscore the misconduct that led to the disciplinary complaint and weigh against the published censure with conditions recommended by the hearing panel majority. Court was encouraged by respondent’s continued efforts toward rehabilitation and improved practice management. The Court believed respondent should have an opportunity to be reinstated after the first three months of suspension.

EIGHTEEN-MONTHS’ SUPERVISED PROBATION
IN RE DAVID K. LINK

ORIGINAL PROCEEDING IN DISCIPLINE
NO. 107,751 – JULY 6, 2012

FACTS: This an original proceeding in discipline filed by the office of the disciplinary administrator against David K. Link, of Wichita, an attorney admitted to the practice of law in Kansas in 1999. Three separate disciplinary complaints were docketed between March and November 2009 against the respondent. Each of the complaints was filed by, or on behalf of, a client of the respondent who had been seeking immigration benefits or involved in immigration removal proceeding.

HEARING PANEL: The hearing panel determined that respondent violated KRPC 1.3 (2011 Kan. Ct. R. Annot. 433) (diligence); 1.4(a) (2011 Kan. Ct. R. Annot. 452) (communication); and 8.4(c) (2011 Kan. Ct. R. Annot. 618) (engaging in conduct involving misrepresentation and reflecting on lawyer’s fitness to practice law). Despite the conclusion that the respondent violated KRPC 8.4(c) (misconduct), the hearing panel was struck by the respondent’s integrity as observed by the hearing panel during the hearing on the formal complaint. As a result, the hearing panel unanimously recommended that the respondent be suspended from the practice of law for a period of six months. The hearing panel further recommended that the imposition of the suspension be suspended and that the respondent be placed on probation for a period of 18 months, subject to various terms and conditions.

DISCIPLINARY ADMINISTRATOR: On January 3, 2011, the office of the disciplinary administrator filed a formal complaint against the respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC). The respondent filed an answer on January 25, 2011. On February 24, 2011, the respondent filed a proposed plan of probation. A hearing based on stipulated facts was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on December 6, 2011, where the respondent was personally present and was represented by counsel. The deputy disciplinary administrator recommended that the hearing panel recommend that the respondent be suspended for a period of six months. Additionally, the deputy disciplinary administrator recommended that the imposition of the suspension be suspended and that the respondent be placed on probation for a period of 18 months.

HELD: Court concluded the hearing panel’s findings were supported by clear and convincing evidence and that the hearing panel’s conclusions of law regarding aggravating and mitigating factors were supported by the facts. Court stated the hearing panel unanimously recommended that the respondent be suspended from the practice of law for a period of six months, that the imposition of the suspension be suspended, and that the respondent be placed on probation for a period of 18 months, subject to specified terms and conditions. Court accepted the hearing panel’s recommendation of probation with the modifications to the probation plan requested by the office of the disciplinary administrator.
ONE-YEAR SUSPENSION
IN RE UZO L. OHAEBOSIM
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 107,680 – JUNE 29, 2012

FACTS: This is an original proceeding in discipline filed by the office of the disciplinary administrator against the respondent, Uzo L. Ohaebosim, of Kansas City, Mo., an attorney admitted to the practice of law in Kansas in 2003. Ohaebosim’s unethical conduct involved client funds in unauthorized accounts, communication with clients, and compliance with attorney diversion program.

DISCIPLINARY ADMINISTRATOR: The office of the disciplinary administrator filed a formal complaint against the respondent on August 8, 2011, alleging violations of the Kansas Rules of Professional Conduct (KRPC). The disciplinary administrator recommended that the respondent be suspended for no more than a year and that the respondent undergo a reinstatement hearing so that the respondent can have a plan of probation in place that would address his difficulties.

HEARING PANEL: A panel of the Kansas Board for Discipline of Attorneys conducted a hearing on the complaint on October 13, 2011, at which the respondent appeared in person and by counsel. The hearing panel determined that respondent violated KRPC 1.1 (2011 Kan. Ct. R. Annot. 416) (competence); 1.3 (2011 Kan. Ct. R. Annot. 433) (diligence); 1.4(a) (2011 Kan. Ct. R. Annot. 452) (communication); 1.15(b) (2011 Kan. Ct. R. Annot. 519) (safekeeping property); 1.16(d) (2011 Kan. Ct. R. Annot. 535) (termination of representation); and 6.1 (2011 Kan. Ct. R. Annot. 609) (failure to respond to lawful demand for information from disciplinary authority); Kansas Supreme Court Rules 207(b) (2011 Kan. Ct. R. Annot. 314) (failure to cooperate in disciplinary investigation); and 211(b) (2011 Kan. Ct. R. Annot. 334) (failure to file answer in disciplinary proceeding). The hearing panel was concerned by the respondent’s misconduct as well as his approach to the attorney disciplinary case. First, the respondent practiced law in violation of the Kansas Supreme Court’s order suspending the respondent’s license. Second, the hearing panel had the opportunity to observe the respondent during the hearing. The respondent appeared to the hearing panel unconcerned about the pending attorney disciplinary case. Finally, the disciplinary administrator worked out a diversion agreement for the respondent regarding the first three disciplinary complaints. The respondent failed to take advantage of this opportunity by complying with the diversion agreement. Conversely, the respondent’s total disregard to his obligations under the diversion agreement clearly establish the respondent’s lack of interest in doing what it takes to be an attorney in good standing in Kansas. The hearing panel unanimously recommended that the respondent be suspended from the practice of law for a period of six months.

HELD: Court found the hearing panel’s findings of fact were not objected to and were deemed admitted. Court held the respondent’s failure to take advantage of the diversion agreement and his substantial disregard of his obligations under that agreement, as well as the seriousness of respondent’s misconduct during the pendency of the diversion agreement, convince this court that the panel’s recommended six-month suspension is an insufficient sanction in this case. Court held the appropriate sanction is a one-year suspension from the practice of law.

DISBARMENT
IN RE STEPHEN R. ROBINSON
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 107,311 – JUNE 29, 2012

FACTS: This is an original proceeding in discipline filed by the office of the disciplinary administrator against the respondent, Stephen R. Robinson, of Lawrence, an attorney admitted to the practice of law in Kansas in 1986. Respondent filed a motion to continue a formal hearing to allow him time to transfer his license to disabled inactive status but did not follow through with that transfer and failed to file an answer to the formal complaint. Respondent’s unethical conduct involves the commingling of funds and spending clients’ funds for personal use.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator recommended that respondent be disbarred.
HEARING PANEL: On December 13, 2011, a hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys. Respondent was not personally present and was not represented by counsel. The hearing panel determined that respondent violated KRPC 1.15 (2011 Kan. Ct. R. Annot. 519) (safekeeping property) and 8.4(c) (2011 Kan. Ct. R. Annot. 618) (engaging in conduct involving misrepresentation). The hearing panel recommended that respondent be disbarred.

HELD: Court adopted the recommendations of the disciplinary administrator and the hearing panel and disbarred Robinson.

DISBARMENT
IN RE SEAN E. SHORES
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 107,312 – JULY 6, 2012

FACTS: This is an original proceeding in discipline filed by the office of the disciplinary administrator against Sean E. Shores, of Wichita, an attorney admitted to the practice of law in Kansas in 2004. Shores’ unethical conduct involved a complaint by district court judges concerning Shores’ failure to appear in criminal cases and complaints filed by clients who hired Shores to assist with a purchase of a business, for representation in a custody dispute, representation of a criminal appeal, and also Shores failure to address the disciplinary complaint against him.

HEARING PANEL: A hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on October 27, 2011, at which Shores was personally present and was not represented by counsel. The hearing panel determined that respondent violated KRPC 1.3 (2011 Kan. Ct. R. Annot. 433) (diligence); 1.4(a) (2011 Kan. Ct. R. Annot. 452) (communication); 1.16(d) (2011 Kan. Ct. R. Annot. 535) (termination of representation); 8.4(b) (2011 Kan. Ct. R. Annot. 618) (commission of a criminal act reflecting adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer); 8.4(d) (engaging in conduct prejudicial to the administration of justice); and Kansas Supreme Court Rule 211(b) (2011 Kan. Ct. R. Annot. 334) (failure to file answer in disciplinary proceeding). The hearing panel unanimously recommended that the respondent be suspended from the practice of law for an indefinite period of time.

DISCIPLINARY ADMINISTRATOR: On May 16, 2011, the office of the disciplinary administrator filed a formal complaint against the respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC) and filed a supplement to the formal complaint on August 4, 2011. The respondent filed an answer to the formal complaint on September 13, 2011, and a document titled “answer” on October 12, 2011. Due to Shores’ failure to appear at that his disciplinary hearing, the disciplinary administrator recommended that Shores be disbarred.

HELD: Court held the evidence before the hearing panel established the charged misconduct of the respondent by clear and convincing evidence and supported the panel’s conclusions of law. Court adopted the panel’s conclusions. Court noted that Shores appeared before the court on April 16, 2012, to show cause why his license to practice law should not be temporarily suspended. Supreme Court Rule 203(b) (2011 Kan. Ct. R. Annot. 280). As a result of that hearing, on April 17, 2012, respondent’s license was temporarily suspended based on multiple allegations of continued misconduct similar to those at issue in this proceeding. Further, at that hearing, respondent stated he was going to voluntarily surrender his license prior to the oral argument set on this matter. The office of the disciplinary administrator has had no further contact with respondent since that proceeding. Court ordered that Shores be disbarred.

The PEOPLE behind the POLICY

ALPS has always prided ourselves on our accessibility. Nearly 25 years ago, we provided a stable option for lawyers’ professional liability insurance at a time when lawyers simply could not find one. We continue to be here for the legal community today. When you call, we answer. Our policy protects your practice. Our people provide you peace of mind. Let’s connect.

(800) 367-2577 • www.alpsnet.com
ORDER OF DISCHARGE FROM PROBATION
IN RE BRYAN W. SMITH
NO. 103,860 – JULY 3, 2012


DISCIPLINARY ADMINISTRATOR: The disciplinary administra tor has filed a response to Smith’s motion confirming that Smith has fully complied with all conditions imposed upon him by the court and recommending that the respondent be discharged from probation.

HELD: Court reviewed the motion, the affidavits, and the recommendation of the office of the disciplinary administrator and found that Smith should be discharged from probation.

DISBARMENT
IN RE TRACY D. WEAVER
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 107,313 – JULY 13, 2012

FACTS: This is an original proceeding in discipline filed by the office of the disciplinary administrator against the respondent, Tracy D. Weaver, of Overland Park, an attorney admitted to the practice of law in Kansas in 1999. Weaver’s unethical conduct involved his law practice of a nationwide program to modify home mortgage loans taking advantage of the collapse of the housing market and complaints nationwide filed against Weaver.

The hearing panel unanimously recommended that Weaver be disbarred.

DISCIPLINARY ADMINISTRATOR: On January 27, 2011, the office of the disciplinary administrator filed a formal complaint against the respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC). The respondent filed his answer on February 18, 2011, and subsequently consented to an amended formal complaint. On July 26, 2010, the respondent voluntarily agreed to the temporary suspension of his license to practice law. The disciplinary administrator recommended that Weaver be disbarred.

HELD: Respondent was given adequate notice of the formal complaint, to which he filed an answer, and adequate notice of both the hearing before the panel and the hearing before the Court. The respondent filed no exceptions to the hearing panel’s final hearing report. Court held the hearing panel’s findings were supported by clear and convincing evidence and supported its conclusions of law. Court was unpersuaded by Weaver’s argument that his troubles were born of good intentions and that his overarching desire was simply to help people with their mortgage problems. Weaver took money from thousands of distressed and vulnerable mortgagors; he gave most of that money to non-lawyers and did nothing on behalf of the mortgagors; and then respondent refused to refund the fees to the dissatisfied clients as his advertisement had promised. Court held disbarment was the appropriate sanction.

CIVIL

DRIVER’S LICENSE SUSPENSION, SUBJECT MATTER JURISDICTION, AND POST-DRIVING ALCOHOL CONSUMPTION
SWANK V. KANSAS DEPARTMENT OF REVENUE

ALLEN DISTRICT COURT
COURT OF APPEALS – REVERSED AND THE CASE IS REMANDED WITH DIRECTIONS

NO. 102,223 – JULY 27, 2012

FACTS: Yates Center Police Officer Jacob G. Morrison responded to a 1:46 a.m. call about Swank driving recklessly. The call had been placed by Jana Waddell, who said she and Swank had been in an argument at Waddell’s ex-husband’s home. Waddell alleged that Swank chased her home and then sped back and forth in front of Waddell’s house, almost striking Waddell’s car. Waddell described Swank as highly intoxicated and Swank’s driving as erratic. After speaking with Waddell at her house, Morrison left to search for Swank. He found her a few blocks away in Waddell’s ex-husband’s driveway. Swank had pulled into the driveway and was already out of her car. Morrison saw no alcohol in her hands as he approached her. According to Morrison, Swank admitted that she had been drinking and admitted that she had followed Waddell. Morrison did not ask Swank if she had consumed any alcohol after she pulled into the driveway, i.e., after she had stopped driving. Morrison arrested Swank for suspicion of driving under the influence, and Swank submitted to an Intoxilyzer 8000 breath test at the police station. Swank’s breath alcohol concentration was 0.203. After the test, Morrison returned to Waddell’s ex-husband’s driveway and searched Swank’s car. He found an open can of still-cold beer in a Koozie. Notes from the Kansas Department of Revenue administrative hearing leading to Swank’s license suspension show that the hearing officer was aware Morrison had not asked Swank about any post-driving alcohol consumption and had not personally seen Swank driving or attempting to drive. At a de novo evidentiary hearing in district court, Swank testified that after she stopped in the driveway, she drank a half-pint bottle of “Hot Damn” alcohol. The district court ruled in Swank’s favor and set aside the agency order of suspension. The Court of Appeals panel reversed the district court agreeing with the Department’s criticism of the standard of proof applied by Judge Creitz, determined that the evidence demonstrated the existence of Morrison’s reasonable grounds, and said that Swank’s post-driving alcohol consumption could not be considered because it was not among the legal issues enumerated in K.S.A. 8-1020(h)(2).

ISSUES: (1) Driver’s license suspension, (2) subject matter jurisdiction, and (3) post-driving alcohol consumption

HELD: Court held that a petition for judicial review of an administrative driver’s license suspension alleging (a) that the evidence presented at the administrative hearing through the testimony of the arresting officer showed that the arresting officer did not see the licensee operate the motor vehicle on the date in question, (b) that the evidence did not prove that the licensee was under the influence of alcohol at the time she operated the vehicle, and (c) that the Department of Revenue’s order of suspension was without adequate support and therefore unlawful, arbitrary, capricious, and contrary to the evidence, strictly complied with the pleading requirement of K.S.A. 77-614(b) and thus invoked the subject matter jurisdiction of the district court. Court also held that evidence of a licensee’s post-driving alcohol consumption may be considered in a driver’s license

www.ksbar.org
Appellate Decisions

suspension proceeding’s evaluation of whether a law enforcement officer had the reasonable grounds required under K.S.A. 8-1020(h) (2)(A). Court held that because the Court of Appeals erred as a matter of law in refusing to consider Swank’s testimony about her post-driving alcohol consumption, the case was reversed and remanded to the Court of Appeals for re-evaluation under the correct legal standard. Court of Appeals must confine itself to a determination of whether there is substantial competent evidence to support the district court’s ruling that reasonable grounds were lacking to believe Swank was operating a vehicle under the influence of alcohol.

STATUTES: K.S.A. 8-1020; and K.S.A. 77-614

INEFFECTIVE ASSISTANCE OF COUNSEL, SUMMARY DISMISSAL, AND STANDARD OF REVIEW

EDGAR V. STATE

JOHNSON DISTRICT COURT – AFFIRMED
COURT OF APPEALS – REVERSED
NO. 100,477 – JULY 27, 2012

FACTS: A jury convicted Edgar of felony murder in the death of his son and also two counts of child abuse of two of this other children. The district judge sentenced Edgar to a term of life imprisonment for felony murder and 32 months’ each on the two remaining counts. The Court of Appeals affirmed Edgar’s conviction on direct appeal. Approximately one year after this court affirmed Edgar’s convictions, Edgar filed a K.S.A. 60-1507 motion, raising five main issues and multiple sub-issues. Of these multiple issues, only one is subject to review: a claim of ineffective assistance of defense counsel during closing argument. Specifically, in presenting that issue in his motion, Edgar asserted his defense counsel was “ineffective for conceding movant’s guilt to the jury during closing argument. When counsel told them that he wasn’t worried about the abuse of a child charges and that they could go ahead and find him guilty on those he made their conviction for felony murder mandatory under the law.” The district court summarily rejected Edgar’s 1507 motion. The Court of Appeals stated that due to the district judge’s summary denial of Edgar’s motion, there was no evidence from which the panel could determine whether defense counsel’s statements constituted a concession of guilt and, if so, whether that was an objectively reasonable trial strategy. The panel reversed the district judge’s summary denial of the issue and remanded for an evidentiary hearing on the first prong of the test, the Court of Appeals could have and should have as- sumed defense counsel’s performance was deficient and then exam- ined whether the district judge erred in concluding that “[g]iven the overwhelming evidence in this case and the nature of the crimes, the Court cannot conclude that trial counsel’s comment was a concession of guilt during [trial] and, if so, whether it was an objectively reasonable trial strategy. [Citation omitted.]” The panel affirmed the district judge’s decision on all other issues.

ISSUES: (1) Ineffective assistance of counsel, (2) summary dismissal, and (3) standard of review

HELD: Court held that in applying Strickland/Chamberlain, before remanding the case for an evidentiary hearing on the first prong of the test, the Court of Appeals could have and should have assumed defense counsel’s performance was deficient and then examined whether the district judge erred in concluding that “given the overwhelming evidence in this case and the nature of the crimes, the Court cannot conclude that trial counsel’s comment was a concession of guilt during [trial] and, if so, whether it was an objectively reasonable trial strategy. [Citation omitted.]” The Court stated that had the Court of Appeals conducted that review, it would have undertaken a de novo review to determine if the motion, files, and records of the case conclusively showed that Edgar failed to establish a reasonable probability that, but for defense counsel’s errors, the outcome of his trial would have been different. Court concluded that defense counsel’s concessions or proposed compromises regarding counts II and III did not contradict the defense theory that Edgar did not actively participate in the discipline of the children. Fur- ther, it continued the theme of the defense that the discipline of the murdered child was of a different character than previous discipline or the type of discipline applied to the other two children that night and that Edgar had not done anything to aid and abet that type of punishment, on that night or ever. A reasonable jury could have found Edgar guilty beyond a reasonable doubt. Court affirmed the district court’s denial of Edgar’s 1507 motion.

DISSENT: Justice Johnson dissented and would conclude there is no logical difference between this case and State v. Carter, 270 Kan. 426. Both defendants pled not guilty to all charges against them, and both defense attorneys told the jury their clients were guilty of some of the charges. Both defendants possessed a fundamental right to decide how to plead, which rights their attorneys were not entitled to unilaterally waive. Justice Johnson stated that if the majority is going to overrule Carter, he would prefer that it candidly say so. Otherwise Carter is still good law in this state, i.e., we still strive to provide all Kansas defendants with a fair trial. Justice Johnson would reverse and remand for a determination of whether Edgar consented to the guilt-based defense. If not, he is entitled to a new trial.

STATUTES: K.S.A. 20-3018; K.S.A. 21-3401, -3609; K.S.A. 22-3602; and K.S.A. 60-1507

PROPERTY, PARTITION ACTION, AND QUIET TITLE

HANSFORD V. SILVER LAKE HEIGHTS LLC

SHAWNEE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 102,122 – JULY 13, 2012

FACTS: Hansford’s grandfather acquired land in Shawnee County (the east land) in 1929. He deeded the east land to four relatives, including Hansford’s father, in 1939. A small portion of that land was later sold to a water district for a water tower. In 1947, Hansford’s father acquired 50 acres of the land adjacent to the east land. He later sold 40 acres of the land, retaining 10 acres that abutted the east land to the west and on which a house was located (the west land). In 1962, following the intestate death of Hansford’s father, the heirs conveyed full title to both the east and west lands to Hansford’s mother, Viola Hansford. On January 14, 1997, Viola deeded the west land to Hansford. On January 15, 1997, Viola deeded the east land to Hansford and other relatives as tenants in common. A barbed wire fence lay on the land that the conveyance deeds described as part of the east land, near the boundary with the west land. Hansford maintained the fence and stored personal property and ran cattle on the land west of the fence from 1997 on. Following a property partition action, the district court entered an order finding that the defendants owned the east land as tenants in common and ordered partition of the property. The water district owned the property that was excepted in the metes-and-bounds description. After the time for any of the tenants in common to assert a claim to the partitioned property had passed, the district court entered an order directing that the east land, as described above, was to be sold to Silver Lake Heights LLC. The district court confirmed the sale. Hansford filed a petition in Shawnee County District Court seeking to quiet title and to enjoin Silver Lake Heights and others from trespassing and removing property. The district court held that summary judgment in favor of Silver Lake Heights was proper because Hansford had failed to assert his claim during the partition action and was consequently barred from asserting the claim in a collateral action. Hansford appealed, and the Court of Appeals affirmed.

ISSUES: (1) Property, (2) partition action, and (3) quiet title

HELD: Court held that the failure of a party to take a direct appeal challenging the description of the property in a partition action precludes that party from making a collateral attack on the partition orders. Court rejected Hansford’s argument that his factual claim of a boundary by agreement not only defeated summary judgment for Silver Lake Heights but mandated summary judgment in his favor because Silver Lake Heights did not contest the existence of a boundary by agreement in its pleadings. Court held that by standing
Criminal

STATE V. ANTRIM
SEDGWICK DISTRICT COURT – AFFIRMED IN PART AND REMANDED
NO. 104,620 – JUNE 29, 2012

FACTS: Pursuant to plea agreement, Antrim entered a no contest plea to three counts of aggravated indecent liberties with a child, and State agreed to drop rape charge, recommend life sentence with concurrent mandatory 25-year prison terms. Agreement allowed Antrim to seek any legal alternative sentence, and allowed State to oppose any such effort. Antrim filed motion for departure minimum from mandatory minimum sentence under Jessica’s Law. District court denied the motion and imposed consecutive mandatory minimum 25-year sentences. Antrim appealed, claiming: (1) state breached the plea agreement by arguing against its recommendation for concurrent sentences; (2) district court erred in determining parole eligibility after 75-year mandatory minimum term imposed under K.S.A. 21-4643(a) rather than 20 years per K.S.A. 22-3717(b)(2); and (3) district court lacked jurisdiction to include lifetime electronic monitoring in journal entry of judgment.

ISSUES: (1) Breach of plea agreement, (2) parole eligibility, and (3) lifetime electronic monitoring


No error by district court in determining Antrim would be eligible for parole after serving 75 years, the mandatory minimum term imposed under K.S.A. 21-4643(a).

Imposition of parole conditions is within parole board’s authority and outside district court’s jurisdiction. In this case, however, district court did not include lifetime electronic monitoring condition when it imposed sentence from the bench. Remanded for entry of nunc pro tunc order deleting reference in journal entry to lifetime electronic monitoring.

STATUTES: K.S.A. 21-4643(a), -4643(a)(1)(C), -4720(b); and K.S.A. 22-3717(b)(2), -3717(b)(5), -3717(u)

STATE V. BAPTIST
JOHNSON DISTRICT COURT – SENTENCE AFFIRMED IN PART, VACATED IN PART, AND REMANDED
NO. 105,146 – JULY 13, 2012

FACTS: Baptist entered a no contest plea to off-grid crime of rape of child under 14. District court imposed hard 25 life sentence pursuant to K.S.A. 21-4643 is not eligible for parole until inmate has served mandatory 25 years in prison.

Recent decision in State v. Summers, 293 Kan. 819 (2012), regarding post-release supervision is in Baptist’s favor. District court erred in imposing lifetime post-release supervision. That portion of Baptist’s sentence is vacated.

Under facts of this case, reasonable people would agree with court’s decision that Baptist’s lack of criminal history was not a substantial and compelling reason to depart from Jessica’s Law sentence. No abuse of discretion in denying Baptist’s motion for departure.


STATE V. CAMERON
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 103,093 – JULY 27, 2012

FACTS: Cameron pled guilty to three counts of aggravated indecent solicitation of a child involving his 12-year-old step-grand-daughter wherein he solicited her to commit or submit to sexual intercourse, sodomy, and lewd fondling or touching. As required by K.S.A. 22-3717, the district court sentenced Cameron to lifetime post-release supervision.

ISSUES: (1) Sex crimes with minor, (2) lifetime post-release supervision, and (3) cruel and unusual punishment

HELD: Court held that a defendant’s sentence of lifetime post-release supervision under K.S.A. 22-3717(d)(1)(G) for three counts of aggravated indecent solicitation of a child is not cruel or unusual punishment under § 9 of the Kansas Constitution Bill of Rights; in other words, the punishment is not so disproportionate to the crime that it shocks the conscience and offends fundamental notions of human dignity. Factors leading to this conclusion include: the nature of the offense, which is serious and is a sex crime against a minor that historically has been treated as a forcible or violent felony regardless of whether there is physical force; the defendant’s characteristics; and the penological goals of post-release supervision, which include retribution, deterrence, incapacitation, and rehabilitation. These factors outweigh the lack of strict proportionality with other sentences in Kansas and other jurisdictions, especially given that the sentence is not grossly disproportionate. Court also held that applying the factors related to a case-specific proportionality challenge that a sentence is cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution, the sentence in this case to lifetime post-release supervision under K.S.A. 22-3717(d)(1)(G) for three counts of aggrieved indecent solicitation of a child is not cruel and unusual punishment. A sentence of lifetime post-release supervision under K.S.A. 22-3717(d)(1)(G) for three counts of aggrieved indecent solicitation of a child is not categorically disproportionate and, therefore, is not cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution. Court concluded that when the provisions of K.S.A. 22-3717(d)(1) are examined in pari materia with a view of reconciling and bringing the provisions into workable harmony, there is no reasonable doubt that the legislature intended the more specific and more severe provision of (d)(1)(G) to apply to sexually violent off-
fenses rather than the more general provision of (d)(1)(B). This means that an offender convicted of a “sexually violent crime” committed after July 1, 2006, must be sentenced to receive lifetime post-release supervision upon release from prison.

STATUTES: K.S.A. 20-3018; K.S.A. 21-3402, -3511, -4643, -4703, -4704; K.S.A. 22-3717; and K.S.A. 75-5217

STATE V. COLLINS
SEDGWICK DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 101,092 – JULY 20, 2012


ISSUE: K.S.A. 65-4160(a) and K.S.A. 60-4107

HELD: Collins is correct that the Lortab in his possession qualified as a schedule III rather than a schedule II drug. Agreeing with Surowski, however, K.S.A. 65-4160(a) makes possession of hydrocodone a severity level 4 felony regardless of whether formulation of the drug in the possession of a defendant would be classified as a schedule II or schedule III controlled substance.


STATE V. EBABEN
MARION DISTRICT COURT – REVERSED
COURT OF APPEALS – REversed
NO. 102,129 – JULY 21, 2012

FACTS: Pursuant to plea agreement, Ebaben entered Alford plea to one count of sexual battery in amended complaint. Prior to sentencing he sought to withdraw plea, arguing in part the trial court erred by accepting the plea without establishing a factual basis for it. District court denied the motion and imposed sentence. Ebaben appealed. Court of Appeals affirmed in unpublished opinion.

ISSUE: Factual basis for Alford plea

HELD: Case law derived from Widener v. State, 210 Kan. 234 (1972), holding a factual basis can be established by reading a complaint containing facts and essential elements of the crime, is surveyed, and agreement with rationale in State v. Snyder, 10 Kan. App. 2d 450 (1985). Under facts of case, when trial court merely summarized an amended complaint for the record and made no further effort to satisfy itself that there was a factual basis for the plea, requirements of K.S.A. 22-3210(a)(4) were not met. District court committed reversible error. Reversed and remanded to permit Ebaben to withdraw plea.

STATUTES: K.S.A. 20-3018(b); K.S.A. 21-3517; and K.S.A. 22-3210, -3210(a)(4), -3210(d)

STATE V. FRECKS
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 105,952 – JULY 13, 2013

FACTS: Frecks pled guilty to two counts of off-grid aggravated indecent liberties with a child. He sought concurrent service of his Jessica’s Law sentences, but district court ordered the 25-year mandatory minimums to run consecutively. Frecks appealed.

ISSUES: (1) Jurisdiction and (2) consecutive sentences


While it is better practice for district court to include an explanation of its reasons when imposing consecutive life sentences, a sentencing court’s failure to engage in a lengthy colloquy does not amount to an abuse of discretion. Sentencing judge in this case provided minimal justification for its decision to impose consecutive life sentences. No abuse of discretion under facts of case.

STATUTES: K.S.A. 2006 Supp. 21-4643(a); K.S.A. 21-4643, -4643(a), -4721(c)(1); and K.S.A. 22-3601(b)(1)

STATE V. HERONEMUS
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 104,116 – JULY 27, 2012

FACTS: Heronemus was convicted of rape and aggravated criminal sodomy in 1989. He was sentenced to 30 years to life for rape and 10 to 40 years for aggravated criminal sodomy. His conviction was affirmed on appeal. In April 2009, Heronemus filed a pro se motion to correct an illegal sentence. The district court summarily denied the motion without an evidentiary hearing or appointing counsel.

ISSUES: (1) Motion to correct illegal sentence and (2) summary denial

HELD: Court rejected Heronemus’ argument that the district court erred as a matter of law in denying his motion without first appointing counsel and conducting an evidentiary hearing. He contends that the plain language of K.S.A. 22-3504 unambiguously grants a defendant those rights, i.e., it bars any summary disposition of a motion to correct an illegal sentence. Court stated that it has previously, and explicitly, rejected this pure legal argument, and Heronemus presents no new arguments persuading us to revisit those decisions. Court also rejected Heronemus’ argument that the district court erred in denying his motion to correct an illegal sentence on the merits because the 1989 court improbably used his 1984 aggravated battery conviction to twice enhance his sentences. Court stated Heronemus’ sentence conformed to statutory provisions and was legal.

STATUTES: K.S.A. 21-3502, -4501, -4504, -4608, -4710; and K.S.A. 22-3504, -3601

STATE V. LAGRANGE
RENO DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 101,348 – JUNE 29, 2012

FACTS: Willard LaGrange challenges his conviction for criminal possession of a firearm, in violation of K.S.A. 21-4204(a)(4)(A). That statute imposes a 10-year prohibition on the possession of a firearm by persons convicted of certain felonies. LaGrange had a 1994 conviction for aggravated battery, K.S.A. 21-3404, one of the felonies listed in K.S.A. 21-4204(a)(4)(A), for which he served a prison sentence. He was released from prison on that sentence in 2004. LaGrange contends that, as applied to him, the statutory language prohibited firearm possession for 10 years from his date of conviction, which period had expired before his firearm possession in this case. The district court found that the 10-year firearm prohibition period began upon LaGrange’s release from prison in 2004. A split panel of the Court of Appeals affirmed LaGrange’s conviction.

State v. LaGrange, No. 101,348, 2010 WL 1610398. The majority concluded that the legislature intended K.S.A. 21-4204 to make “it a crime for anyone released from prison within the past 10 years for such felony” to include those released from prison within the past 10 years after convictions for one of the specific felonies listed in K.S.A. 21-4204(a)(4)(A). The dissent determined that the language of K.S.A. 21-4204(a)(4)(A) was ambiguous and should be strictly construed against the state under the rule of lenity.

ISSUES: (1) Criminal possession of a firearm and (2) statutory construction
HELD: Court held the wording of K.S.A. 21-4204(a)(4)(A), together with the legislative history of that provision, convinced the Court that the legislature intended for an adult convicted of a listed Kansas felony or of an out-of-state crime that is substantially the same as a listed felony to be prohibited from possessing a firearm for a 10-year period that commences either on the date of conviction of the applicable felony or on the date of release from prison for the applicable felony. That clear intent is not trumped by the rule of lenity, because the alternative construction proffered by LaGrange is unreasonable, nonsensical, and ineffectual to accomplish legislative design and purpose. Court agreed with the district court's interpretation of K.S.A. 21-4204(a)(4)(A): the 10-year ban on the possession of firearms began to run against LaGrange on the date he was released from prison on the aggravated battery sentence.

STATUTE: K.S.A. 21-3404, -3826, -4204

STATE V. LONG
SEDGWICK DISTRICT COURT – AFFIRMED IN PART AND DISMISSED IN PART
NO. 104,594 – JULY 27, 2012

FACTS: Long pleaded guilty to two counts of aggravated indecent liberties with a child and was sentenced to life imprisonment with a mandatory minimum term of 25 years on each count to run concurrently. The court did not order restitution at sentencing, but instead noted that the file indicated the victim's parents had made one $90 payment for counseling for the victim. The court indicated it would leave the issue of restitution open for 30 days to allow the prosecutor to check with the victim's parents regarding restitution.

Further, the court directed that the parties discuss restitution "and if you can't agree upon it, we can set it for hearing." Long neither objected to the court's decision to leave restitution open nor requested a hearing. Within 10 days after sentencing, Long filed this direct appeal. After Long filed his notice of appeal, the district court entered an order establishing restitution in the amount of $90. The order indicated there were no appearances and it was signed and “approved by” both the prosecutor and Long's counsel.

ISSUE: Restitution

HELD: Long first contends the plain language of K.S.A. 2011 Supp. 22-3424(d) requires that restitution be ordered before imposition of sentence. Long argues that because the district court in this case imposed sentence before imposing restitution, the district court lacked jurisdiction to impose restitution. Court stated that it rejected this argument in State v. McDaniel, 292 Kan. 443, 254 P.3d 534 (2011), an opinion filed after Long filed his appeal brief in this case. Also, Court stated that in McDaniel it rejected the defendant's argument that the district court's failure to establish restitution before sentencing deprived the court of jurisdiction. Instead, Court reasoned that the district court's order establishing restitution merely completed the sentence it had earlier imposed. Court also stated that in McDaniel it concluded that even when the victim or the victim's family has requested a hearing, the language of K.S.A. 2011 Supp. 22-3424(d) providing that the "court shall hold a hearing to establish restitution" is directory, not mandatory. Court stated that Long waived his right to a hearing by failing to object to the district court's postponement of the restitution determination and by failing to request a restitution hearing, which was specifically offered by the district court.

STATUTE: K.S.A. 22-3424, -3606

STATE V. MARSHALL
SHAWNEE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED

FACTS: Marshall was convicted by a jury of burglary of a non-residence, criminal damage to property, and obstruction of a legal duty. The strongest evidence against Marshall was an eyewitness's identification of Marshall as the burglar. On appeal Marshall raised two issues related to the eyewitness's identification. First, Marshall argues the prosecutor committed misconduct during closing argument by vouching for the eyewitness's credibility. In response, the state argues the prosecutor's comments were in response to defense counsel's comments about the eyewitness's credibility and cannot be considered prejudicial because the defense opened the door to the prosecutor's comments. Second, Marshall argues the trial court erred in instructing the jury on eyewitness identification using PIK Crim. 3d 52.20 because the instruction allowed the jury to consider the certainty with which the eyewitness identified the defendant.

ISSUES: (1) Prosecutorial misconduct and (2) eyewitness jury instruction

HELD: Court found the state conceded that the prosecutor's comments should not have been made. Court rejected the state's argument and, clarifying inconsistent statements in past decisions, held that a prosecutor can commit prejudicial misconduct when responding to comments – even improper comments – by defense counsel. Court held the prosecutor's comments were not motivated by ill will. Court found under the facts of this case that any misconduct committed by the prosecutor was harmless. Court stated the eyewitness identification of Marshall was crucial to the state's case. Defense counsel presented the jury with an argument that cast doubt on the credibility of the eyewitness testimony. The state responded with an argument pointing out several reasonable inferences that were drawn from the evidence, as well as ways in which common sense suggested the eyewitness's identification could be believed. Consequently, a reasonable juror could have independently found the eyewitness credible. In addition, some physical evidence linked Marshall to the crime; specifically, the pattern on...
the soles of Marshall’s boots appeared to match the footprint on the shed door. Finally, we have recognized flight as a circumstance from which guilt can be inferred and there is no reasonable possibility the prosecutor’s statements affected the verdict in this case. Court stated that it had recently held that it is error for a trial court to give that portion of the eyewitness identification instruction. Nevertheless, because Marshall did not object to the instruction in this case, he must establish that the instruction was clearly erroneous, and Court concluded he failed to meet that burden.

STATE V. MARTIN
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 104,899 – JUNE 29, 2012

FACTS: Martin convicted in 1986 and sentenced to two consecutive life sentences and a concurrent three- to 10-year sentence. He filed motion to correct illegal sentence, claiming his punishments for felony murder and aggravated kidnapping convictions were cumulative because both arose from same act of violence. District court summarily denied the motion as having been previously determined. Martin appealed.

ISSUE: Res judicata

HELD: Summary denial of Martin’s motion is affirmed. Martin previously raised identical issue at least six times. Claim barred by doctrine of res judicata.

STATE V. MOSSMAN
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 103,111 – JULY 27, 2012

FACTS: Mossman entered a no contest plea to one count of aggravated indecent liberties with a child and one count of possession of cocaine involving sexual acts with the 15-year-old daughter of the family he was living with. Prior to sentencing, Mossman filed two motions. In one, he requested a dispositional departure. In the second, he argued that the imposition of lifetime post-release supervision, which is statutorily mandated for a conviction of aggravated indecent liberties under K.S.A. 22-3717(d)(1)(G), is disproportionate and, therefore, cruel and/or unusual punishment prohibited by § 9 of the Kansas Constitution Bill of Rights and the Eighth Amendment to the U.S. Constitution.

ISSUES: (1) Sex crimes with minor, (2) lifetime post-release supervision, and (3) cruel and unusual punishment

HELD: Court stated that a claim that a criminal defendant’s sentence of lifetime post-release supervision is cruel or unusual punishment is ripe for decision at sentencing and in a direct appeal of the sentence. The three-part test stated in State v. Freeman, 223 Kan. 362, 574 P2d 950 (1978), applies to a determination of whether a sentence of lifetime post-release supervision under K.S.A. 22-3717(d)(1)(G) is cruel or unusual punishment under § 9 of the Kansas Constitution Bill of Rights. Court held that under the facts of this case, a defendant’s sentence of lifetime post-release supervision under K.S.A. 22-3717(d)(1)(G) for the crime of aggravated indecent liberties with a child is not cruel and unusual punishment under § 9 of the Kansas Constitution Bill of Rights; in other words, the punishment is not so disproportionate to the crime that it shocks the conscience and offends fundamental notions of human dignity. Factors leading to this conclusion include: the nature of the offense, which is serious and is a sex crime against a minor that historically has been treated as a forcible or violent felony regardless of whether there is physical force; the defendant’s characteristics; and the penological goals of post-release supervision, which include retribution, deterrence, incapacitation, and rehabilitation. Those factors outweigh the lack of strict proportionality with other sentences in Kansas and other jurisdictions, especially given that the sentence is not grossly disproportionate. Applying the factors related to a case-specific proportionality challenge that a sentence is cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution, the sentence in this case of lifetime post-release supervision under K.S.A. 22-3717(d)(1)(G) for a conviction of aggravated indecent liberties with a child is not cruel and unusual punishment. Court concluded that a sentence of lifetime post-release supervision under K.S.A. 22-3717(d)(1)(G) for a conviction of aggravated indecent liberties with a child is not categorically disproportionate even as to first-time sex offenders and, therefore, is not cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution.

DISSENT: Justice Johnson dissented and argued that the punishment should fit the crime and that the lifetime post-release supervision does not fit the crime in this case.

STATE V. PARKS
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 101,905 – JULY 21, 2012

FACTS: Parks convicted of first-degree felony murder and aggravated robbery. District court imposed consecutive hard 20 life and 247-month sentences. Parks appealed, claiming: (1) district court erred in admitting evidence of Parks’ post-Miranda silence; (2) violation of order in limine prohibiting reference to Parks’ possession of drugs denied Parks a fair trial; (3) right of confrontation violated by limiting defense counsel’s cross-examination of witness about immigration status; (4) district court’s inclusion of Allen-type instruction was reversible error; (5) cumulative error denied Parks a fair trial; (6) district court erred in convicting and sentencing Parks for both first-degree felony murder based on underlying felony of aggravated robbery and for aggravated robbery; and (7) district court erred in sentencing without jury finding aggravating factor and criminal history.

ISSUES: (1) Post-Miranda silence, (2) violation of order in limine, (3) right of confrontation, (4) Allen-type instruction, (5) cumulative error, (6) conviction and sentencing for both aggravated robbery and felony murder, and (7) Appendix sentencing claims

HELD: Comment on Parks’ refusal to agree to videotaping did not implicate Doyle v. Ohio because Parks’ post-Miranda refusal to have statement to law enforcement memorialized in a certain way, e.g. by video recording, is not the legal equivalent of suspect exercising right to remain silent. Conflicting authority in other jurisdictions is noted.

Detective’s brief and vague reference to finding “some marijuana” at Parks’ home at time of Parks’ arrest, despite violating pretrial order in limine, does not require reversal of Parks’ conviction when the implied misdemeanor possession offense was minor compared to charged offenses, the district judge directed jury to disregard the testimony as requested by defense, and there was strong evidence against Parks on the charged crimes.

Parks was granted limited voir dire of state’s witness regarding the witness’ undocumented immigration status, which resulted in no evidence of any assurance of favorable immigration treatment in exchange for witness’ testimony. Court does not consider whether district court abused its discretion in limiting cross-examination of that witness before a jury where defense did not seek that sort of general cross-examination.

Under facts of case, no reversible error in giving Allen-type instruction.

Parks’ arguments regarding conviction and sentencing for both aggravated robbery and felony murder do not persuade the court to revisit or revise analysis in State v. Schoonover, 281 Kan. 453 (2006).
No reversal or new trial on basis of cumulative error when errors in violating order in limine and in giving Allen-type instruction were relatively insignificant and unrelated to each other.

Appendix sentencing claims defeated by controlling Kansas cases.

STATUTES: K.S.A. 21-3107(2), -3107(2)(b), -3401, -3401(b), -3427, -3436, -3436(a), -3436(a)(4); K.S.A. 22-3414(3); and K.S.A. 60-420

STATE V. SIMS
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 105,931 – JULY 20, 2012

FACTS: Sims was convicted on 1995 charges of first-degree felony murder, aggravated battery, and criminal discharge of firearm at an occupied building, criminal possession of a firearm. He filed 2011 motion to correct an illegal sentence under K.S.A. 22-3504. District court summarily denied the motion, finding Sims was attempting to collaterally attack his sentence. Sims appealed.

ISSUES: (1) Motion to withdraw plea and (2) motion to correct illegal sentence

HELD: No error in district court summarily denying the motion. Sims’ claims challenging the sufficiency of the complaint challenge his conviction rather than the sentence. Sims’ multiplicity challenge not properly raised because this is not a jurisdictional defect. Sims’ one claim of sentencing error fails because no reasonable interpretation of sentencing hearing transcript supports Sims’ argument.

STATUTES: K.S.A. 2011 Supp. 22-3601(b)(3); K.S.A. 22-3504, -3504(1); K.S.A. 60-1507; and K.S.A. 1994 Supp. 21-4204, -4204(a)(3), -4219, -4219(b)

STATE V. SZCZYGIEL
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 105,024 – JUNE 29, 2012

FACTS: Szczygiel was convicted on plea to 1980 charge. In March 2010 he filed motion to withdraw guilty plea, arguing state breached plea agreement by Kansas Department of Corrections service of sex offender override order; plea was not knowing or understanding when state failed to disclose victim’s affidavit, medical records, and pre-testimony interview transcript; and defense counsel was ineffective in failing to request or conduct discovery. He also filed motion to correct illegal sentence, claiming sentencing court improperly considered perjured preliminary hearing testimony of victim in determining extent of harm caused. District court denied motion to withdraw plea as untimely filed, and denied motion to correct illegal sentence. Szczygiel appealed.

ISSUES: (1) Motion to withdraw plea and (2) motion to correct illegal sentence

HELD: District court erred in denying motion as time barred. The one-year statute of limitations for filing motion to withdraw plea, K.S.A. 2011 Supp. 22-3210(a)(1), begins to run for preexisting claims on date amended statute became effective in April 2009. Szczygiel filed his motion within that grace period. Merits of his appeal are considered, finding no support in the record or in law. District court properly denied motion to correct illegal sentence. Szczygiel does not argue his sentence did not conform to statutory provision in character or the term of punishment authorized.


STATE V. WILSON
MONTGOMERY DISTRICT COURT – SENTENCE VACATED AND REMANDED
NO. 102,221 – JULY 20, 2012

FACTS: Wilson pled guilty to one count of off-grid aggravated indecent liberties. Based on Wilson’s 1985 felony conviction for aggravated indecent solicitation of a child, district court granted state’s motion to double the Jessica’s Law 25-year mandatory minimum prison term pursuant to persistent sex offender statute, K.S.A. 60-4107(j). Wilson appealed, conceding he would qualify for a persistent sex offender sentence had he been facing a new grid sentence, but arguing K.S.A. 60-4107(j) had no application to off-grid Jessica’s Law crimes.

ISSUE: Jessica’s Law and persistent sex offender

HELD: K.S.A. 21-4704(j), the persistent sex offender statute that permits doubling of a maximum presumptive sentence, does not apply to double the mandatory minimum of 25 years’ imprisonment for an off-grid Jessica’s Law offense. Sentence vacated and remanded for resentencing.

STATUTE: K.S.A. 21-4703(q), -4704(j), -4704(j)(1), -4643(a), -4643(d)

STATE V. WOODARD
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 105,132 – JULY 13, 2012

FACTS: Woodward pled guilty to three counts of aggravated indecent liberties with a child. He filed motion for departure from hard 25 life sentence under Jessica’s Law and argued a life sentence violated Kansas and United States constitutional prohibitions on cruel and/or unusual punishment under facts of his crimes. District court ruled the sentences were constitutional, denied Woodward’s motion for downward departure, and imposed three concurrent hard 25 life terms. Woodward appealed.

ISSUES: (1) Cruel and unusual punishment, and (2) motion for departure from hard 25 life sentence

HELD: Woodward’s sentences are not grossly disproportionate to the crimes, and do not violate Eighth Amendment of the U.S. Constitution. Nor do the sentences violate Kansas Constitution and State v. Freeman, 223 Kan. 362 (1978), as applied to Woodward. Compared with punishments imposed for other offenses in Kansas, and compared with penalties imposed for similar offenses in other jurisdictions, the punishments/penalties under K.S.A. 21-3504(a)(1)(C) are not disproportionately harsh.

No abuse of discretion in district court’s refusing to grant Woodward’s motion for departure.

STATUTES: K.S.A. 21-3502, -3420, -3420(b), -3439, -3504(a), -3504(a)(1)(C), -3504(a)(3)(A), -4624, -4638, -4643, -4643(d); and K.S.A. 22-3717(d)(2)(C)
CIVIL

CHILD SUPPORT AND DISABILITY PAYMENTS
IN RE MARRIAGE OF TABER
LYON DISTRICT COURT – REVERSED AND REMANDED
WITH DIRECTIONS
NO. 105,922 – JUNE 29, 2012

FACTS: James and Molly Taber were divorced in 1996. James was ordered to pay $300 per month for child support for G.T. Throughout the years, Taber paid his child support obligation sporadically at best. As of May 31, 2010, he was $10,974.75 in arrears. In September 2007, Taber became disabled and ultimately was deemed eligible to receive disability benefits on May 14, 2010. However, due to a required five-month waiting period, the Social Security Administration (SSA) determined his “entitlement” began in March 2008. Taber received a lump-sum SSDI payment for back benefits for the period of March 2008 to May 2010. G.T. also received a lump-sum SSDI payment for the period of March 2008 to May 2010. Because G.T. was already receiving SSI due to his own health problems, pursuant to federal law his lump-sum SSDI award of $17,154 was reduced by his personal SSI payments for the same time period ($13,747), such that G.T. only received a net award of $3,406. Taber filed a motion asking that the district court apply G.T.’s total lump-sum award of $17,154 to Taber’s child support arrearage that accumulated between September 2007 and May 2010. The district court denied the motion.

ISSUES: (1) Child support and (2) disability payments

HELD: Court held that it, along with the majority of other courts in the country which have considered this issue, has held that lump-sum SSDI benefits for back benefits received by Mother on behalf of her minor child because of Father’s disability may be credited toward Father’s child support arrearage that accumulated during the months covered by the lump-sum payments. Court stated that its review of the record leads to the conclusion that from G.T.’s total lump-sum award of $17,154, James is entitled to a credit toward his child support arrearage for the months of March 2008 through May 2010 in the amount of $7,600. This represents the amount he owed for those 27 months ($8,100) minus the amount he paid during those months ($500). The balance, which would include the $3,406 net award to G.T., is a voluntary overpayment that inures to the benefit of G.T. and cannot be applied to any pre-March 2008 arrearage. Court reversed the district court ruling denying any credit toward Taber’s child support arrearage that was specifically attributed to the months between March 2008 and May 2010 and remanded with directions for the district court to credit Taber’s arrearage consistent with this opinion.

STATUTES: No statutes cited.

DIVORCE, CASE MANAGER, AND FEES
IN RE MARRIAGE OF MERRILL
DOUGLAS DISTRICT COURT – AFFIRMED IN PART,
REVERSED IN PART, VACATED IN PART,
AND REMANDED WITH DIRECTIONS
NO. 106,707 – JULY 6, 2012

FACTS: Matthew and Nancy Merrill, n/k/a Nancy Jadlow, filed cross-petitions for divorce in mid-2004. The district court granted the divorce on October 12, 2004, but retained jurisdiction over child custody, child support, and division of marital property. On April 21, 2005, the district court ordered the parties to participate in mediation with Larry Rute, of Associates in Dispute Resolution (ADR), for unresolved issues. Following a hearing on August 3, 2005, the district court entered two separate journal entries, one concerning a parenting plan, child custody, and child support, and the other resolving shared child expenses, division of property, and debt allocation. On July 15, 2010, the district court ordered the parties to participate in case management with Patrick Nichols, as provided for in K.S.A. 23-1001, -1002, 1003, and K.S.A. 60-1610, -1615, -1620, -1628

ISSUES: (1) Divorce, (2) case manager, and (3) fees

HELD: Court held that a weighing of the three Mathews, 424 U.S. 319, due process factors leads to the conclusion that when the case manager’s recommendations materially affect a parent’s right to the care, custody, and control of a child and the case manager’s report relies upon material facts that are either not supported by specific factual references or are specifically disputed by a parent, due process requires that the district court conduct an evidentiary hearing prior to ruling on the recommendations. Court recognized that although this holding may result in courts having busier dockets, the information received at such a hearing will aid the courts in deciding whether the case manager’s recommendations are in the best interests of the child and insure that due process, one of the most sacred and essential constitutional guarantees, is provided to the parties. Court held that due process requires that Wray be given an adequate opportunity to contest or rebut Powers’ claims and recommendations through cross-examination and the presentation of witnesses. Court also found that Wray’s failure to timely file a motion requesting that the trial judge recuse himself or herself from the proceedings below bars the party from raising the issue on appeal.

STATUTES: K.S.A. 20-311d; K.S.A. 23-1001, -1002, 1003; and K.S.A. 60-1610, -1615, -1620, -1628
HELD: Court stated the district court should not rubber stamp a request for costs and professional fees against a party who objects to a case manager’s recommendation. Court held the district court must make findings as to the reasonableness of the charges, taking into consideration whether the fees were incurred for services involving custody decisions or whether they were incurred for reassignment or withdrawal of the case manager. Court held that because a motion to withdraw is not advancing the statutorily defined role of case manager, a case manager’s time spent preparing a motion to withdraw as case manager and time spent defending against a motion to reassign the case manager are not appropriate bases for assessing fees to either party. The district court’s assessment of Nichols’ $7,575 costs and fees against Merrill constituted an abuse of judicial discretion. The case was remanded to the district court for a determination of the amount of fees appropriately attributable to Nichols’ role as a case manager and not the time spent in justifying his continued employment as the case manager. Court remanded the case to a different district court judge; affirmed the district court’s decision on the case manager’s motion to withdraw; reversed the district court’s denial of Merrill’s motion to assign a new case manager; charged the district court with determining whether a case manager is necessary, and if a case manager is required, appoint a different case manager; and vacated the fee award with instructions to hold an evidentiary hearing for the purpose of determining the amount, if any, of Nichols’ billable time that was legitimately based on his role as a case manager.

STATUTES: K.S.A. 23-607, -1001, -1002, -1003, -1103, -1104; and K.S.A. 60-1610

OIL AND GAS, BREACH OF COVENANT OF WARRANTY OF TITLE, AND SUMMARY JUDGMENT
RAMA OPERATING COMPANY INC. V. BARKER
RICE DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 105,589 – JULY 27, 2012

FACTS: Barker obtained an oil and gas lease from B.F. and Eleanor Babb on May 6, 1996, covering lots in Rice County. A previous lease of that tract (the Tyrell lease) had been unitized with other leases to form a 160-acre gas unit apparently known as the “Fitzgerald Gas Unit.” The lessee of the Tyrell lease, Bear Petroleum, executed, and there was recorded, a release of its right, title, and interest in the Tyrell lease on October 3, 1996. A second release of its interest in the Tyrell lease was requested by Barker and executed by Bear Petroleum on March 1, 2001, and was subsequently recorded, but there is a dispute as to its validity. Within the primary term of Barker’s Babb lease and on May 6, 2001, Barker obtained an identical lease from the Babbs – except the primary term was specified as two years. That lease was recorded on February 7, 2001. After obtaining a supplemental drilling title opinion on the acreage, on April 9, 2001, Barker executed an assignment conveying to RAMA its right, title, and interest in the oil and gas lease. On that date, the records of the Kansas Corporation Commission and Rice County Assessor’s Office show there had been no production by the only well on the Fitzgerald Gas Unit for at least 23 months. In July 2001, when RAMA’s drilling rig contractor appeared on the lease property to commence drilling operations, Robin Austin of RAMA became aware of potential adverse claims to the title through a landowner. RAMA terminated drilling operations and purportedly incurred damages “in the form of expenses in the commencement of drilling operations” totaling $13,356.44. After RAMA filed its petition alleging breach of warranty of title, Barker sought summary judgment on the ground that RAMA caused its own damages when it precipitously terminated drilling operations although no lawful adverse claim was ever established to the oil and gas lease assigned to RAMA. The district court denied the motion because the court found there were genuine issues of material fact. After a different district judge was assigned to the case, Barker’s motion for reconsideration of his motion for summary judgment was denied, and the matter was set for bench trial. After trial, the court found that RAMA had sustained its burden to establish a breach of the covenant of warranty of title and awarded it damages in the amount claimed.

ISSUES: (1) Oil and gas, (2) breach of covenant of warranty of title, and (3) summary judgment

HELD: Court concluded that in the absence of a lawful claim by a third party to the interest conveyed to the assignee of an oil and gas lease, the assignor had no duty to defend and did not breach his warranty of title. Court found that lack of production after the primary term of the lease, together with (i) no factual assertions to support its being merely temporary, (ii) no allegations that the well was a shut-in well with royalty payments being made, and (iii) at least one undisputed release of record by the prior operator/lessee, rendered a conclusion that the prior leases had expired. Court found that a long-distance phone call with the individual executing the second release indicating that it was a “mistake” has little if any evidentiary value on the question of continuing lease validity. Court held that because of the oil and gas lease operator’s failure to successfully controvert the production history on the gas production unit and the resulting 23 months of nonproduction, its failure to factually support a temporary cessation of production, its failure to support constructive production by reason of shut-in royalty payments on a well capable of producing in paying quantities, and the fact of at least one undisputed release of record by the operator/lessee of the prior lease on this acreage, there was no breach of the assignor’s covenant of warranty of title and the assignor of the oil and gas lease was entitled to judgment as a matter of law at summary judgment.

CONCURRENCE: Judge Atcheson concurred in the decision and commented on the question of whether a denial of summary judgment is appealable following a trial on the merits to a judge or jury.

STATUTES: K.S.A. 58-2203, -2222; and K.S.A. 60-250, -252, -256

PROPERTY AND JOINT TENANCY
REICHERTER ET AL. V. MCCALLEY
MARSHALL DISTRICT COURT – AFFIRMED
NO. 106,622 – JULY 13, 2012

FACTS: Richard F. Reicherter and his cousin, Douglas M. Reicherter, acquired an 80-acre farm in Marshall County in 1990, as joint tenants with rights of survivorship. Years later, when Richard was residing in a care facility, he signed a quitclaim deed on December 18, 2009, that conveyed his interest in the 80 acres to himself in an apparent attempt to sever the joint tenancy and create a tenancy in common. After signing, Richard gave the deed to his attorney, Rodney Symmonds, for recording. On December 22, 2009, Symmonds mailed Richard’s quitclaim deed along with a filing fee to the Marshall County register of deeds. Then, Richard died on December 28, 2009. One day after his death, the Marshall County Register of Deeds recorded Richard’s quitclaim deed. Douglas Reicherter was unaware that Richard had executed and filed a quitclaim deed until after Richard’s death. There was no express agreement between Richard and Douglas preventing Richard from severing the joint tenancy. Barbara J. McCauley was appointed executrix of Richard’s estate. Naming McCauley as the defendant, Douglas and his wife filed a quiet title action in Marshall County seeking title to the entire 80-acre tract. McCauley counterclaimed claiming a half ownership interest and sought partition of the farm. Douglas opposed that action. Ruling that Richard clearly intended to sever the joint tenancy and he could convey his interest to himself unimpeded and could thus create a tenancy in common, the district court granted Executrix McCauley’s motion and denied Douglas’ motion for sum-
mary judgment. The district court also held that the joint tenancy was severed when Richard, prior to his death, delivered the quitclaim deed to his attorney for filing. Later, the district court clarified that during the summary judgment hearing Douglas waived any argument that there was an oral agreement in which Douglas gave consideration for the joint tenancy to Richard in exchange for the same benefits and burdens from the land upon Richard’s death.

**ISSUES:** (1) Property and (2) joint tenancy

**HELD:** Court held that a joint tenant can self-convey and thus destroy a joint tenancy in this case where there are just two joint tenants. Court found that under Kansas law, any joint tenant may unilaterally sever his or her joint tenancy interest in real property and create a tenancy in common by conveying his or her interest to a third person. Next, court stated that when the intent to create a joint tenancy is clearly manifested, a joint tenancy may be created by a transfer to persons as joint tenants from an owner or a joint owner to himself or herself and one or more persons as joint tenants. Last, court agreed with persuasive authority from other jurisdictions that unilateral self-conveyance severs a joint tenancy and have dispensed with the old requirements of deeding property to a straw man. Court held that upon an effective delivery during the grantor’s life, a quitclaim deed by a joint tenant to himself or herself as a tenant in common effectively severs the joint tenancy and creates a tenancy in common. Court concluded that the recording statute did not bar the conveyance of Richard’s interest as a joint tenant in the 80 acres to himself as tenant in common upon delivery of the deed to his attorney. Since the deed was effective upon delivery, then the joint tenancy was severed by his actions. Richard had, indeed, severed the joint tenancy several days before his death.

**STATUTE:** K.S.A. 58-501, -2221, -2222, -2223

---

**REAL ESTATE AND VALUATION**

**IN RE TAX APPEAL OF JOHNSON COUNTY APPRAISER/PRIVITERA REALTY HOLDINGS**

**COURT OF TAX APPEALS – AFFIRMED NO. 105,769 – JULY 27, 2012**

**FACTS:** Privitera Realty Holdings owns a fast-food restaurant (Kentucky Fried Chicken, Taco Bell, and Pizza Hut a/k/a "KenTacoHut") built in 1989 and located in front of a community shopping center at the intersection of 119th Street and Metcalf Avenue in Overland Park, a heavy retail intersection. For 2008, the county assigned a value of $1,774,450 to the KenTacoHut for ad valorum tax purposes. Privitera appealed the tax assessment to the small claims and expedited hearings division of the Court of Tax Appeals (COTA). The hearing officer presiding over the matter concluded that Privitera's recommended value of $1,393,200 better reflected the fair market value of the KenTacoHut compared to the value assessed by the county. Accordingly, the hearing officer reduced the assessment to $1,393,200. The county appealed the decision of the hearing officer to the regular division of COTA. At the evidentiary hearing before COTA, the county presented the testimony of Linda Clark, a commercial valuation specialist with the county appraiser's office. Clark testified that the county's original assessment of $1,774,450 was calculated using a cost approach to value within the report as a person contributing significant assistance. Providing such information whether the value assigned to the property – through the use of a computer assisted mass appraisal (CAMA) system – was reasonable. Providing such information does not automatically transform a mass appraisal, which must conform to Standard 6, to an individual appraisal, which must conform to Standards 1 and 2 of the Uniform Standards of Professional Appraisal Practice (USPAP). Court also held that Clark's report and testimony sufficiently addressed the issue of highest and best use, and Privitera failed to present any evidence before COTA to suggest otherwise. Court held that based on the clear language of Standard 6-8 of the USPAP, Clark was not required to include counsel's name within the report as a person contributing significant assistance. Court held that because Clark testified that the CAMA system used by the County to determine the value of the KenTacoHut was approved by the PVD, the appraisal report generated from the system was sufficient under Kansas law. Court ultimately held that substantial evidence supports COTA's decision to reinstate the County's original 2008 assessment of $1,774,450 for the KenTacoHut.

**STATUTES:** K.S.A. 74-2426, -2433; K.S.A. 77-601, -603, -621; and K.S.A. 79-501, 503a, -504, -505, -506, -1466, -1609

**UTILITY RATES**

**CITIZENS UTILITY RATEPAYER BOARD V. KCC ET AL. KANSAS CORPORATION COMMISSION – AFFIRMED NO. 107,897 – JULY 27, 2012**

**FACTS:** This is an appeal from the order of the Kansas Corporation Commission (Commission) granting the inclusion of $4.5 million for consultant and attorney fees as rate case expenses for Kansas City Power and Light Co. (KCP&L) a public utility regulated by the Commission. In 2005, KCP&L agreed with the Commission and its staff (Staff), along with other interested parties, to provide for the future energy needs of Kansas energy users by making substantial improvements in the company's capacity to generate and transmit electricity. When the agreement was made, the parties recognized that KCP&L needed to "make substantial investments in its electric infrastructure over a five-year period" to meet the projected future energy demands of its customers in an environmentally friendly way. This meant that the company would make major improvements to its generating station at Iatan I in Missouri and construct a new coal-fired plant called Iatan II at the same location. The Plan contemplated that KCP&L would recover the costs of its investments through a four-step rate increase application process. The rate application that is the subject of this lawsuit is the fourth and last of that series of applications. The Citizens' Utility Ratepayer Board (CURB) entered its appearance in the rate case and made it known that it opposed granting KCP&L any money in excess of $2.1 million for rate case expenses, the amount initially claimed by KCP&L. In due course, the Commission approved $4.5 million in rate case expenses to KCP&L. Both CURB and KCP&L asked the Commission to reconsider its award. CURB contended that the approved amount was too high, while KCP&L thought the amount was too low. After taking additional evidence and entertaining argument on the matter, the Commission once again approved $4.5 million to KCP&L for rate case expenses. CURB appeals the rate case award on three fronts, claiming: (1) The award is not supported by substantial competent evidence when viewed in the light of the record as a whole; (2) the award is unreasonable, arbitrary, and capricious; and (3) the award results in an erroneous interpretation or application of the law.

**ISSUE:** Utility rates
HELD: Court held that CURB failed to explain how an award of rate case expenses of more than $2.1 million, which was to be amortized over a four-year period, renders the Commission's overall determination of KCP&L's final revenue requirement outside the zone of reasonableness. Court stated that it could nullify a Commission order only when the decision is so unreasonable as to be outside the realm of fair debate. Court held that basic calculations establish that the Commission's order allowed $1.1 million more in rate case expenses than supported by CURB's expert witness. That amount, amortized over four years, accounts for approximately $275,000 – or 1.25 percent – of KCP&L's rate increase. The Commission's final decision authorized a $21,846,202 revenue increase. The increase was determined necessary to give KCP&L the opportunity to earn income to meet its determined revenue requirement of $149,121,865. Therefore, even if the Commission acted improperly with respect to its determination of rate case expenses, CURB failed to establish that any error carried the Commission's overall rate determination outside the zone of reasonableness for its rates.

STATUTES: K.S.A. 66-101b, -117, -118c, -1222; and K.S.A. 77-601, -621

CRIMINAL

STATE V. JONES
FINNEY DISTRICT COURT – AFFIRMED
NO. 106,605 – JUNE 29, 2012

FACTS: Jones was charged with possession of cocaine and drug paraphernalia, based on drugs found in warrantless search of vehicle incident to traffic stop. District court granted motion to suppress that evidence, finding stop was pretextual and officer violated Jones' right against unreasonable search and seizure. State filed interlocutory appeal.

ISSUE: Reasonable suspicion and extension of detention

HELD: District court erred in relying on pretextual nature of initial stop, but decision affirmed on different grounds. Under facts of case, slurred speech and “cotton mouth” by driver and observation of a clear plastic baggy within the vehicle may have been sufficient to support a further investigation for driving under the influence, but were not sufficient to detain driver for further investigation of transporting controlled substances – including employment of a drug-sniffing dog to examine the vehicle. The factors articulated do not support reasonable suspicion given state's burden. Even if reasonable suspicion existed to support extension of Jones' detention, under facts of case, detention for at least 20-30 minutes to await drug-sniffing dog was unreasonably prolonged and this alone would justify suppression of the evidence ultimately discovered through use of the canine unit, even if officer had gained reasonable suspicion that vehicle might contain controlled substances.

DISSENT (Buser, J.): Agreed that district court erred in relying on pretext, but found record contains inadequate findings of fact and conclusions of law for proper analysis of search and seizure issue. Would reverse district court's ruling suppressing the evidence, and remand to district court to make findings on controlling facts, and legal conclusion regarding suppression based on those factual findings.

STATUTES: None

STATE V. MASON
SHAWNEE DISTRICT COURT – SENTENCE AFFIRMED AND CASE REMANDED WITH DIRECTIONS
NO. 105,535 – JULY 6, 2012

FACTS: Mason pled guilty to one count of rape of a child less than 14 years old and one count of aggravated criminal sodomy of a child less than 14 years old. The victim was his adopted daughter, who was 12 years old at the time of the offense. Mason filed a motion for departure. At sentencing, the district court heard statements from several of Mason's family members and family friends, expressing their support for Mason, their respect for his good character, and their continued belief that he was innocent. Mason made a statement, and his attorney presented argument in favor of departure from life sentences with lengthy mandatory minimums under Jessica's Law. The state presented testimony from the victim's therapist, who said the victim had been in a residential mental health facility for over a year and was making little to no progress as a result of trauma from the sexual abuse. The district court found that Mason failed to demonstrate any substantial and compelling reasons for a departure. Mason was sentenced to life imprisonment, without eligibility for parole for 592 months, for rape of a child under the age of 14. Mason was also given a concurrent life sentence, without parole eligibility for 25 years, for aggravated criminal sodomy of a child under 14 years of age. The district court informed Mason that he would be required to register as a sex offender for his lifetime following his release. In addition to the sentence imposed from the bench, the journal entry of sentencing included that Mason was subject to lifetime post-release supervision and lifetime electronic monitoring.

ISSUES: (1) Sentencing and (2) Jessica's Law

HELD: Court held that Mason did not meet his burden of proof that the denial of the departure from the Jessica's Law sentence was not an abuse of discretion. Court also held that because the journal entry erroneously included lifetime post-release supervision and lifetime electronic monitoring, the case was remanded with directions to the district court to issue a nunc pro tunc order to correct that portion of the sentence in the journal entry.

STATUTE: K.S.A. 22-3504, -3717, -4643

STATE V. PROCTOR
SALINE DISTRICT COURT – SENTENCE VACATED IN PART AND REMANDED
NO. 104,697 – JULY 6, 2012


ISSUE: Case-specific Eighth Amendment challenge to lifetime supervision

HELD: Ripeness concern is addressed, finding resolution of Proctor's challenge cannot be deferred to a more opportune time. Three decades of U.S. Supreme Court jurisprudence on Eighth Amendment in noncapital sentences is surveyed. Under facts of this case, imposition of lifetime post-release supervision on this defendant, as provided in K.S.A. 2009 Supp. 22-3717(c) (1)(G) and K.S.A. 2009 Supp. 75-5217(c), violates the prohibitions against cruel and unusual punishment in the U.S. and Kansas constitutions. Court does not consider or decide constitutionality of lifetime post-release supervision in Kansas statutes as a category of punishment or as it might be applied to anyone other than Proctor.

STATE V. SALINAS
RENO DISTRICT COURT – AFFIRMED
NO. 105,988 – JULY 13, 2012

FACTS: After Salinas pleaded guilty to one count of aggravated criminal sodomy involving oral contact with a child less than 14 years of age, Salinas filed a motion to depart from the life sentence provided for in Jessica’s Law. In support of his motion, Salinas stated five reasons for departure: (1) a non-prison or shorter sanction will serve community safety interests by promoting offender reformation more than incarceration; (2) the offender, because of his mental impairment, lacked substantial capacity for judgment when the offense was committed; (3) after the crime was committed on September 20, 2008, the defendant has had no arrests or police contact and his criminal history reflects that he has no convictions or adjudications and is a criminal history I; (4) that the defendant had just turned 18 years old on August 2, when this offense was committed on September 20, 2008; and (5) that Salinas has admitted to the crime charged, acknowledges that his behavior was wrong and is amenable to sex offender treatment and can enter in a treatment program. Salinas called his mother and a psychologist to testify in support of the mitigating factors. Court rejected the motion for departure finding the factors did not rise to substantial and compelling reasons to depart. Court also rejected Salinas’ argument that a life sentence would be cruel or unusual punishment.

ISSUES: (1) Sentencing and (2) Jessica’s Law

HELD: Under the facts of this case, the district court did not abuse its discretion in denying the defendant’s motion to depart from the hard 25 life sentence provided for in Jessica’s Law, K.S.A. 21-4643, for a conviction of aggravated criminal sodomy with a child less than 14 years of age. Reasonable people could agree with the district court’s determination that the mitigating factors presented by the defendant were not substantial and compelling in light of the circumstances of the case, which included the fact that the victim was a 6-year-old autistic child who had been in the defendant’s care at the time of the crime, that expert testimony indicated the defendant was likely to reoffend, and that evidence supported the conclusion that the defendant was not amenable to rehabilitation.

STATUTE: K.S.A. 21-3506, -3601, -4643

STATE V. SOOD
JOHNSON DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS
NO. 105,930 – JULY 27, 2012

FACTS: Sood was convicted by a jury of one count of computer fraud and one count of attempted theft in conjunction with a lottery sting where lottery officials had Sood check fake winning lottery tickets, but Sood told the undercover officials the ticket was not a winner and then turned in the ticket later to the lottery office.

ISSUES: (1) Jury instructions and (2) sufficiency of the evidence

HELD: Court held that computer fraud is a specific intent crime. Court held that the facts support Sood’s argument that the trial court should have given an ignorance or mistake of fact instruction. In other words, this evidence would be sufficient to justify a rational fact-finder finding in accordance with Baldirh’s defensive theory under both his computer fraud and attempted theft charges. Consequently, the trial court erred in refusing to give the ignorance or mistake of fact instruction based on the state’s charges that Baldirh had committed computer fraud and attempted theft on July 29, 2009. Court held that without the trial court instructing the jury on the specific intent element—that Baldirh devised or executed a scheme or artifice with the intent to obtain money, property, services, or any other thing of value by means of false or fraudulent pretense or representation—the trial court’s instructions that it gave to the jury did not preclude a conviction of Baldhir on the basis of mistake. Thus, the trial court committed reversible error in failing to include the specific intent element in the jury instructions and to give an ignorance or mistake of fact instruction for Baldhir’s computer fraud charge. Court stated the computer fraud charge and the attempted theft charges are so closely interwoven that the outcome of the computer fraud charge will most likely determine the outcome of the attempted theft charge. Court remanded for new trial on both counts.

STATUTE: K.S.A. 21-3201, -3301, -3701, -3755

STATE V. UWADIA
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 105,622 – JUNE 29, 2012

FACTS: Uwadia was charged with criminal threat against Joel Womochil, Edward Jones, Eugene R. Williams, and Shawn Madsen, stemming from an incident at a Sedgwick County nightclub. Before trial, the state moved for admission of Womochil’s video deposition at trial on grounds that he was an essential eyewitness. However, he would be leaving for military basic training on May 19, 2010, in Fort Jackson, S.C., and would be unavailable for trial on May 24, 2010. Womochil was deposed by agreement between the State and Sarah Green, Uwadia’s first attorney. Uwadia’s next attorney, James Crawford, objected on hearsay grounds to admission of the video. After reviewing the cross-examination portion of the video, the court found no Crawford violation because Uwadia was present at the deposition and Green’s opportunity to cross-examine Womochil was not limited. The court ruled that the deposition could be used at trial. A jury trial was held on May 24 and 25, 2010. Before the state played Womochil’s video deposition, Crawford renewed his objection and the district court granted him a continuing objection. The court explained to the jury that the deposition was taken on April 21, 2009, by another attorney from Crawford’s office, and was being played because Womochil was at basic training. After the deposition was played for the jury, the court admitted the video and its transcript into evidence, but allowed only the video to be taken into deliberations. Uwadia did not testify, and he was found guilty of criminal threat. Crawford filed a motion for new trial claiming insufficient evidence and erroneous admission of the video, and later with new counsel added a claim of ineffective assistance of counsel against Green and Crawford.

ISSUES: (1) Video deposition, (2) witness availability, and (3) ineffective assistance of counsel

HELD: Court held that parties can bypass the requirements of K.S.A. 22-3211(4) by agreeing to a deposition of an essential witness in a criminal case. Court stated that Uwadi’s right of confrontation was protected, the prosecution has discretion whether to depose an essential witness, the district court shall authorize deposition of an eyewitness, and K.S.A. 22-3211(4) allows depositions of essential witnesses by agreement rather than court order. Court stated that since it found that a prosecutor need not move for a deposition under K.S.A. 22-3211(4) when the parties agree to the deposition, it could not conclude that counsel’s performance was deficient for failing to force the prosecutor to file an unnecessary motion, and failing to object to the deposition’s admission for lack of such motion. Exclusion of Womochil’s deposition would not have rendered the evidence insufficient to support Uwadia’s conviction. Court also said that counsels’ performance was not deficient for failing to investigate Uwadia’s suggested witnesses.

STATUTES: K.S.A. 21-3419; K.S.A. 22-3211; and K.S.A. 60-1507
Insurance Law Institute

Distinguished Faculty Include:
- Matthew D. All
- Karen R. Glickstein
- Douglas S. Laird
- Jennifer L. Osborn
- Scott A. Smith
- William W. Sneed
- Jennifer R. Sourk
- Lauren E. Tucker McCubbin

Register at www.ksbar.org/cle
or call (785) 234-5696

Friday, Sept. 7, 2012
Kansas Law Center
1200 SW Harrison St.
Topeka, KS

7.0 hours of CLE credit, including 1.0 hour Ethics and Professionalism credit has been approved by the Kansas CLE Commission.

Outdoor Recreation Law
CLE and Clay Shoot

Distinguished Faculty Include:
- Thomas A. Adrian
- J. Philip Davidson
- P. Jay Skolaut
- David J. Stucky
- Chadwick Jonathan Taylor
- Christopher J. Tymeson

Register at www.ksbar.org/cle
or call (785) 234-5696

Friday, Sept. 21, 2012
Flint Oak Hunting Preserve
2639 Quail Rd.
Fall River, KS

4.0 hours of CLE credit, including 1.0 hour Ethics and Professionalism credit pending approval by the Kansas CLE Commission.
HOUSTON AV-RATED LAW FIRM SEEKS ATTORNEYS licensed in Kansas to join its growing oil and gas practice. Candidates should have 2+ years of experience in writing title opinions. Being also licensed in Texas, Oklahoma, or New Mexico is a plus. Excellent pay and benefits for qualified individuals. Please send cover letter and resume in confidence to KILBURN LAW FIRM, Attn. Chuck Lundeen, 1001 West Loop South, Suite 400, Houston, TX 77027 or call Lundeen at (713) 974-1333.

NEWBERY, UNGERER & HICKERT LLP, a limited practice law firm seeks attorney to assist with estate planning, probate, trust administration, and business formations and transactions. Must have an interest in these areas and possess strong written and verbal communication skills. Attention to detail and organization are mandatory. The firm practices in the areas of taxation, estate planning, probate, trusts, employee benefits, business law, real estate, private foundations and health law. For additional information visit www.nuhlaw.com. Send resumes, including law school transcript, to Newbery, Ungerer & Hickert LLP, 2231 SW Wanamaker Rd., Suite 101, Topeka, KS 66614.

CONTRACT BRIEF WRITING. Experienced brief writer is willing to take on appellate proceedings for any civil matter. Attorney has briefed approximately 20 cases in the Kansas Court of Appeals and 10 briefs to the 10th Circuit, both with excellent results. If you simply don’t have the time to help your clients after the final judgment comes down, call or email to learn more. Jennifer Hill, (316) 263-5851 or email jhill@mtsqh.com.

CONTRACT BRIEF WRITING. Former federal law clerk and Court of Appeals staff attorney available to handle appeals and motions. Attorney has briefed numerous appeals in both the Kansas and federal appellate courts. Contact me if you need a quality brief. Michael Jilka, (785)218-2999 or email mjilka@jilkalaw.com.

INTERNATIONAL BUSINESS COMPLIANCE. Have a client considering the sale of goods or services overseas? Experienced attorney available to assist you and your clients in identifying and meeting U.S. regulatory compliance obligations when doing business internationally. Please visit www.angelolegal.com or call John Angelo at (316) 239-6005 to learn more.

MEDICAL-LEGAL LITIGATION SUPPORT. I am an attorney practicing in Kansas, with a Bachelor of Science degree in nursing and substantial experience in critical care, burns, trauma, and nursing home care. I have consulted with attorneys in the following types of cases: health care provider malpractice, personal injury, nursing home negligence, and criminal cases involving injury or death. I offer comprehensive litigation and pre-litigation support services that include document review, causation/mechanism of injury analysis, witness interviews, and preparation for deposition or trial and accurate, timely medical research. $35 per hour for most services. Contact David Leffingwell, JD (Washburn, 1995), BSN (Wichita State University, 1982) at (785) 484-2103 or Ddl.legalmed@live.com.

QDRO DRAFTING. I am a Kansas attorney and former pension plan administrator with years of experience in employee benefit law. My services are available to draft your QDROs, communicate with the retirement plans, and assist with qualification of your DROs or other retirement plan matters. Let me help you and your client through this technically difficult process. For more information call Curtis G. Barnhill at (785) 856-1628 or email cgb@barnhillatlaw.com.

Executive Office Space

Very nice individual offices for rent on the top floor of Capital City Bank Plaza, 3706 SW Topeka Blvd, Topeka, KS, starting at $370/month. Reception, utilities and parking included. Fax, copier, internet and secretarial services available.

Ideal Space for Attorneys

www.topekaofficespace.net

DOWNTOWN TOPEKA OFFICE SPACE FOR RENT. Offices are located at 115 SE 7th, 2nd Floor. Four offices are available and may be rented individually or as a group. Receptionist desk and waiting area are also available. Conference room is available for tenants use. Several offices have great built-in cabinets for storage. All offices have windows. Offices are available for immediate occupancy: Office 1 – 10’7” x 13’9”/Office 2 – 10’ x 13’9”/Office 3 – 12’ x 15’2”/Office 4 – 12’ x 13’3”. Receptionist and Waiting Area – 10’8” x 16’8”. The offices are located on the second floor of the Petroleum Marketers and Convenience Store Association of Kansas building. The location is just across the street from the Shawnee County Courthouse and three blocks from the Capitol. Monthly parking is available at the Park and Shop Garage, 615 S. Quincy; metered street parking in front of the building is available for customers/clients. Call the PMCA office at (785) 233-9655 to schedule an appointment to view the offices.

LAW OFFICES located in downtown Overland Park, in remodeled historic building, free parking, reception area, kitchen, conference room, fax, scanner, copier, phones, voice mail, and high speed internet access. The offices are in

CLASSIFIED ADVERTISEMENTS
OFFICE SHARING/OFFICE FOR LEASE – COUNTRY CLUB PLAZA, KANSAS CITY. Office sharing or office lease opportunity on the Country Club Plaza in a Class A high profile corner building with ample free public parking for clients. 200 to 11,000 square feet available. Window offices available, high-speed DSL, printer, copier, facsimile, scanning, telephone, kitchen facilities, reception area, and multiple conference rooms. Offices are state-of-the-art with award-winning interior finish and design. Dedicated area available for your assistant if needed. Reasonable rent. No long-term lease required. Some possibility of business referrals depending on your area of practice. We are an AV-rated litigation firm with full management, accounting, research, and other support services. We would consider cost sharing these services with a compatible transactional, tax, and/or real estate practice. Professional, collegial, friendly atmosphere with other attorneys. Confidential inquiries can be made to Michael Grier at mgrier@wardengrier.com.

OFFICE SPACE AVAILABLE. Great space for attorney, businessperson, or CPA. Up to 3,000 feet available, conference room, security system, easy access to downtown Topeka or interstate. Call Bob Evenson at (785) 231-7987.

OFFICE SPACE AVAILABLE. One office (approximately 14” x 15”) is available in AV-rated firm located at Metcalf and 110th Street in the Commerce Plaza Building in Overland Park. Available immediately. Excellent location and a Class A building. Recently redecorated. Furniture not included. Competitive price including all the amenities of a full service law firm (phone, Internet access, copier, fax, coffee galley, etc.). Staff support available if needed. Please contact Tara Davis at (913) 498-1700 or tdavis@ktplaw.com.

OFFICE SPACE for one attorney in class A, high profile building at One Hallbrook Place in Leawood. No long term lease required. For more information please contact April at (913) 661-9600 ext. 125.

Need clients?
Need increased visibility?
Join the Kansas Bar Association’s Lawyer Referral Service
Join LRS online at www.ksbar.org/LRS

Your trusted legal source.
A TRADITION OF CREDIBILITY AND SUCCESS

We are plaintiff’s trial attorneys with a long tradition of credibility and success in the courtroom. Because of this tradition of success, our substantial resources and our unparalleled experience, we have maximized the value of cases referred to our firm for over 40 years and will continue to do so into the future.

If you have a client with a catastrophic injury or death case we would welcome a referral or co-counsel relationship with you.

OUR EXPERIENCE PAYS