A Kansas Lawyer Who Kept Kansas a Free State and Saved Lincoln’s Presidency

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30

A Kansas Lawyer Who Kept Kansas a Free State and Saved Lincoln’s Presidency
By Ron Smith

Items of Interest

8 Electronic Voting Coming in 2013
9 Advance Notice: Elections for 2013 KBA Officers and Board of Governors
11 What’s New with Your KBA Membership for 2013
12 Announcing a New KALAP Service
21 Welcome Fall 2012 Admittees to the Kansas Bar
24 The Threat to Merit Selection: An Ominous Political Cloud Hovers Over the Capitol, Casting a Dark Shadow on the Judiciary
26 Pillars of Professionalism: A Fitting Tribute to a True Professional
27 U.S. District Court and U.S. Bankruptcy Court for the District of Kansas: Pillars of Professionalism Memorandum and Order
28 Supreme Court Order 82: Pillars of Professionalism

Regular Features

6 President’s Message
7 Young Lawyers Section News
13 Law Practice Management Tips & Tricks
14 Substance & Style
15 The Diversity Corner
16 Law Students’ Corner
17 A Nostalgic Touch of Humor
22 Members in the News
23 Obituaries
38 Appellate Decisions
40 Appellate Practice Reminders
54 Classified Advertisements
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In Memoriam:
Chief Judge Richard D. Greene (1950-2012)

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If It Ain’t Broke, Don’t Fix It

Proponents for changing the current method of selecting Kansas appellate judges will seek to accomplish their goal in the 2013 legislative session. As stated in a recent Wichita Eagle editorial, “What they still lack are the reasons to do so.”

Proponents for change forget the reasons why the Kansas legislature and voters enacted the 1958 constitutional amendment to institute merit selection. It resulted from Gov. Fred Hall’s “Triple Play.” At the end of Gov. Hall’s second term, Chief Justice William Smith became seriously ill, which caused him to consider retirement. Governor Hall contacted Lt. Gov. John McCuish with the details of the “Triple Play.” Upon announcing Justice Smith’s retirement decision, Gov. Hall resigned as governor allowing McCuish to be sworn in to replace him. McCuish’s first act was to appoint Hall to the Supreme Court vacancy. The announcement of Justice Smith’s retirement, Hall’s gubernatorial resignation, and subsequent Supreme Court appointment occurred in a matter of minutes. Kansas voters were outraged. The result was the constitutional amendment that continues to this day.

Our Constitution now provides for judicial selection by merit selection through a nominating commission composed of four non-attorneys appointed by the governor and five attorneys elected by registered Kansas attorneys across the state. Appellate judge openings, created through retirement or failure to win retention elections, are filled by a democratic process in which all Kansas attorneys are notified of the opening, the application process and the filing deadline. After (1) rigorous background checks of applicants, (2) telephone calls and letters to their clients, (3) contacts with other attorneys and judges familiar with the candidates, and (4) an interview of the candidates, the committee presents a slate of three names for final selection by the governor. The system is designed to ensure judicial independence by providing a selection process based solely on merit and excellence. The politics associated with a popular election or with gubernatorial appointment are virtually eliminated. Thereafter, the appellate judges run for retention. The process has worked beautifully. In the last election, Kansas citizens reflected their satisfaction with the system by an overwhelming vote to retain every Kansas Court of Appeals judge on the ballot. Recently, the U.S. Chamber Institute for Legal Reform ranked Kansas as the fifth best state in the nation for the legal climate of its state courts. Over the last decade, the lowest Kansas has ever ranked in this study is 16th place in 2005.

Only Kansas Supreme Court selection is built upon this constitutional amendment. However, the same nominating commission methodology was statutorily adopted for the Kansas Court of Appeals when that court was created in 1976. The system has worked well. It has retained judicial independence which would not exist with a popular election or a gubernatorial appointment system. Despite that success, the system has been criticized for having a majority of attorneys on the commission.

However, lawyers are as varied as the clients they serve. Our system is designed to be adversarial, pitting one party against another. For each prosecutor, there is a criminal defense attorney. For each attorney representing an injured person, there is an attorney representing a defendant’s interests. Lawyers reflect their clients. Lawyers have no common bond in a system which requires that they play opposing roles. The lawyer majority criticism weakens further when one considers the purpose of the nominating commission. Who is more able to ascertain the honesty, intelligence, and diligence of a judicial candidate than the attorneys with whom that candidate has interacted? Moreover, the nominating commission is counterbalanced by four non-attorneys appointed by the governor.

Proponents seeking change complain of the lawyer majority to advocate for a gubernatorial appointment system modeled after the federal government. The governor would select and appoint the appellate judge subject to confirmation proceedings by the Kansas legislature. Proponents ignore the recent political embarrassments created by the Senate confirmation process of Clarence Thomas or the confirmation hearing of Samuel Alito, televised to capture his wife crying quietly in the background while senators attacked his character.

Judicial candidates should not be required to seek campaign funds and votes, or to curry favor with politicians. Kansas appellate judges should be appointed through a democratic, yet non-political, process which presents the very best candidates to the governor for appointment. Our present process has generated a superb judiciary, a judiciary whose excellence is recognized nationally. We can only preserve this excellence by preserving our judiciary’s independence.

Our system provides for a fair and impartial judiciary. Our system produces highly qualified judges and justices. Our system works efficiently and effectively. If it ain’t broke, don’t fix it!

KBA President Lee M. Smithyman may be reached by email at lsmithyman@ksbar.org, by phone at (913) 661-9800.

Footnotes
2. Id.
Chester actually did a great job testifying. Unfortunately, he was no match for the many correctional officers whose versions of the events in question were wildly different from Chester’s. We ended up losing the case. Although I was disappointed in the outcome, I know that I gave it my best effort.

After the verdict came down, Chester was visibly upset; however, he told me that he had accomplished what he set out to do all along — tell his story. He even sent me a thank-you letter the following week.

I encourage all of you to take pro bono and civil appointment cases, and even sign up to be on the C.J.A. panel. Although you may not make as much money as you would working for other clients, the experience you can gain is invaluable.

I learned more about being a lawyer than I ever thought possible from taking on that one case. It taught me about client interactions (and client control), as well as enabled me to meet amazing lawyers from the attorney general’s office. I also got the experience of trying a case in federal court. Most importantly, I learned that by putting my best foot forward despite fighting an uphill battle, it not only impressed the judges, but also reflected well on my entire law firm.

I would be remiss if I failed to mention that over the course of the case, I received more than 50 handwritten letters from Chester, many of which contained some pretty entertaining statements. I will leave you with some of my favorites:

• “You’re a fine lady and a true scholar indeed.”
• “You’ve shown true prestige and I’m very appreciative of your ability to orate.”
• “Perception is deception because what you have perceived can be deceived because the only thing you see is what another allows you to receive.”
• “The temple of the body is the mind and the power is knowledge.”
• “I have not lost my moral compass [sic] and do not bleed in greed instead of helping those in need.”

So, when that federal judge comes calling for you to take a civil appointment, I encourage you to say yes, and in the words of Chester, “I wish you the very best of skill.”

About the Author

Brooks G. Severson is a member of Fleeson, Gooing, Coulson & Kitch LLC in Wichita, where she practices in civil litigation. She currently serves as president of the KBA YLS. Brooks can be reached at bseverson@fleeson.com.
Electronic Voting Coming in 2013

The Kansas Bar Association is introducing electronic voting for the 2013 Officers and Board of Governors elections. The goal of e-voting is to increase the security of the ballot, speed up the process of the results, and, ultimately, make the voting process easier.

What can you expect?

- Anonymous voting through the use of a unique username and password sent via email.
- Optional paper ballots that may be requested with a simple click of the mouse.
- Candidate biographies and photos that are viewable as voting is in progress.
- An easier, faster, and more authentic voting process.
- And much more!

All ballot information will be sent via email. Make sure the KBA has your correct email by logging into the website at www.ksbar.org and updating your contact information.
It’s not too early to start thinking about KBA leadership positions for the 2013-14 leadership year.

Advance Notice
Elections for 2013 KBA Officers and Board of Governors

The KBA Nominating Committee, chaired by Rachael K. Pirner, of Wichita, is seeking individuals who are interested in serving in the positions of Vice President, Secretary-Treasurer, and KBA Delegate to the ABA House of Delegates.

Officers

President: Lee M. Smithyman, 2012-13; Dennis D. Depew, 2013-14
President-elect: Dennis D. Depew, 2012-13; Gerald L. Green, 2013-14
Vice President: Gerald L. Green, 2012-13; Natalie G. Haag, 2013-14; and nominations welcome
Secretary-Treasurer: Natalie G. Haag, 2012-13; open
KBA Delegate to ABA House of Delegates: Sara S. Beezley, 2012-13; open

If you are interested, or know someone who should be considered, please send detailed information to Jordan Yochim, KBA Executive Director, at 1200 SW Harrison St., Topeka, KS 66612-1806, or at jeyochim@ksbar.org by Friday, January 18, 2013. This information will be distributed to the Nominating Committee prior to its meeting on Friday, January 25, 2013. In accordance with Article V, Elections, Section 5.2 of the Kansas Bar Association Bylaws, candidates for Vice President, Secretary-Treasurer, and KBA Delegate to the ABA House may be nominated by petition bearing 50 signatures of regular members of the KBA with at least one signature from each Governor district.

Board of Governors

There will be four positions on the KBA Board of Governors up for election in 2013. Candidates seeking a position on the Board must file a nominating petition, signed by at least 25 KBA members from that district, with Jordan Yochim by Friday, February 15, 2013. If no one files a petition, the Nominating Committee will reconvene and nominate one or more candidates for open positions. KBA districts with seats up for election in 2013 are:

• District 1: Nominations welcome; incumbent Kip A. Kubin is not eligible for re-election. Johnson County.
• District 2: Nominations welcome; incumbent Paul T. Davis is not eligible for re-election. Atchison, Brown, Doniphan, Douglas, Franklin, Jackson, Jefferson, Leavenworth, Miami, Nemaha, Osage, Pottawatomie, and Wabaunsee counties.
• District 7: Incumbent J. Michael Kennalley is eligible for re-election. Sedgwick County.

For more information
To obtain a petition for the Board of Governors, please contact Christa Ingenthron at the KBA office at (785) 234-5696 or via email at cingenthron@ksbar.org. If you have any questions about the KBA nominating or election process or about serving as an officer or member of the Board of Governors, please contact Rachael K. Pirner at (316) 630-8100 or via email at rpirner@ksbar.org or Jordan Yochim at (785) 234-5696 or via email at jeyochim@ksbar.org.
On October 7, 2012, Kansas lost the Hon. Richard D. Greene, chief judge of the Kansas Court of Appeals. He was 62 having been born in Hermann, Mo., on January 9, 1950. He received his Bachelor of Science in business administration from the University of Missouri-Columbia in 1972 and in 1975 he earned his Juris Doctor from Southern Methodist University in Dallas.

Upon graduation he practiced law at the law firm of Morris, Laing, Evans, Brock & Kennedy for 28 years. Chief Justice Lawton Nuss, who has known Greene since they were both attorneys in private practice, said “He possessed two notable abilities that are hard to find in the same person. First, he had a great legal mind that allowed him to independently analyze the most complex issues. Second, he was a great leader who worked tirelessly with the other Court of Appeals judges, plus their lawyers and staff, to manage their huge caseload.”

Greene was appointed to the bench in 2003 and elevated to chief judge in 2011. He attended the Appellate Judge School in 2004 and was often appointed to sit with the Kansas Supreme Court. He authored three opinions for that Court: *In re Tax Appeal of Weisberger* (285 Kan. 98 (2007)), *State v. Alderete* (285 Kan. 359 (2007)), and *In re Trust D of Darby* (290 Kan. 785 (2010)). He was active with the Kansas Bar Association, serving as editor of the Kansas Annual Survey of Law and as a member of the Bench-Bar Committee. He received the KBA Outstanding Service Award in 2007 for distinguished service to the profession. Greene was a member of the National Council of Chief Judges of State Courts of Appeals and served as chair of its membership committee and on its executive committee.

As chief judge, Greene implemented a host of initiatives to make the courts more technologically savvy, more efficient, and more responsive to its legislative mandate to take the court to the people. Under his leadership, the court convened panels in all 31 judicial districts, achieved the filing of nearly 96 percent of its opinions within 60 days of hearing, and enhanced its public and educational outreach to civic clubs, local bar associations, high schools, community colleges, and universities throughout the state.

“Chief Judge Greene was a dedicated public servant who loved the court and our great state,” said Gov. Sam Brownback in a press release. “He will be missed.”

Greene had a long history of both community and charitable involvement. He served as a volunteer judge for Youth Entrepreneurs Kansas and was a member of the emeritus council of Project Concern International, where he served as chairman of the board from 1992-94.

“I will miss his scholarship and his leadership, but most of all, his friendship.” Nuss said. “His passing is a big loss for Kansas.”

The Hon. Thomas Malone, who succeeds Greene as chief judge of the Court of Appeals, said that he was an outstanding friend and outstanding chief for the court. In addition, Malone said, “Richard was dedicated to the rule of law, and his only allegiance was to the Constitution. He will be deeply missed, and his passing is a huge loss for the state of Kansas.”

Greene is survived by his wife, Mary Sue; four daughters, Kristin, Julie, Katie, and Jenny; and four granddaughters.
What’s New with Your KBA Membership for 2013

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

The Kansas Bar Association is always on the lookout for new member benefits and giving our members more bang for their membership buck. Our members already know the great savings they receive on KBA CLEs with top-notch speakers and timely topics. New KBA handbooks are coming out every year providing the latest information from the most highly regarded attorneys in specific areas of practice.

One of the greatest benefits of being a KBA member is the opportunity to join a Section. The KBA has 25 Sections with specific practice area focus. Belonging to a Section keeps you connected with other attorneys in the field through e-communication, newsletters, and the opportunity to be listed in the public KBA attorney search on our website.

KBA Sections include:

- Administrative Law
- Agricultural Law
- Alternative Dispute Resolution
- Appellate Practice
- Bankruptcy & Insolvency Law
- Construction Law
- Corporate Counsel
- Corporations, Banking & Business Law
- Criminal Law
- Elder Law
- Employment Law
- Family Law

When you renew or join the KBA, your membership, you can choose one Section at no additional fee – your choice! Other sections are available to you as well for a minimal fee. Belonging to more than one section will help you enhance your practice.

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

But wait, there's more! You can also join another section. Or two! Or more! Enrollment costs just $20 for each Section per year. You can enroll online at http://bit.ly/W2jJ1L or by calling (785) 234-5696. If you have questions about Sections, contact Danielle Hall at dhall@ksbar.org.

Footnotes
1. This offer is not available to those who receive the government member rate.
2. The Family Law Section is $25.
3. Free for student and new admittee members of the KBA. All other section members are $10.

Renew your membership online via your KBA Member Portal at www.ksbar.org.

Full Instructions on Page 19
Announcing a New KALAP Service

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

KALAP is blessed with dedicated staff and volunteers, and the support of our Supreme Court. We further enjoy great relationships with the KBA and local bar associations. But what we haven’t had, up to now, is easy access to clinical services for Kansas lawyers at many locations in the state. So we are very happy to announce a new contractual relationship with Alternatives Inc. that became effective October 1, 2012.

Previously, if a lawyer needed an evaluation or short-term counseling and had no or limited insurance, we had to rely on local agencies that often had long waiting times and of course charged a fee. With this new benefit, if a lawyer working with KALAP needs those services, we can, when appropriate, refer him or her to Alternatives Inc.

A few words about Alternatives Inc.: They have many contracts around the country, including one with the state of Kansas to supply EAP (Employee Assistance Program) services to state employees. They have licensed social workers and psychologists available in more than 50 cities in and near Kansas. They were the successful bidder when a Request for Proposals was issued some months ago.

This being a new venture, we expect to learn as we go and to encounter some unanticipated questions, but both entities are dedicated to providing services to Kansas lawyers and we’re confident answers will be found when necessary.

Some other things you need to know. Alternatives Inc. staff will now answer the KALAP toll-free hot line number (888-342-9080) and the local number (785-368-8275) during non-business hours, specifically from 5 p.m. to 8 a.m. and on weekends and holidays. They will immediately notify KALAP of any calls they receive from lawyers and KALAP staff will also contact the caller. Alternatives Inc. staff members are subject to HIPPA laws and so will not reveal any confidential information without the proper release forms. They are also mandated reporters so any self-report of child or elder abuse would fall outside the confidentiality boundaries.

Some other state lawyer assistance programs have pioneered relationships with similar EAP providers and have found them to be beneficial to the lawyers they serve. The KALAP Board formed an Ad Hoc Committee which explored this area of service for several months and then recommended seeking a contract with a provider. They saw several distinct advantages to going this route. First, Alternatives Inc. has locations in more than 50 cities so that lawyers have relatively easy geographic access to professionals. Alternatives Inc. verifies the licensing and credentials of the professionals so that and other administrative tasks do not devolve on KALAP. And because there are a large number of professionals and locations, lawyers using the services are not restricted to just one or two psychologists or social workers. This should make it easier to find someone who is a good fit for the lawyer and his or her situation.

A primary concern was – and always is – confidentiality. Both KALAP and Alternatives Inc. are committed to protecting the confidentiality of the lawyers who contact us or work with us in any setting. We believe we have all the necessary safeguards in place to ensure that.

Most lawyer assistance programs (LAP) throughout the country are finding that although alcohol abuse remains a serious matter in the legal community, the number of people presenting with mental health issues, such as depression, stress, anxiety, attention deficit hyperactivity disorder, and post-traumatic stress disorder, is increasing. It has become a vital part of LAP services, and it is important to be able to have access to professionals either on the LAP staff, or professionals easily available at low cost. Some states have a clinical professional as the Executive Director of their LAP. Here in Kansas, to date, we have believed that it was important to have a lawyer overseeing the program so that understanding of, and connection to, the legal community was maintained. The flip side however, is that as a lawyer, the director does not have the education or credentials to professionally diagnose or treat psychological conditions. The new services through Alternatives Inc. will begin to fill that need.

Some other states are also using contract providers and technology to conduct discussions and support groups around their state because most of us have large rural regions that do not have the population to maintain local groups. KALAP is very aware of this need and continues to explore ways to meet it. I hope someday soon to be writing another column announcing an expansion of services in that area as well.

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.
Cloud Computing Ethics Summary

By Larry N. Zimmerman, Valentine, Zimmerman & Zimmerman P.A., Topeka, ks/lpm@larryzimmerman.com

The legal ethics of cloud computing can ignite passionate debate. A Q-and-A session for a cloud-based vendor presentation I attended last year erupted into heated argument between lawyers and judges aligning at points along a spectrum from “prima facie unethical” to “pry it from my cold, dead fingers.” Nothing was settled in that discussion, but things are settling down in the 13 states with ethics opinions and with release of the initial proposals of the American Bar Association Commission on Ethics 20/20 (available at http://bit.ly/PzHSeh, as of October 15, 2012). There are some basic guiding principles which will provide confidence (and cover) for attorneys considering the leap.

Cloud computing hearkens back to the origins of computing when mighty mainframes existed only at universities and government departments and users logged in from terminals. I am just barely old enough to remember Westlaw and Lexis-Nexis offered that way. Cloud computing is the modern variant of that approach – put robust server hardware, applications, and data at a remote site where it can be maintained and updated by professionals and then access it from the desktop over the Internet. The cost savings, improved security, and flexibility for smaller firms in particular are enticing. The concerns about the cloud relate to access; how can access be protected for those who need it while preventing access from those who do not?

American Bar Association Commission on Ethics 20/20

The 20/20 report recommends that a new line be added to Rule 1.6 to say, “A lawyer shall make reasonable efforts to prevent the inadvertent disclosure of, or unauthorized access to, information relating to the representation of a client.” A modification to a comment for Rule 1.1 is also proposed suggesting, “… a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with technology ….” Those, of course, are so vague as to comfort no one and, probably, make many lawyers a good deal more nervous about the cloud or any technology.

State Ethics Opinions Overview

Fortunately, there are 13 states which have waded into the issue and provided formal ethics opinions related specifically to the cloud. Those states are Alabama, Arizona, California, Iowa, Maine, Massachusetts, New Jersey, New York, Nevada, North Carolina, Oregon, Pennsylvania, and Vermont. Their opinions range from very specific and helpful to reasonably reassuring but not necessarily instructive, and an overview with links to actual opinions can be obtained at http://bit.ly/LGV1k6, as of October 15, 2012. Condensing the opinions’ counsel provides some more concrete guidance:

1. Notify clients about use of cloud services, explaining types of use (i.e., backup, case management, or client-accessible file storage).
2. Secure express written approval of clients for highly sensitive information (i.e., trade secrets) prior to transmission to cloud services.
3. Know how a cloud provider stores and secures data. In which jurisdictions are the provider’s data held and transmitted? What are the physical security conditions of facilities? What screening and review is conducted on staff and subcontractors?
4. Confirm that the cloud provider has an enforceable confidentiality agreement providing real teeth to protect firm and clients.
5. Require vendor disclosures of data breaches, regardless of origin, complete with scope and descriptions of information impaired and estimates of impact.
6. Use the cloud only with proper understanding of best practices for the technology including encryption, password quality, and backup mechanisms.
7. Conduct a periodic review of a provider’s agreements, notices, and services as well as reviewing evolving best practices addressed in item 6.
8. If the lawyer or firm lacks the legal and technical expertise to evaluate a provider, consult with a person or company with expertise and understanding of any needs peculiar to legal services.
9. Plan for and address how to secure unfettered access to data throughout service outages or termination of the provider’s ongoing business.
10. Be aware of any information which would be required by law to be retained in paper format as well as any agreements with clients to retain originals.

Frankly, the guidance provided by the opinions and the new proposed changes to ethics rules from the 20/20 Committee are still daunting and, in some cases, confusing in application but not insurmountable. The best summary would be that attorneys may ethically use cloud services but must be cognizant of the risks.

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.

www.ksbar.org

The Journal of the Kansas Bar Association | November/December 2012 13
When I was in law school, I used to waste a tremendous amount of time playing an addictive computer game called Tetris. In Tetris, a series of different-shaped blocks are dropped from the top of the screen. The players must organize the blocks to complete a full row and when they do so, the blocks disappear. If the player fails to clear the blocks fast enough, they stack on top of one another and time runs out.

I recently read an article that analogized the workload of lawyers and law students to a game of Tetris; we sometimes have so many things to do that we have difficulty clearing them off our desks fast enough. The article, *Time: An Empirical Analysis of Law Student Time Management Deficiencies,* interested me for other reasons, including that it uses the word “empirical” in the title. I read a lot of articles that are just someone’s opinion about something. This one has data to back it up. Despite the title’s focus on law students, the article spends a good deal of time discussing the time management concerns of practicing lawyers.

So what did I learn? Well, I learned that while most of us have a lot of time management skills, often our perceptions about time can lead us to be inefficient and procrastinate. The key for me was to think about changing those perceptions and remembering some simple tricks and tools to help me better manage my time.

The research shows that how well you manage your time is based on certain aptitudes, for example how organized you are and how persistent you are, particularly at difficult tasks. Lawyers and law students tend to score relatively high on these kinds of aptitudes. Where we tend to score low is on perceived control of time and present orientation. Almost 50 percent of law students do not frequently break large tasks into smaller ones. I hope that number is much lower for practicing lawyers. To me, this is the key to managing my time – the dreaded to-do list. My guess is that most of us have some version of a to-do list. The question for all of us is how manageable are the items on our list. If your list says “file that brief,” or “draft that contract,” or “solve client X’s problem,” or “write that darn Kansas Bar Journal article,” the list is not very helpful.

To facilitate good time management, the list needs to include items that can be accomplished in a relatively short period of time. If the items on the list are too big, it is easy to put off doing them. We have a natural tendency to work on the smaller items on the list – “call George back” or “order new pair of shoes” – because there is such a great satisfaction in crossing items off the list. Thus, we need to take that larger item, “draft that contract,” and break it into manageable chunks that we can accomplish and cross off our list: “review the file – check; look for similar contracts – check; draft the easy parts – check; work on the release provisions – check.” and so on.

**Footnotes**

2. Id. (manuscript at 18).
3. Id. (manuscript at 24-25).
4. Id. (manuscript at 25-26).
5. Id. (manuscript at 28).
6. Id. (manuscript at 28-29).
7. Id. (manuscript at 26).
8. Id.
9. Id. (manuscript at 29).
10. Id.
11. Id.
Diversity in the workplace has become an important issue for the legal profession. More persons with disabilities are graduating from professional graduate programs, including law programs, and are seeking employment in professional career fields. Since attorneys with disabilities can experience discrimination in the workplace like attorneys from other minority groups, the unique perspective that they offer is valuable and should be considered in discussions about diversity.

The U.S. Equal Employment Opportunity Commission (EEOC) published a “fact sheet” in 2006 to address the myth that attorneys with disabilities requiring reasonable accommodations are less competent and productive than attorneys without disabilities. Though reasonable accommodations may be needed, that does not suggest an inability to work or incompetency. Reasonable accommodations are made to enable attorneys with disabilities to enjoy equal employment opportunities in the performance of their job. The provision of reasonable accommodations for attorneys with disabilities removes barriers in the workplace that would otherwise impede such qualified attorneys from competing for, performing, or gaining access to employment. The types of reasonable accommodations can vary, and commonly include:

- Making workplaces accessible;
- Modified work schedules;
- Acquiring or modifying equipment or software (i.e., TTY equipment; screen reading software);
- Permitting telework;
- Modification of workplace policies;
- Job restructuring (i.e., removal of marginal duties from job description);
- Adjustment of training materials; and
- Provision of qualified readers or interpreters.

The legal profession is well suited for attorneys with disabilities, since many legal jobs do not require strenuous physical activity and have flexible work hours. However, encouraging legal employers to be flexible and open-minded in the hiring of attorneys with disabilities is only the first step toward the inclusion of attorneys with disabilities into the legal profession. According to Michele Gatto, vice chair of the Association of Corporate Counsel, there is a need to continue best practices in disability inclusion within the legal environment, such as communicating effectively, avoiding misconceptions about competence, and building awareness for reasonable accommodations. The unique experiences and expertise of professionals with disabilities merits taking steps to ensure their participation in all professional settings.

About the Author

Katherine Lee McBride is an Assistant Revisor of Statutes for the Office of Revisor of Statutes and a member of the KBA Diversity Committee. She is a candidate for a LL.M. in Elder Law from the University of Kansas School of Law and a graduate certificate in gerontology from the University of Kansas Gerontology Center, Life Span Institute.

Killing Time

(Con't. from Page 14)

When you break complex tasks down, it is also easier to identify how long each task will take. That will help improve your perceived control of time. It will help you more accurately identify whether you actually have time to complete all your tasks by your deadlines or whether you need to seek an extension. It will also help you realize when you do not have time to procrastinate and force you to use your time more efficiently. In the end, if you can improve your perceived and actual control over your time, you will not only get more done, but you will lower your stress and increase your job satisfaction. You might even have time to play some Tetris.

About the Author

Betsy Brand Six became a Tetris expert while a student at Stanford Law School. She then practiced environmental law for 13 years in Kansas City. She is now a Lawyering Skills Professor and Director of Academic Resources at the University of Kansas School of Law. These days she prefers wasting time playing Word Solitaire with her husband and four kids.
How does a student born and raised in Texas, a state that does not exactly lack options for aspiring law students, wind up at a law school in Kansas? In my case, the answer to this question involves a considerable leap of faith. It also requires an examination of the stereotypes applied to certain states, which is something that native Kansans can probably relate to. Though I have lived through a tornado and I’d like to think my flashy red running shoes rival Judy Garland’s red slippers, neither was responsible for bringing me to the Sunflower State.

One common assumption is something along the lines of, “Texans don’t like to leave Texas.” The most common explanation for this stems from the state’s uniqueness. Like a different country, everything is bigger, and so on and so forth. To be sure, this attitude is pervasive in the mindsets of many Texans. My family was not immune to this belief, making my decision to move away a difficult one. However, I am living proof that this rule does have exceptions.

Aside from a few relatives scattered across the state, I had very little connection to Kansas before leaving the Lone Star State. I could count on one hand the number of times that I had visited Kansas. Importantly, however, none of those visits included a trip to Lawrence and KU. As I learned more about the state, and the city and university I now call home, I began to find that not even the prospect of out-of-state tuition could deter my impending move.

As I pondered my options, many factors influenced my decision. KU offered everything I could want in a law school, and Kansas offered something new. I appreciated all of the unique qualities of Lawrence, but I also appreciated its proximity to so many other interesting places. Big cities, open country – and everything in between – were all less than an hour away. And, of course, Kansas City barbeque would help to mitigate any potential homesickness. All of these things offered the prospect of exciting new experiences and motivated me to submit an application in hopes of exploring this new frontier. An application that was … well, waitlisted.

The waitlist is truly the purgatory of the admissions process. No applicant likes to be rejected but being waitlisted can be just as bad. Being waitlisted at your preferred school forces you to be hesitant to commit anywhere else. Even when visiting other schools, there is always that little mental asterisk denoting that “I’ll go here as long as I don’t get in to that other place that I’d rather go to.” I did my best to keep the faith, wondering if I should trust my instinct that my future would play out north of the border.

My stint in waitlist purgatory seemed to last for ages but my gamble against home state inertia ultimately paid off. Once everything fell into place, I had less than three weeks to complete the paperwork, find an apartment, uproot myself from all that I had known, and relocate to an entirely new environment. All of this change was chaotic but I would not have had it any other way. In the end, I found my goal, persevered, and made it happen. I arrived just in time for orientation and opened a new chapter in my life.

So here I am, almost three years later, preparing to embark upon yet another new journey. I can’t predict what the future will hold or where that first job out of law school will take me, but it will probably be the result of a process a lot like the one that brought me here. My leap of faith, and refusal to accept conventional wisdom as binding, prepared me for the adventures that lie ahead far better than playing it safe and staying home would have.

About the Author

Matthew Greenberg is a third-year law student at the University of Kansas. He received his degree in history from the University of Texas in 2010. He currently works for the Shawnee County District Attorney’s Office as a legal intern and is applying to serve in the military as part of the JAG Corps.
A Nostalgic Touch

KCMBA Convenes Civility Summit

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

What would it take to bring together 200 attorneys for half a day? To assemble a cross section of lawyers from small, medium, and large firms on both sides of the state line to listen, break into smaller groups, and then “share”? To sacrifice the better part of a work day that would otherwise be devoted to the almighty billable hour?

Yet on Monday, October 8, that’s what took place at the Indian Hills Country Club from 11 a.m. to 4 p.m. The purpose was to discuss, debate and, if necessary, decry a topic no less pressing than the state of civility in the metropolitan bar. The gathering, the brainchild of former Kansas City Metropolitan Bar Association President Jerry Wolf, was hailed as the first of its kind – a summit devoted to seeking solutions for the perceived decline of professionalism in our practice.

And if this gathering wasn’t monumental already, more than half the attendees were MU grads who sat enraptured to hear the keynote speaker – KU basketball coach Bill Self, a leader who, in this world, embodies the qualities of not just a winner, but a good guy, on and off the court.

I asked Wolf to give the background to this undertaking: “When I was chairman of the Past Presidents’ Committee of the KCMBA in 2010, my project was to do a video interview of all of the past presidents and executive directors.” Wolf said, “When the smoke cleared, I had interviewed 31 past presidents and two executive directors. The recurring theme in the interviews was a concern that civility among lawyers had deteriorated over the years.” He continued that “various reasons included impersonal technology and increased competition [...] The KCMBA had suggested 25 years ago Tenets of Professional Courtesy, but they weren’t widely known and needed [...] to be updated.”

The press release for the KCMBA noted, correctly, that “no one in the U.S. has done anything like this. You have the opportunity to participate in a nationally precedential event and to contribute to the betterment of the Kansas City Metropolitan Bar, which is already one of the best in the country.” The message was well received.

Joining Self were, among others, a longtime pillar of the metropolitan bar, Larry Ward, of Polsinelli Shughart; one of my partners, Willie Epps Jr; and a few judges, Johnson County District Court Judge Charles Droege, Duane Benton from the U.S. Court of Appeals for the 8th Circuit, and U.S. District Court Judge Fernando Gaitan.

That afternoon, it became clear that many attendees had little familiarity with the KCMBA’s tenets, which still represent laudable goals in our practice. They are:

1. A lawyer shall never knowingly deceive another lawyer.
   Candor between lawyers is vital to open channels of communication.

2. A lawyer should honor promises or commitments made to another lawyer.
   A lawyer’s word is his bond on which witnesses, parties, court personnel, and other lawyers may rightfully rely.

3. A lawyer should make all reasonable efforts to schedule matters with opposing counsel by agreement.
   Lawyers should recognize the scheduling interests of the opposing parties, the court, and witnesses.

4. A lawyer should maintain a cordial and respectful relationship with opposing counsel.
   Lawyers are engaged in a profession of representing adverse interests that often are in conflict. The conflict is between the clients and not the lawyers. Effective and open communication between lawyers aids the resolution of the conflict.

5. A lawyer should seek sanctions against opposing counsel only where required for the protection of the client and not for mere tactical advantage.

(Con’t. on next page)
Seeking sanctions against opposing counsel may impugn the integrity of that individual. Such action should be sought only after efforts for agreement have failed, after careful consideration, and only in those cases where the interest of the client cannot otherwise be protected.

6. A lawyer should not make unfounded accusations of unethical conduct about opposing counsel.
The legal system works best when it has the respect and confidence of the court, lawyers, and members of the public. Unfounded accusations of unethical conduct tend to diminish the respect of the entire profession.

7. A lawyer should never intentionally embarrass another lawyer and should avoid personal criticism of another lawyer.
A lawyer should at all times remember that opposing counsel is a fellow professional deserving of respect and courtesy. Criticisms and intentional efforts to embarrass another lawyer in the presence of the court, the lawyer’s client or other counsel, often results only in hard feelings on the part of that lawyer, handicapping future dealings.

8. A lawyer should always be punctual.
A lawyer should arrive sufficiently in advance at trials, hearings, meetings, depositions, conferences or other scheduled events so that preliminary matters can be resolved.

9. A lawyer should seek informal agreement on procedural and preliminary matters.
When an adversary is entitled to something, such as information or documents in discovery, normally it should be provided without resort to formal procedural mechanisms such as motions, briefs, hearings, or orders.

At the conclusion of the meeting, the comments, observations and challenges identified by those in attendance were recorded by the KCMBA staff and an action plan is forthcoming, with the goal of doing whatever is necessary to elevate the tone of discourse to its rightful place. What happened on that day in October is the beginning, not the end, of a new initiative, and I look forward to reporting the forthcoming recommendations.
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Patrick Charles Hunt Guinness, Kansas City, Mo.
Christina L. Hammond, Topeka
Katie S. Hammond, McLouth
Byron J. Harden, Topeka
Heather J. Hardinger, Kansas City, Mo.
Sarah Elizabeth Harris, Kansas City, Kan.
Molly Ann Hartley, Mission
Renee J. Henke, Downs
Collin G. Hildebrand, Great Bend
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Michael Paul Hinkin, Manhattan
Andrew D. Holder, Bonner Springs
Courtney E. Holt, Lee's Summit, Mo.
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Nicholas H. Jefferson, Topeka
Andrew Joseph Jennings, Lawrence
Myles Dean Jennings, Garden Plain
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Joann Wirth Johnson, Stilwell
Mandy Johnson, Topeka
John Stanley Jones, Basehor
Tara Stephanie Jordan, Derby
Daniel Joseph Keating, Roeland Park
Logan P. Keech, Kansas City, Mo.
Michael James Kelly, Leawood
Tara M. Kelly, Overland Park
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Jeffrey Allen Christopher Kincaid, Lawrence
Matthew Tyler Kincaid, Kansas City, Mo.
Kasey Andrew Klenk, McPherson
Patricia J. Klunin, Chanute
Michael Kopit, Olathe
Susan Richelle Kueker, Concordia
Allison Darlene Kuhns, Ashland
Joslyn Michelle Kuskial, Wichita
Jared Thomas Langford, Omaha, Neb.
Robert Charles Large, Manhattan
Danielle Marie Lavelly, Lawrence
Joseph Leiker, Topeka
Ryan J. Loehr, Kansas City, Kan.
Sarah Catherine Longhiller, Topeka
Mallory Anne Loudenback, Dallas
Jonathan Lee Lowrey, Kansas City, Mo.
Kyle W. Malone, Dodge City
Will C. Manly, Lawrence
Larry L. Marczynski II, Derby
Peter James Marples, Kansas City, Mo.
Dane C. Martin, Columbia, Mo.
Kendall Jane Mathewson, Lawrence
Kristen Miller Maun, Leawood
Allison H. Maxwell, Topeka
Andrew Stone Mayo, Topeka
Jason R. McClitis, Kansas City, Mo.
Carolyn Marie McKune, Lenexa
Mary Kathryn Means, Overland Park
Michael Paul Megaris, Lawrence
Jessica Diane Meyer, Lincoln, Neb.
Christopher Claiborne Miles, Leawood
Kellie Jo Mitchell, Olathe
Michelle Elaine Morris, Overland Park
Sarah A. Morse, Topeka
Sarah Mahoney Mueting, Lenexa
Ganesh Nair, Denver
Christopher Michael Napolitano, Great Bend
Kelly Ann Navinsky-Wenzl, Alma
Christopher Brian Nelson, Overland Park
Natalie A. Nelson, Lawrence
Michael James Nolan, Lawrence
Matthew Scott Nygaard, Lawrence
Michael Steven Obermeier, Lawrence
Le' Tiffany O. Osefo-Obozele, Topeka
Ashley Marie O’Connor, Kansas City, Mo.
Joseph Anthony Orrino, Archison
Ann Marie Elliott Parkins, Lindsborg
David Scott Patrzykont, Kansas City, Kan.
Edward F. Penner Jr., Fort Scott
Jacob Erik Peterson, Salina
Veronica Anne Petree, Kansas City, Mo.
Margot Marie Pickering, Lawrence
Paige D. Pippin, Wichita
Steven Andrew Pippin, Wichita
Jason Kyle Pollock, Topeka
Brandon Michael Porter, Kansas City, Mo.
Jonathan Puebla, Sarasota, Fla.
Dana Katherine Pugh, Olathe
Ryan Russell Raybould, Leawood
Paul Andrew Ready, Kansas City, Mo.
Nicolette Marie Reavenaugh, Topeka
Melissa Richards, Manhattan
Boyce Neal Richardson, Kansas City, Mo.
Jessica Marie Rieger, Topeka
Zachary Paul Roberson, Rowlett, Texas
Madeline Jayne Rogers, Overland Park
Erik Michael Romie, Shawnee
Eli Andrew Rosenberg, Joplin, Mo.
Katelyn Elizabeth Ross, Dallas
Nicholas Steven Ruble, Lee's Summit, Mo.
Jonathan D. Ruhlen, Lawrence
Elizabeth Ann Russell, Kansas City, Mo.
Samuel Dickinson Schirer, Wichita
Allen Dee Schup, Leawood
Hannah Carleene Schroller, Topeka
Joseph Samuel Schultz, Overland Park
Aaron D. Schuster, Tecumseh
Alex Matthew Scott, Kansas City, Mo.
Jessica Marie Shannon, Wichita
Samuel Brady Short, Oxford
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Madeleine Mar Simpson, Lawrence
Rebecca Faye Sisk, Overland Park
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Anthony Smith, Shawnee
Daniel A. Smith, St. Paul
Cody M. Snell, Tecumseh
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Samantha Marie N绫h, Kansas City, Mo.
Sarah J. McCall, Topeka
Matthew Matthew, McLouth
Sarah Jane Merchant, Topeka
Heather Anna Mitchell, Topeka
J. Matthew Godfrey, Shawnee
Benjamin Daniel O’Keeffe, Overland Park
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Matthew Michael Pendergrass, Overland Park
Samantha Marie Pinkston, Kansas City, Mo.
Katie A. Pendergrass, Overland Park
Matthew Michael Pendergrass, Overland Park
Mattie L. Pendergrass, Leawood
Kasey Kennon, St. Louis
Allison M. Pengelley, Leawood
Ray Charles Perry, Wichita
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Changing Positions

Riley W. Baber, Kristi D. Topper, and Ashley Wiechman have joined Sedgwick County District Attorney’s Office, Wichita.

Robert E. Bauer and Lindsey D. Moore have joined Bauer, Pike & Johnson Chtd., Great Bend.

Michael Book has joined Duggan Shadwick Doer & Kurlton P.C., Overland Park.

Virginia L. Brady has joined Carpani & Gordon P.A., Leawood.

Marty Bregman and Mark A. Salle have joined Stinson Morrison Hecker LLP, Kansas City, Mo., as partners.

Jordan Kieffer has joined the firm’s Wichita office as a litigation associate.

Taylor P. Calcaro has joined Watkins Calcaro Chtd., Great Bend.

Whitney P. Casement has joined the Office of the Kansas Attorney General, Topeka, as an assistant attorney general.

Derek S. Casey has joined Triplett, Woolf & Garretson LLC, Wichita.

Dustin R. Cook has joined the firm of Bryan W. Smith, Attorney at Law, Topeka, as an associate.

Julia A. Craft has become a partner of Joseph & Hollander, Wichita, whose name changed to Joseph Hollander & Craft LLC.

David W. Fairbanks has joined Norton Hare LLC, Overland Park, as an associate.

C. Ryan Gering has been named as a shareholder and partner at Hulnick Stand & Rapp PA, Wichita.

Blair T. Gisi has joined South & Associates, Wichita.

Tiffany D. Hogan has joined American Family Insurance, Kansas City, Mo., as regional legal staff attorney.

Andrew D. Holder has joined Fisher, Patterson, Sayler & Smith, Topeka, as an associate.

Michael S. James has joined Denbury Resources Inc., Casper, Wyo.

Rebecca Jelinek has been promoted to of counsel at Bryan Cave LLP, Kansas City, Mo.

Allison D. Kuhns has joined Woolwine Law LLC, Ashland.

Joslyn M. Kusiak has joined Klenda Aus- terman LLC, Wichita.

Leilani R. Leighton and Natalie M. Schumann have joined the Overland Park office of Wallace, Saunders, Austin, Brown & Enochs Chtd.

James M. Luce has joined Brumbaugh & Quandahl P.C., Kansas City, Mo.

Robert D. Maher has become a shareholder at McDowell, Rice, Smith & Buchanan P.C., Gardner.

Kyle W. Malone has joined Arthur-Green LLP, Manhattan, as an associate.

Keven M.P. O’Grady has been appointed to the 10th Judicial District Court, Olathe, by Gov. Sam Brownback.

Terence M. O’Malley has joined Bottaro Morefield Kubin & Yocum P.C., Leawood.

Mike R. O’Neal has been named as the new president and CEO of the Kansas Chamber of Commerce, Topeka.

Ann M.E. Parkins has joined Wise & Reber L.C., McPherson, as an associate.

Melissa D. Richards has joined Brenda J. Bell P.A., Manhattan.

Erik M. Rome has joined Newbury Un- gerer & Hickert LLP, Topeka.

Alison J. St. Clair has joined Goodell, Stratton, Edmonds & Palmer LLP, Topeka, as an associate.

Mark N. Skoglund has joined Sanders Warren & Russel LLP, Overland Park, as an associate.

Dillon L. Stum has joined WaKeeney Law Firm, WaKeeney.

Stuart N. Symmonds has joined Sym- monds & Symmonds LLC, Emporia.

Jan T. Williams has joined Morris, Laing, Evans, Brock & Kennedy Chtd., Wichita.

Changing Locations

Eldon L. Boisseau, Wichita, has moved to 200 W. Douglas, Ste. 101, Wichita, KS 67202.


Angelee R. Gregory started a practice, Law Office of Angelee R. Gregory LLC, 214 N. Main St., PO Box 411, Cheney, KS 67025.


Dana M. Harris and Brette S. Hart have started Harris & Hart LLC, 4501 College Blvd., Ste. 190, Leawood, KS 66211.

Mary A. McDonald has opened her own firm at 900 N. Poplar St., Ste. 300, New- ton, KS 67114.

Valentine, Zimmerman & Zimmerman, P.A. has moved to 909 SE Quincy St., Topeka, KS 66612.

Miscellaneous

Jeffrey L. Carmichael, Wichita, has been installed as president of the Kansas Association for Justice.

J. Eric Engstrom, Wichita, has been appointed to the Wichita State University Board of Trustees by Gov. Sam Brownback.

Parthenia B. Evans, Kansas City, Mo., has been inducted into the American College of Environment Lawyers.

Bradley E. Haddock, Wichita, was invited to become a member of the panel of ar-bbitrators for the International Centre for Dispute Resolution. He was also named as a 2012 Alumni Fellow by Washburn University School of Law.

Jeffrey T. Klaus, Wichita, has been selected as the 2012 Newman University St. Maria De Mattias Award recipient.

Rachael K. Pirner, Wichita, has been elected to serve on the membership and program committees for the National Conference of Bar Presidents.

Bradley J. Prochaska, Wichita, has been elected as the 2012 co-chairman of the Birth Trauma Litigation Group of the American Association for Justice.

Michael B. Roach, Wichita, has been elected to the Arts Council of Wichita.

Hon. Wendel W. Wurst, Garden City, has been awarded the Southwest Kansas Bar Association’s “Civilty Award” in recognition of his civility to attorneys, courtesy to witness, and others in the legal process.

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.

Welcome Fall 2012 Admittees (Cont’d. from Page 21)
Obituaries

Gary R. Hathaway

Gary R. Hathaway, 70, of Ulysses, died October 17 at Via Christa Regional Medical Center in Wichita. He was born July 5, 1942, in Liberal, the son of Addison E. and Helen M. (Nix) Hathaway. He grew up in Hugoton and Garden City, and was active in the Boy Scouts. Hathaway graduated from Southwestern College in Winfield with a bachelor’s degree in business. Following graduation he worked at Johnson State Bank in Johnson for two years before attending Washburn University School of Law; he graduated in 1969 with a juris doctorate.

Hathaway established a law practice in Ulysses in 1970 and served as Grant County attorney and Ulysses city attorney. He was a member of the Kansas and Southwest bar associations, and Kansas Association for Justice. He was admitted to practice before the Kansas bar, U.S. District Court for the District of Kansas, and the 10th U.S. Circuit Court of Appeals.

Hathaway is survived by his wife of 35 years, Sonja, of the home; two brothers, Kenneth, of Winfield, and Doyle, of Wichita; and many nieces and nephews. He was preceded in death by his parents.

Keith D. Hoffman

Keith D. Hoffman, 62, of Abilene, died August 11 at his home in Abilene. He was born August 8, 1950, in Abilene, the son of Wilson and Deana (Townsend) Hoffman. He graduated from Chapman High School and later graduated with a law degree from Washburn University School of Law.

He served as Dickinson County attorney for 15 years and spent an additional 14 years in private practice. Hoffman served in the U.S. Marines during the Vietnam War and was a member of the Kansas Bar Association and the American Legion in Chapman.

Hoffman is survived by his wife, Ruth, of the home; stepdaughter, Sherie, of Abilene; stepsons, Jeff, of Austin, Texas, and Jon, of Abilene; brother, John, of Abilene; sister, Darlene, of Herington; 10 stepgrandchildren; and five stepgreat-grandchildren. He was preceded in death by his parents and his brother, Donald.
The Threat to Merit Selection:
An Ominous Political Cloud Hovers Over the Capitol, Casting a Dark Shadow on the Judiciary

By Justice Fred N. Six, Kansas Supreme Court, retired, Lawrence

The American philosopher George Santayana got it right: “Those who cannot remember the past are condemned to repeat it.” Regrettably, it appears that with the passage of time the collective memory of the Kansas legislature has faded. A number of Kansas legislators and the governor appear to have forgotten the political Supreme Court shenanigans of 1956-1957. As a result, a dark shadow has been cast on the judicial selection horizon, “packaged” for arrival at the Capitol during the 2013 legislative session.

Do you know the story of the infamous “Triple Play”? In 1956, Gov. Fred Hall was defeated in the primary in his bid for reelection. About to become unemployed as the year drew to a close, Hall made a pact with then-Chief Justice William Smith, who was hospitalized in Topeka, an invalid. On December 31, 1956, Smith resigned from the Supreme Court and on January 3, 1957, Hall resigned as governor. The lieutenant governor, John McCuish, a patient in a clinic in Newton, was driven to Topeka and sworn in as governor. McCuish appointed Hall to the Supreme Court—McCuish’s only official act during his 11-day tenure as governor. All of those events occurred just days before the incoming Democratic governor, George Docking, took office.

Kansans were so outraged that in 1958 a fundamental change was made in the manner in which Supreme Court justices were chosen. Voters resoundingly approved a constitutional amendment creating the Supreme Court Nominating Commission and establishing merit selection of Supreme Court justices. Twenty years later, when the legislature created the Court of Appeals, it adopted the same model by statute for vacancies on the Court of Appeals. Thus, for the past 54 years, Kansas has been selecting justices and judges for the appellate bench using the nominating commission process. For half a century, Kansans have been able to walk into a Kansas courtroom with confidence, knowing that a fair and impartial judge will hear his or her story—this has been the Kansas way. Since 2005, various legislative proposals relating to the selection of appellate judges have been unsuccessfully advanced to alter or abolish merit selection.

“If it ain’t broke, don’t fix it”

The recent proposals to abolish the Nominating Commission are solutions searching for a problem. Alternatives to merit selection, such as appointment by the governor with confirmation by the senate, or the outright election of all judges, will serve only to politicize the selection of judges.

Anyone who urges radical changes in basic institutions must bear a heavy burden of proof on two points. First, they must show by solid evidence that the existing system is broken. Second, they must show that the proposed changes would make the institution better. The opponents of merit selection have neither attempted to provide evidence that our present system does not work nor produced any reasons to believe that gubernatorial appointments would make the judiciary more independent and less political.

Absent the Nominating Commission, the governor would have unbridled discretion to appoint whomever he or she might choose. There would be no application process, no investigation or vetting of qualifications; there would be only the governor’s phone call. “Phone call selection” offers the opportunity and invitation for an appointment based on political considerations rather than judicial qualifications.

A primary function of the Nominating Commission is to evaluate the ability and competence of attorneys who apply for an appellate vacancy. It is not surprising that Kansans by their Constitution assigned this task to a Nominating Commission with an attorney majority. The rule in Kansas, rather than the exception, is to appoint members of the same profession to evaluate ability and competence of professionals. The Board of Healing Arts, K.S.A. 74-1805a, each have majority members from the profession regulated.

Objections to the composition of the Nominating Commission for the Court of Appeals are not addressed by abolishing the Commission. The few voices claiming undue attorney influence on the Commission can be silenced by legislation requiring a majority of the Commission to be lay persons. The absence of such a simple legislative proposal indicates that the real objective of those opposing merit selection is to politicize the process.

A nine-member Nominating Commission of four laypersons and five lawyers investigates, interviews, and ponders. Our Constitution ensures a broad range of Kansas views by requiring a layperson and lawyer from each congressional district. The governor must appoint one of the three names submitted by the Commission. Judicial accountability is tested at the next general election after a probationary period, and again at the end of each appellate judge’s limited regular term. The judge’s name is on the ballot. The voters give either a “thumbs up” or “thumbs down” for retention, thus constitutionally incorporating a “populist” voter participation concept.

4017118 (C.A. 10 (Kan.)). The Dool court joins the other federal courts in Alaska, Iowa, and Indiana that have rejected an equal protection attack based on the composition of judicial nominating commissions.

Judge O’Brien, concurring in Dool, observed:

- Merit Selection is a system employed in one form or another by more than 30 states.
- “Forged in the ashes of the Kansas triple play, the Commission is designed to ensure the conduct of the executive branch does not threaten the integrity of the judicial branch. Its charter concerns the distribution of power within and among the various organs of government; it is a structural body, not a representative one.”
- “The Commission, in interviewing candidates and recommending suitable nominees, performs a carefully circumscribed intermediate role. That role—winnowing a candidate pool to cabin the governor’s discretion and ensure he chooses from only qualified nominees—is not a traditional government function, but rather a structural innovation of the merit selection system. If anything the role is anti-governmental, in that it is carved from the governor’s previously unlimited authority to make judicial appointments and vested in an independent commission of citizens.”
- “The constitutional amendment creating the Commission has been in place for more than half a century, its vintage a testament to the state’s time honored commitment to judicial independence.” Dool at 2, 6, 7.

Merit selection as the Kansas “Judicial Vehicle,” has a proven “track record” in the court decisions based on the law, the facts, and the record from the trial court.

During my time on the Court of Appeals and the Supreme Court, I served with colleagues appointed by Gvns. Bennett, Carlin, Hayden, Finney, and Graves. My observation is that, at all times, each judge and justice approached the task at hand earnestly. The black robe worn by each spoke for an impartial Third Branch of Government; an independent judiciary. We came to the Court with past party affiliations, and especially their legislators, of the past: of the political shenanigans of the Triple Play. The Bar has a responsibility of vigilance: a responsibility to marshal its collective force for the protection and preservation of a fair and impartial appellate judiciary, selected by the time-tested Kansas constitutional concept of merit selection.

About the Author

Justice Fred N. Six, a resident of Douglas County and a former Kansas Assistant Attorney General, practiced law in Lawrence from 1959 until his appointment in 1987 to the Kansas Court of Appeals. In 1988, he was appointed to the Kansas Supreme Court, serving on that Court until his retirement in 2003. He was a lawyer member of the Commission on Judicial Qualifications for 13 years before his appointment to the Court of Appeals. He is a former member of the Board of Governors of the KBA and the Kansas Commission on Judicial Performance. Justice Six received his B.A. and J.D. degrees from the University of Kansas in 1951 and 1956 and a Master of Laws in Judicial Process from the University of Virginia in 1990. Justice Six was awarded the Philip H. Lewis Medal of Distinction by the Kansas Bar Association in 2008.

In November 2010, Kansas voters retained all four justices of the Supreme Court and all six of the Judges of the Court of Appeals who were up for retention by margins of sixty per cent or better. When Kansas voters reflect on how the role of a judge differs from that of other public officials and that a judge must decide cases impartially without political influence, they favor merit selection as offering greater assurance that our judges will be qualified.

Vetting by the Commission, appointment by the governor, a probationary period retention vote, and a retention vote after each regular term, blend to create the finest procedure for the selection of appellate court judges. It is a procedure that avoids open political and interest group influence, a goal that forms the heart of merit selection.

Members of the Kansas Bar should remind their friends and especially their legislators, of the past: of the political shenanigans of the Triple Play. The Bar has a responsibility of vigilance: a responsibility to marshal its collective force for the protection and preservation of a fair and impartial appellate judiciary, selected by the time-tested Kansas constitutional concept of merit selection.
Pillars of Professionalism: A Fitting Tribute to a True Professional

By Timothy M. O'Brien, Clerk, U.S. District Court, Kansas City, Kan.

When I served as president of the Kansas Bar Association, I had the opportunity to meet and work with some extraordinary people, including the late Chief Justice Robert E. Davis of the Kansas Supreme Court. At the Wichita Judges Appreciation Dinner in 2009, we discovered a shared “mutual interest in maintaining the high standards we have come to enjoy from the members of the Kansas Bar.” Shortly thereafter, the Chief Justice wrote to tell me about a professionalism project undertaken in Virginia that had recently been featured in the American Inns of Court’s magazine, The Bencher. He asked whether the KBA might be interested in pursuing a similar initiative. I assured him that the KBA would take on the project, which became the “Pillars of Professionalism,” an inspirational and aspirational set of principles to guide Kansas lawyers.

In the fall of 2009, to manage the project, the KBA formed the Commission for Professionalism and invited participation. The commission was comprised of an impressive and diverse group of lawyers and judges from across the state.

In March 2010, the Commission met for the first time at the Kansas Judicial Center and began its work. In August 2011, the Commission, led by Judge Fleming and co-chaired by me, began formulating the pillars. Thomas E. Spahn, of McGuire Woods LLP and chair of the Virginia Bar Association’s Commission on Professionalism, traveled to Kansas to discuss how Virginia developed and implemented its project. Then in late 2011, after numerous conference calls and emails, the Commission circulated a draft of the pillars among its members. In January 2012, the group met in person to edit the document. The editing process, like sausage making, although not pretty, resulted in a great product. After a few more tweaks, the final version was presented to the KBA Board of Governors and adopted at the annual meeting on June 15, 2012. The Kansas Supreme Court issued its Order adopting the pillars on September 28, 2012. On October 19, 2012, the U.S. District and Bankruptcy Courts for the District of Kansas also adopted the Pillars. Copies of the courts’ orders are included here.

The pillars are dedicated to Chief Justice Davis, who sparked this work. Chief Justice Davis had a rich and distinguished career. He received his Bachelor of Arts from Creighton University and his law degree from Georgetown. After serving in the military as a JAG captain, he practiced with his father, a well-respected lawyer, in Leavenworth from 1967-84. He served as a magistrate judge from 1969-76. Chief Justice Davis was the Leavenworth County Attorney from 1981-84. He was appointed to the District Court bench in 1984 and to the Kansas Court of Appeals in 1986. In 1993, he was elevated to the Kansas Supreme Court and became the Chief Justice in January 2009. He served on the court until one day before his death on August 4, 2010.

The pillars ask Kansas lawyers to give back to the community through pro bono, civic or charitable involvement, mentoring or other public service. Chief Justice Davis lived this aspiration. He was a director of the Leavenworth Historical Society from 1970-75 and general counsel and member of the board of directors of Leavenworth National Bank and Trust Company from 1972-84. He was a member of the Governor’s Advisory Commission on Alcoholism and chairman of the board at St. John’s Hospital in Leavenworth from 1980-84. He served as president of the Leavenworth County Community Corrections Board from 1980-1984 and was active in the Judge Hugh Means American Inn of Court in Lawrence, serving as its counselor, president-elect and from 1998-2000 as president.

With his passing came tributes. Gov. Mark Parkinson issued the following statement upon hearing about the Chief Justice’s death: “Late Wednesday night, Kansas lost a great jurist with the death of Chief Justice Bob Davis. He was a brilliant but humble man who passionately advocated his positions, without ever being argumentative. But Chief Justice Davis was much more than a great judge. He made every person he encountered, regardless of their relative stature in the world, feel like they were the most important person he had ever met. Kansas didn’t just lose a brilliant justice on Wednesday night; we lost a great man and a true Kansan.” Speaking from personal experience, I can tell you that the Chief Justice had the same impact upon me: the Chief made me feel very important when we talked about this project.

The Chief Justice, as noted above and by all accounts, was a model of professionalism and civility. Mike Crow, a fellow Leavenworth lawyer, tells that when Chief Justice Davis was a magistrate judge, he treated all litigants with the same amount of respect and fairness as he treated litigants and lawyers when

Footnotes
2. Special thanks are due to Tom Spahn. Mr. Spahn planned two visits to Kansas, though the first one was cancelled because of a Kansas blizzard. As noted, he did make it to Kansas to present Virginia’s Pillars, as well as provide advice about drafting and implementation. His input and guidance helped tremendously. Another member of the Virginia Commission, Irving M. Blank, provided much-appreciated insight, most notably at the Southern Conference of Bar Presidents Meeting, which the KBA hosted in October 2009.
he was on the Supreme Court. No matter what the ruling, the litigants and lawyers always felt as if justice had been done and that the system had worked as well as it could, according to Crow. He was a great lawyer, a great judge and an even better person.

Chief Justice Davis modeled the tenets of the Pillars of Professionalism in his long and storied career. It is with great pride that the KBA dedicates these aspirational goals to Chief Justice Robert E. Davis.

Chief Justice Davis modeled the tenets of the Pillars of Professionalism in his long and storied career. It is with great pride that the KBA dedicates these aspirational goals to Chief Justice Robert E. Davis.

About the Author

Timothy M. O’Brien has been the clerk of the U.S. District Court for the District of Kansas since 2008. Prior to that, he practiced law and was a partner at the Shook, Hardy & Bacon law firm in Overland Park and Kansas City, Mo. He graduated from the University of Kansas in 1980 with a Bachelor of Arts degree and then the University of Kansas School of Law in 1983, where he was an associate editor of the Kansas Law Review. O’Brien has served on the board of directors of the Johnson County Bar Association, Johnson County Bar Foundation, Johnson County Developmental Supports, and the Kansas Bar Association, where he served as president in 2009.

IN THE UNITED STATES DISTRICT COURT
AND
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN THE MATTER OF THE KANSAS BAR ASSOCIATION’S
PILLARS OF PROFESSIONALISM
MEMORANDUM AND ORDER

This matter is pending before the District and Bankruptcy Courts of the District of Kansas on the recommendation of the Court’s Bench Bar Committee’s Rule 1 Working Group on Professionalism and Sanctions and affirmed by the District Court’s Bench-Bar Committee to “adopt” the Kansas Bar Association’s “Pillars of Professionalism.”

The “Pillars of Professionalism” were suggested to the Kansas Bar Association by the late Kansas Supreme Court Chief Justice Robert E. Davis as a means of providing an inspirational and aspirational set of guidelines for lawyers across the State of Kansas. The Kansas Bar Association appointed a Commission on Professionalism and the Bar composed of lawyers and judges from around the state. This group worked over months to draft these goals. After consideration, the Board of Governors of the Kansas Bar Association approved and adopted the “Pillars of Professionalism” at their annual meeting on June 15, 2012. Subsequently, the Kansas Supreme Court issued an order on September 28, 2012 adopting the aspirational goals contained in the Pillars.

The District and Bankruptcy Courts have considered the recommendation of the Rule 1 Working Group and adopt the attached “Pillars of Professionalism” as aspirational goals to guide lawyers in their pursuit of civility, professionalism and service to the public.

IT IS SO ORDERED. The Clerks of the respective courts are directed to file this Memorandum and Order as a permanent record of the court and publicize it on the courts’ website or otherwise publish at the Court’s discretion.

DATED this 19th day of October, 2012.

s/ Kathryn H. Vratil
KATHRYN H. VRATIL
Chief District Judge

s/ Robert E. Nugent
ROBERT E. NUGENT
Chief Bankruptcy Judge
IN THE SUPREME COURT OF THE STATE OF KANSAS

ORDER

WHEREAS, the Supreme Court of Kansas desires to formally recognize the attached “Pillars of Professionalism” as developed by the Kansas Bar Association’s Commission on Professionalism in the Bar; and

WHEREAS, the Supreme Court of Kansas commends the Commission for its fine efforts; and

WHEREAS, these Pillars represent inspirational and aspirational goals which Kansas attorneys should strive to reach; and

WHEREAS, these Pillars are not a formal element of the Kansas Rules of Professional Conduct; therefore, a failure to follow any Pillar would not itself lead to administrative action against an attorney’s license to practice law;

NOW, THEREFORE, the attached “Pillars of Professionalism” are hereby adopted as aspirational goals which should guide attorneys in attaining and maintaining professionalism.

BY ORDER OF THE COURT this 28th day of September, 2012.

FOR THE COURT

Lawton R. Nuss
Chief Justice

PILLARS OF PROFESSIONALISM*

Professionalism focuses on actions and attitudes. A professional lawyer behaves with civility, respect, fairness, learning and integrity toward client, as an officer of the legal system, and as a public citizen with special responsibilities for the quality of justice.

Admission to practice law in Kansas carries with it not only the ethical requirements found in the Kansas Rules of Professional Conduct, but also a duty of professionalism. Law students who aspire to be members of the Kansas bar should also heed these guidelines. Kansas lawyers have a duty to perform their work professionally by behaving in a manner that reflects the best legal traditions, with civility, courtesy, and consideration. Acting in such a manner helps lawyers preserve the public trust that lawyers guard and protect the role of justice in our society. Lawyers frequently interact with clients, courts, opposing counsel and parties, and the public at large. A lawyer’s actions also reflect on the entire legal profession. With those interactions in mind, the following Pillars of Professionalism have been prepared. These Pillars should guide lawyers in striving for professionalism.

With respect to clients:

1. Respect your clients’ goals and counsel them about their duties and responsibilities as participants in the legal process. Treat clients with courtesy, respect, and consideration.

2. Be candid with clients about the reasonable expectations of their matter’s results and costs.

3. Encourage clients to act with civility by, for example, granting reasonable accommodations to opponents. Maintaining a courteous relationship with opponents often helps achieve a more favorable outcome. Counsel clients against frivolous positions or delaying tactics, which are unprofessional even if they may not result in sanctions.

4. Counsel clients about the risks and benefits of alternatives before making significant decisions. Act promptly to resolve the matter once the relevant facts have been obtained and a course of action determined.

5. Communicate regularly with clients about developments. Keep them informed about developments, both positive and negative.

With respect to courts:

1. Treat judges and court personnel with courtesy, respect, and consideration.

2. Act with candor, honesty, and fairness toward the court.
3. Counsel clients to behave courteously, respectfully, and with consideration toward judges and court personnel.

4. Accept all rulings, favorable or unfavorable, in a manner that demonstrates respect for the court, even if expressing respectful disagreement with a ruling is necessary to preserve a client’s rights.

With respect to opposing parties and counsel:

1. Be courteous, respectful, and considerate. If the opposing counsel or party behaves unprofessionally, do not reciprocate.

2. Respond to communications and inquiries as promptly as possible, both as a matter of courtesy and to resolve disputes expeditiously.

3. Grant scheduling and other procedural courtesies that are reasonably requested whenever possible without prejudicing your client’s interests.

4. Strive to prevent animosity between opposing parties from infecting the relationship between counsel.

5. Be willing and available to cooperate with opposing parties and counsel in order to attempt to settle disputes without the necessity of judicial involvement whenever possible.

With respect to the legal process:

1. Focus on the disputed issues to avoid the assertion of extraneous claims and defenses.

2. Frame discovery requests carefully to elicit only the information pertinent to the issues, and frame discovery responses carefully to provide that which is properly requested.

3. Work with your client, opposing counsel, nonparties, and the court to determine whether the need for requested information is proportional to the cost and difficulty of providing it.

4. Maintain proficiency, not only in the subject matter of the representation, but also in the professional responsibility rules that govern lawyers.

5. Be prepared on substantive, procedural, and ethical issues involved in the representation.

With respect to the profession and the public:

1. Be mindful that, as members of a self-governing profession, lawyers have an obligation to act in a way that does not adversely affect the profession or the system of justice.

2. Be mindful that, as members of the legal profession, lawyers have an obligation to the rule of law and to ensure that the benefits and the burdens of the law are applied equally to all persons.

3. Participate in continuing legal education and legal publications to share best practices for dealing ethically and professionally with all participants in the judicial system.

4. Take opportunities to improve the legal system and profession.

5. Give back to the community through pro bono, civic or charitable involvement, mentoring, or other public service.

6. Defend the profession and the judiciary against unfounded and unreasonable attacks and educate others so that such attacks are minimized or eliminated.

7. Be mindful of how technology could result in unanticipated consequences. A lawyer’s comments and actions can be broadcast to a large and potentially unanticipated audience.

8. In all your activities, act in a manner which, if publicized, would reflect well on the legal profession.

*The late Chief Justice Robert E. Davis (1937-2010) inspired these pillars of professionalism. The Chief Justice “always maintained his sense of grace and civility” and was a model of professionalism. See 79 J. Kan. B. Ass’n. 10 (Oct. 2010). Chief Justice Davis cited the pillars in the Ralph Waldo Emerson poem “A Nation’s Strength” to inspire and recognize the staff of the Kansas Legal Services and, thus we believe it is fittingly used here. See 79 J. Kan. B. Ass’n. 9 (Oct. 2010). We dedicate these pillars of professionalism to the memory of Chief Justice Davis.
A Kansas Lawyer Who Kept Kansas a Free State and Saved Lincoln’s Presidency

By Ron Smith

Thomas Ewing photo courtesy of KansasMemory.org, Kansas State Historical Society
January 4, 1858, was raw and blustery, and made colder by a wind howling across the Missouri River and down the main street of Kickapoo, Kansas.

Thomas Ewing Jr., wrapped in a greatcoat, was not a man comfortable on a horse, and he rode slowly and awkwardly into the dirty, seedy tree-less town. Behind him were 30 other Free State men similarly bundled against the wind and cold. Each man was armed and like Ewing, each was intent on ensuring that the election about to commence that day was fair.

Kickapoo was just across the lumpy ice-encrusted river from Weston, Mo., a hotbed of pro-slavery agitation. A small town with big ideas, Kickapoo lay in the middle of the struggle for what the eastern press labeled “Bleeding Kansas.” The town was chartered in 1854 by Missourians intent on rivaling Leavenworth in size and political importance. Like original Leavenworth, there was no central planning. The town looked as if God had dropped liveries, buildings, saloons, and a few houses from a great height and declared the result habitable. The town catered to the Missouri ruffians, who were ferried across the river and liquored up in the town’s clapboard saloons before voting as “one-day abolitionists.”

No one realized that the election that day was the beginning of the end of pro-slavery efforts in Kansas. Whether the territory would come into the Union as a slave state or free state was still in doubt. However, the vote that day would lead to major national events that kept Kansas a free state and set the stage for politicians in Kansas to create the state’s organic law, the Wyandotte Constitution, the following year.

That day in Kickapoo would also solidify the national reputation of one of the Free State leaders of Kansas. Thomas Ewing Jr.’s later civil war command would save Abraham Lincoln’s presidency.

How Kickapoo attracted this electoral prominence is a story unto itself.

Illinois Sen. Stephen A. Douglas sponsored the 1854 Kansas-Nebraska Act that created the Kansas territory. The Act changed how a territory would apply for statehood. Since 1791, all new state charters were determined by the Congress with slave states having a disproportionate influence in decisions. Douglas had tired of the sectional bickering. Slavery concerns figured in every Congressional decision, from military policy to a transcontinental railroad. Douglas wanted the railroad, and to build one he needed slave state cooperation in the road’s funding. He demanded that fellow Democrat President Franklin Pierce sign the Kansas-Nebraska Act and allow territorial settlers to decide in local elections whether their new territory came into the Union as a free or slave state.

Pierce’s successor, James Buchanan, was a colleague of Douglas’ and handpicked by him. Buchanan agreed in principle to Popular Sovereignty and its implied free and open statewide vote before any constitution submitted by territorial men was adopted. Douglas’ 1854 bill had enthralled slavery interests but galvanized a new and reactionary Free State party. Pro-slavery men viewed Kansas-Nebraska as the last opportunity to expand slavery beyond the Deep South and into the territories. Without such expansion, slavery would die of economic paralysis. Douglas gained a tactical victory with his bill, but also a formidable future adversary. Abraham Lincoln felt Kansas-Nebraska betrayed Southern promises not to extend slavery into the territories.

It might have been called Popular Sovereignty, but the government that formed on the plains of territorial Kansas resembled a banana republic. Between 1854 and 1861 in the Kansas territory, Americans saw a miniature civil war over political ideas. Kansas citizens (with outside agitation) created and fought over four constitutions, voted on one of them three different times, saw federal cavalry break up political meetings, enacted laws creating five different capital cities, suffered through the Panic of 1857, and watched President Buchanan clumsily try to deal with the panic by reneging on the credit the government allowed on the sale of government lands to homesteaders. Buchanan’s homestead bungling caused land prices to nose-dive, impoverishing landowners. The territory also spawned two separate legislatures—one antislavery, the other pro-slavery. Each lawmaking body served at the same time and each ignored the other’s laws. In response to the sack of Lawrence in May 1856 by pro-slavery hooligans, John Brown and a small party took broadswords to five pro-slavery men, leaving mutilated bodies floating in the Pottawatomie Creek. One measure of the lawlessness of the time was nobody dared arrest Brown for the killings. Hundreds died in the years of fighting. If civil war wasn’t enough, during Bleeding Kansas there also was a major drought and a grasshopper invasion.

While Bleeding Kansas was about slavery, it was also about claim jumping and neighbors settling old scores. During this mayhem, Tom Ewing and his older brother, Hugh, came out to Leavenworth in 1856 to practice law and engage in land speculation in a rough and tumble river town. Leavenworth was the largest town between St. Louis and San Francisco at the time. With its location on a major river, it wanted to become the new St. Louis. More than a hundred lawyers were on the court rolls. The Ewing firm eventually included brother-in-law William T. Sherman and Daniel McCook, both well-known Ohioans. Hugh and Daniel McCook were Douglas Democrats, but 29-year-old Tom Ewing was drifting politically toward the Republican Party, which had laid a political egg in the 1856 presidential campaign of John C. Fremont. Many Kansans felt Fremont (often called “the Pathfinder”) could not follow a path to an outhouse, let alone the White House. Kansas Free State men were joining the Republican party in droves. Ewing favored William H. Seward for the 1860 nomination, but also appreciated the political views of a former Whig, Abraham Lincoln.

Footnotes
1. Kickapoo was located on the river four miles north and west of the northern boundary of Fort Leavenworth.
2. The 3/5ths representation clause in Congress and the two Senators per state were constitutional compromises in 1787 that heavily influenced political decisions about the pro- or anti-slavery makeup of new states entering the Union in antebellum America.
3. More and more slaves in the same isolated economic area would drive down the value of slaves, which were the primary collateral for northern bank loans to southern slave interests.
4. For the size and scale of the bloodshed, if the same proportion were to die in present-day Kansas, the dead and wounded would exceed 20,000.
Four weeks before Ewing’s 1858 ride into Kickapoo, a Free State convention was held at the Congregational Church in Lawrence. Tom Ewing later called that meeting the beginning of “the final struggle for freedom in Kansas.” Prior to the meeting, lawlessness had prevailed throughout Eastern Kansas. Much of it centered around the September 1857 efforts by President Buchanan’s political cronies, aided by pro-slavery editors and agitators, to convene a convention attended only by pro-slavery men. There, the Lecompton Constitution, intended to turn Kansas into a political satellite of Missouri complete with a slave code, was cobbled together. That was in spite of the strong majority of Free Staters now populating Kansas.

Territorial officials set a statewide ratification vote for Lecompton’s provisions for December 21, 1857. The “war wing” of radicals within the Free State Party – men like Brown and James Montgomery – wanted nothing to do with what they considered the illegitimate ratification of the Lecompton Constitution. Any participation by free staters would give Lecompton too much credibility. The radicals preferred violence at the polls, picking a fight with the federal government that was sponsoring and protecting this bogus Missouri-style government on Kansas free state men. By goading the government to suppress abolitionist sentiments with force, martyrs would be created for their cause. Abolitionists believed the nation would rally to their anti-slavery cause, and promote that cause to higher national prominence.

Free State moderates were concerned there might be violence. Admittedly, the December 21, 1857, pro-slavery election was not intended to be fair. Buchanan was pushing a minority viewpoint in the territory and pulling out the stops to get the pro-slavery Constitution adopted. His was the “higher purpose” doctrine in action – only Lecompton could save the Union from secession and division, and keep peace in his own cabinet, which contained several future generals in the Confederacy as well as Jefferson Davis. The December vote was an up or down effort to ratify Article VII, a referendum on whether to allow the buying and selling of slaves in Kansas. Free Staters called it a “turkey or buzzard” choice. Even if Article VII failed, there was no up or down vote on the rest of the Lecompton constitution, which allowed slavers to bring their property to Kansas and homestead with slaves as the labor force. The Lecompton document required state government to protect that institution.

At the Lawrence convention, in a low modulated voice, Ewing argued with force and logic that the Free State fight must be at the ballot box, and he recommended Free Staters vote in the December election on the Lecompton Constitution. Even if the expected voting frauds occurred and Lecompton was ratified, constitutional provisions could be changed when those provisions did not represent majority will.

They should do what they could in December, but they should fully participate in the January 4, 1858, vote to elect officials who would take state office if Congress ratified the Lecompton document. Ewing’s check and balance on a government created under a pro-slavery constitution was to operate it using free state elected officials. The January vote was an alternative means of Free Staters killing Lecompton without relying on a vote in Congress, but it required putting together a slate of Free State candidates and getting the word out to all the polling places in Kansas. To the radicals who advocated ignoring the elections and fighting the federal government, Ewing declared, “Such a course is rebellion and Buchanan will deal with it as rebellion.” Ewing was not persuasive. The convention voted to boycott the December and January votes and not field a slate of candidates.

Ewing and his moderate friends thought inaction was folly. It left the field solely to the pro-slavery party. He and a small group of moderates bolted the meeting and were determined to field a slate of candidates in spite of the convention’s vote. In early December, Ewing made a deal with the Douglas Democrats in Kansas, a small party numerically inferior to the free staters. The Democrats and the free staters had the same stake in defeating the pro-slavery candidates. Ewing suggested through his prominent Democrat cousin, Hamp Denman, that Democrats should endorse the Free State ticket. George Brown was nominated as the Free State candidate for governor with William Y. Roberts for lieutenant governor. P. C. Schuyler of Burlingame was nominated as secretary of state and Andrew Mead, of Manhattan, for treasurer. Marcus P. S. Roberts, the anti-slavery South Carolinian, was nominated the state’s first congressional delegate. Each pledged that if they later took office under the Lecompton Constitution, they would call another convention to create a new constitution and eliminate slavery. Tom Ewing was to manage the campaign. The bolter’s committee falsified the results of their bolting campaign – reporting that the Free State convention had ratified the slate of officers when the convention had done just the opposite. Then Ewing and George Brown, editor of the Lawrence Herald of Freedom, paid a large sum from their own pocket to deliver the special edition of the newspaper and its slate of candidates throughout the territory.

Ewing knew that he did not have to show the election frauds; the frauds were expected from Buchanan’s men. He only needed to expose them to Free State supporters in Washington. That would be enough to taint Lecompton’s legitimacy in Congress. Ewing convinced a surprising ally, territorial Gov. James W. Denver, where to expect the frauds. One was Kickapoo township, in Leavenworth County. Ewing convinced Denver that a small number of troops in key towns could control the violence and insure fairness. Denver was a Buchanan appointee, but he could hardly refuse Ewing’s request because Ewing had endorsed Denver’s request that the free state men participate in the elections. Denver approved troops in some, but not all, precincts. Because of its close proximity to Fort Leavenworth, Kickapoo was not on Denver’s list. Few men were registered to vote there, however. Two days before the critical vote for state leaders under the Lecompton charter, Ewing wrote his brother, Hugh, who was

5. The same philosophy spurred John Brown to his ignominious raid at Harper’s Ferry, Virginia, in 1859.
wintering in St. Louis, “I take a company of select men to Kickapoo and am bound to have fair play there … ”

With free staters boycotting the December 21st election, Lecompton carried decisively, but over one half of the votes in favor of Article VII (the slavery article) came from three townships – Oxford, Shawnee, and Kickapoo. At Kickapoo on January 4, 1858, there was hope for a different outcome. Ewing and his men kept to themselves for awhile, stamping their feet against the cold, blending in, watching the small ferry move back and forth across the river. Each trip brought more Missourians over to vote. Some were teenage boys. Ewing was soon recognized and excitement grew. Several Missourians crossed the street and confronted Ewing, threatening to run the Free Staters out of town, or worse. Two of the men waving pistols under Ewing’s nose introduced themselves as Horace Greeley and William H. Seward, bragging they had just voted for a pro-slavery legislature and if Ewing did not like it, the ruffians would kill him. C.F. Currier, the chief clerk of the territorial House of Representatives from Lecompton, nervously pulled Ewing aside and suggested he get his men off the street to avoid gunplay.

Although he was the target of jeers, oaths, and rotten garbage, Ewing kept his wits. He gave his own pistol to a friend and ordered everyone but Currier to head back up the road and keep alert, and to return quickly at the sound of gunfire. More than one man had been beaten to death by ruffians over mere rumors. Missourians demanded to know why the most prominent Free State attorney in Leavenworth was roaming Kickapoo’s main street. Ewing ignored them but also used the power of rumor, letting it be known thatabolitionist firebrand James H. Lane’s militia was nearby and if free staters were harmed, the militia would build a bridge over the Missouri River with the ashes of Weston, Mo. Ewing might be bluffing, but the Missourians knew of Lane and his rattlesnake temperament.

The day moved along. Ewing watched the long line of Missourians walk into the voting office, swear to their Kansas residency, and vote. Several got into line two or three times after trips to nearby saloons. At the end of the day, Ewing and Currier got into line and were the 550th and 551st voters. Ewing knew county records showed only 300 registered voters in the township. After they voted, the polling place closed. Under a shower of garbage and taunts, Ewing rode off.

Franklin Pierce had appointed John Calhoun, of Boston, the chief land officer for Kansas in 1854. Calhoun was also named to chair the commission and given subpoena powers. As he took office, he received word that President Buchanan had welcomed Calhoun’s representations as to the legitimate vote count, and demanded that Congress admit Kansas with its new pro-slavery constitution and slate of officers. Ewing swore out arrest warrants for the Missourians he saw vote and Free State deputies swung into Kickapoo and Delaware townships to arrest the men for perjury.

Ewing’s concerns about violence in Kansas were real. Among the 16,000 registered Kansas voters, fewer than 1,000 were registered pro-slavery men. Denver was also concerned and wrote Buchanan, suggesting another constitutional convention to ease Free Staters anger. Buchanan ignored him. Ewing was afraid the recklessness of radicals like Lane, Charles Jenness, Montgomery, and Brown, would goad Buchanan into suppressing Free State meetings using the army. Lane wanted a shooting war with the federal government and he raised the decibel levels in his anti-Lecompton rhetoric. More was riding on this Lecompton issue than just politics. Tom Ewing wrote his brother, Hugh, “I fear we shall have a season of violence and probability of civil war, which would ruin us all.”

Tom Ewing began his investigation by subpoenaing a Calhoun henchman, Jack Henderson. Ewing expertly elicited a confession from Henderson that Henderson had forged the election returns at Delaware Crossing precinct on Calhoun’s orders. Ewing expected the same had occurred at Kickapoo. Another Calhoun employee, Lauchlan MacLean, swore under oath that Calhoun had taken the Kickapoo returns with him to Washington. On the second night, in a back alley meeting with a stranger who kept his features covered, Ewing was given information that MacLean had hidden a large box of ballots under a woodpile outside the territorial offices. Ewing quickly

12. That Ewing addressed the legislature, see Ewing to his wife, Ellen Cox Ewing, January 12, 1858, Ewing Papers, KSHS. Ewing’s “voting frauds board” was created by Kansas statutes, 1857 Territorial Session Laws, chapter 27, Sec. 1.
13. Denver letter to Buchanan, January 16, 1858, Buchanan Manuscript Collection, Historical Society of Pennsylvania, Philadelphia; for Buchanan and the Lecompton effort, see Marcus Parrott to John Hutchinson, January 15, 1858, William Hutchinson Manuscript Collection, Kansas State Historical Society; TEJr. to his father, January 15, 1858, Thomas Ewing Jr. papers, Kansas State Historical Society; “season of violence” from “TEJr. to Hugh Ewing, January 10, 1858, Thomas Ewing Jr. papers, KSHS. www.ksbar.org
wrote out a subpoena and search warrant. Sheriff Sam Walker served the warrant, found MacLean at the Lecompton office and demanded to know where the ballots were. They looked under the woodpile and the ballots were there. An entire city directory of names was cruelly spliced into the list of Kickapoo voters. When they went back to arrest MacLean for perjury, he had disappeared into the western prairies of Kansas.

Ewing immediately telegraphed Stephen A. Douglas about their evidence of voting fraud. Popular sovereignty had been subverted. A disgusted Douglas had had enough perversion of his legislation. His party was known as Douglas Democrats, not Buchanan Democrats. Douglas vowed he would undo Buchanan, even if it divided his party. Douglas stormed onto the Senate floor and charged that key men of Kansas (alluding to Ewing) were “coming to Washington” to assist the investigation of the “Lecompton doings.” Buchanan charged Douglas with subverted. A disgusted Douglas had had enough perversion of his legislation. His party was known as Douglas Democrats, not Buchanan Democrats. Douglas vowed he would undo Buchanan, even if it divided his party. Douglas stormed onto the Senate floor and charged that key men of Kansas (alluding to Ewing) were “coming to Washington” to assist the investigation of the “Lecompton doings.” Buchan charged Douglas with grandstanding and then played hardball. Senators and congressmen were showered with presidential favors and patronage if they would avoid support for any lengthy investigation. The reactionary firebrand rhetoric of the war intensified that spring in Washington. On March 3, 1858, New York Sen. William Seward spoke on the “irrepressible conflict between the two

features Article: A Kansas Lawyer Who Kept ...| The Journal of the Kansas Bar Association

The civil war erupted that spring. During the Civil War, by different routes, each member of the Leavenworth law firm of Sherman, Ewing, and McCook became generals in the Union Army. Sherman finished the war an international hero. Hugh Ewing led a brigade at Antietam and one of Sherman’s division’s throughout the Vicksburg and Chattanooga campaigns. Daniel McCook fought at Shiloh on the staff of his brother, Maj. Gen. Alex McCook. Dan went on to raise the 52nd Ohio Infantry regiment and distinguished himself as a brigade commander at Perryville but was mortally wounded leading his brigade over rebel parapets at Kennesaw Mountain, Ga., in June 1864.

Tom Ewing resigned his position of chief justice in 1862 to raise the 11th Kansas Infantry regiment. With no military training, Col. Ewing fought the regiment well at the Cane Hill and Prairie Grove battles in northwest Arkansas, battles credited historically with preserving southwest Missouri and northwest Arkansas for the Union. Due in part to that service, Abraham Lincoln promoted Ewing to brigadier general in early 1863 and assigned him to command the distressing District of the Border, which included eastern Kansas and western Missouri, a hotbed of guerrilla activity.

William C. Quantrill’s devastating raid on Lawrence on August 21, 1863, killed 150 unarmed male citizens – including a few teenage boys. Among the graveyard was unassailable Louis Carpenter, whom Tom Ewing had appointed as the first reporter of the Kansas Supreme Court. Carpenter’s wife threw herself over his body until another gunman pulled her off and calmly shot Carpenter again. Their house burned, taking with it some of the court’s law books. So many men were dead nobody was left to build coffins. Many of the dead were buried in a mass grave.

Ewing called the attack a “fiendish atrocity,” and reacted by issuing Order No. 11, ordering 10,000 civilians and guerrilla sympathizers moved by force out of four western Missouri counties into Arkansas, the largest nonracial forced movement of Americans in the country’s history. The measure was harsh but necessary to keep angry Kansans from launching a “jayhawking” bloodbath across Missouri that would rival Sherman’s later march through Georgia. While Order No. 11 killed any hope of achieving Ewing’s major ambition, a U.S. Senate seat, it saved Kansas towns from any further guerrilla attacks.

Ewing’s crowning wartime achievement came in 1864. He was assigned as deputy commanding general for the Department of Missouri, under Gen. William Rosecrans in St. Louis. The war in 1863 had gone badly for the Confederacy. Confederate victories at Chancellorsville and Chickamauga could not offset major Union victories at Vicksburg, Gettysburg and Missionary Ridge. Lincoln sought re-election in 1864 in order to “finish” the war, but high casualties in the Union

The actual number of refugees is unknown but estimated by census records of the day to between 10,000 and 20,000. See Walter E. Busch, General You Have Made the Mistake of your Life (masters dissertation, California State University).

15. On Admission of Kansas, Under the Lecompton Constitution, Speech before the U.S. Senate, March 4, 1858.
17. Unprincipled men, Emporia Kansas News, May 15, 1858. Introduced by Indiana congressman William English, “the English Bill,” was an attempt by moderate democrats to salvage something from the Lecompton affair.
18. The actual number of refugees is unknown but estimated by census records of the day to between 10,000 and 20,000. See Walter E. Busch, General You Have Made the Mistake of your Life (masters dissertation, California State University).
army in 1863, and horrible losses in early 1864, made Lincoln unpopular. Senior Confederate officers knew all the Confederacy had to do was hang on and bleed the Union armies in 1864 until the Democrat nominee, George McClellan, could be elected and sign a promised armistice, leaving the administration’s war goals unfinished and preserving slavery intact within the old South.19

In May 1864, two great coordinated invasions were launched by Union forces to finish the Confederacy. Grant’s movement into Virginia pinned down Robert E. Lee around Richmond, but with enormous casualties.20 Sherman’s march into Georgia to seize Atlanta was less costly in dead and wounded, but agonizingly slow. Gen. George Crooks’ army in the Shenandoah Valley kept Confederate generals Lee and Joe Johnston from resupplying each other. Sherman took Atlanta on September 1, which caused great rejoicing in the North but did not break the Confederacy’s spirit. If in addition to heavy Union losses another rebel army broke loose into the North and caused havoc, an embarrassed Lincoln could still lose re-election. The only southern option for such a break-away invasion lay west of the Mississippi River.

Gen. Sterling Price, a Mexican war veteran and former Missouri governor, outfitted a 15,000-man Confederate force of mounted infantry and unarmed conscripts. On August 28, 1864, four days before Sherman took Atlanta, Price began his invasion from Camden, Arkansas. The plan was to march through Missouri to St. Louis, burn the city’s wharves and military stores, and arm his conscripts with weapons from the St. Louis arsenal. The campaign would demonstrate that the South was still alive and Union forces were unable to stop them, achieving the political embarrassment on which the Confederacy’s last hopes lay. The chance of success was good. There were only 6,500 Union troops scattered in dozens of places between Price and St. Louis.

Before Union forces could concentrate, they had to know which route Price was taking towards St. Louis. In late September, Rosecrans sent Tom Ewing into southeast Missouri to telegraph back first-hand intelligence on Price’s route. Ewing rode the trains south to Ironton, Missouri. At a small earthen fort in the Arcadia Valley near Pilot Knob, Ewing found himself the senior officer commanding 800 federal infantry, cavalry and twelve cannon. Rebel cavalry under Jo Shelby cut off a Union retreat and Ewing was surrounded by Price’s army. Surrender of Fort Davidson was demanded by Ewing’s old political enemies,21 but Ewing had black civilians in the fort and he was concerned the Confederates might kill them like they did black soldiers at Fort Pillow, Tenn. Further, as the author of Order No. 11, Ewing had a price on his head.

Instead of bypassing Fort Davidson, Price ordered a frontal assault. It was the first battle of the invasion. The assault, if easily accomplished, would see southern morale soar and send a devastating message up the line as to what St. Louis could expect. Price’s men lined up and charged. The fort’s cannons spewed canister in ear-splitting roars, and four companies of Shiloh veterans from the 14th Iowa Regiment, caused awful casualties in the rebel lines from their well-concealed rifle pits. More than 1,500 Confederates – the cream of Price’s force – were shot down in a single afternoon. Ewing lost less than 200 men. At midnight, Ewing led his force out of the fort and through Confederate lines and made a successful fighting withdrawal to Rolla, Mo.22

His force shattered, Price could not complete his intended plan for St. Louis. He turned west and, on October 23, was defeated at the Battle of Westport in Kansas City. Three days later, at the Battle of Mine Creek north of Fort Scott, in our state’s only conventional civil war battle between organized armies, Price’s remaining mounted infantry were shattered by the largest Union cavalry charge of the American Civil War.

The battle of Pilot Knob was hailed as the Thermopylae of the West by eastern writers. Ewing was its hero. But the war went on and his star soon faded. However, one man knew what Tom Ewing had done for the nation. When Lincoln first elevated Ewing to brigadier general, Thomas Ewing Sr., a Lincoln friend and advisor, second-guessed the appointment of his non-military son to the Kansas posting. “What did you name the Brat a Brigadier General for?” he asked Lincoln. Lincoln knew what the outcome of the Battle of Pilot Knob meant to his re-election, and Tom Ewing’s part in it. At a social event, Lincoln pulled the elder Ewing aside and asked, “What do you think of your Brat now?”23

While friends would refer to Ewing as “General Ewing” throughout his post-war life, he never wrote any military memoirs. As a lawyer in Washington, he helped the Johnson Administration avoid impeachment by lobbying the key vote against impeachment, Kansas Sen. Edmund Ross, who served under Ewing in the 11th Kansas regiment. Ewing helped build railroads in Kansas, and then moved back to Ohio and served two terms in Congress. His opponents labeled him a pro-southern sympathizer in later campaigns, forgetting his toughness issuing Order No. 11 and his crucial stand at Fort Davidson. Abraham Lincoln was not around to set Ewing’s critics straight.

His post-war work as a leading greenback supporter and railroad developer expanded his horizons. After a failed run for governor of Ohio in 1880, Ewing practiced law in New York City but maintained his professional ties with the bench and bar in Kansas. In an address to the Kansas Bar Association convention in 1890, and at a time when there were far more scenic areas of Missouri, and the battlefield is as well preserved as any.

21. Price’s adjutant demanding surrender of Ewing was L. A. MacLean, who evaded Ewing’s arrest warrant in Lecompton when he tried to unlawfully hide the falsified 1858 Lecompton voting ballots.
22. Fort Davidson near Pilot Knob and Ironton Missouri is one of the more scenic areas of Missouri, and the battlefield is as well preserved as any.
23. “Brat” was Thomas Ewing Sr.’s nickname for his namesake son. The remarks are noted in papers of Thomas Ewing III, February 26, 1896, found in box 214, Thomas Ewing Collection, in the Library of Congress.
trials than today, Ewing suggested the need for a state civil procedure code and a less than unanimous jury verdict law to alleviate a court system plagued with hung juries. His proposals were enacted in 1964 and 1976.

Later, of all his accomplishments, he would cite the defeat of the Lecompton Constitution as his most important work. In 1896, after Ewing’s death in New York City, retired Kansas Supreme Court Justice Samuel Kingman, who served with Ewing on the state’s first Supreme Court in 1861, wrote:

His moral character was of the best; no bad habits marred the beauty and symmetry of his life. He was honest, not merely honest in keeping his word and meeting his obligations, but honest with himself. He had strong convictions and stood by them manfully. He had great ambition but he never permitted it to dominate the integrity of his life. His life was his own ... and he never pawned it for the gratification of his ambition. I was his senior in years, in nothing else. In the course of nature I ought to have preceded him. He has passed from earth while I still linger here feebly to bear witness to his worth. Citizen, jurist, soldier, statesman, friend. I grieve that I cannot lay a worthier tribute upon his grave.24

In 1976, the Kansas Bar Association commemorated the importance of the Leavenworth law firm of Sherman, Ewing, and McCook by placing a plaque at the corner of 2nd and Delaware Street, where the old firm once stood in a rickety wooden building. It was a small tribute to this larger than life leader of the early Kansas bench and bar.

About the Author

Prior to joining Smith, Burnett, Larson & Butler LLC in 2005, Ron Smith served as general counsel to the Kansas Bar Association and was counsel for the Community Development division of the Kansas Department of Commerce. He was a brownwater Navy veteran during the Vietnam conflict, a 1973 Kansas Wesleyan graduate and a 1976 graduate of Washburn University School of Law. After law school he practiced briefly in Great Bend, then served as deputy secretary of administration for Gov. John Carlin. While at the bar association, Smith was responsible for the association’s lobbying program and its ethics and professionalism programs, and is still active in professionalism activities of the Bar. In October 2008, the University of Missouri Press published Smith’s biographical history of Thomas Ewing Jr., a notable Kansas free state advocate and general in the Union Army during the civil war.

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ORDER OF REINSTATEMENT
IN RE CHAUNCEY M. DEPEW
NO. 103,061 – AUGUST 27, 2012

FACTS: On August 6, 2010, this court suspended the respondent, Chauncey M. Depew, from the practice of law in Kansas for a period of one year. See In re Depew, 290 Kan. 1057, 237 P.3d 24 (2010). Before reinstatement, the respondent was required to pay the costs of the disciplinary action, comply with Supreme Court Rule 218 (2011 Kan. Ct. R. Annot 379), and comply with Supreme Court Rule 219 (2011 Kan. Ct. R. Annot. 380). On October 21, 2011, the respondent filed a petition with this court for reinstatement to the practice of law in Kansas.

DISCIPLINARY ADMINISTRATOR: On June 28, 2012, a hearing was held before a hearing panel of the Kansas Board for Discipline of Attorneys to consider the respondent’s request for reinstatement. On August 16, 2012, the panel filed its report setting out the circumstances leading to respondent’s suspension, a summary of the evidence presented, and its findings and recommendations. The panel unanimously recommended that respondent’s petition for reinstatement to the practice of law in Kansas be granted.

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

ORDER OF REINSTATEMENT
IN RE JOSEPH M. LASKOWSKI
NO. 96,886 – OCTOBER 16, 2012


DISCIPLINARY ADMINISTRATOR: The petition was referred to the disciplinary administrator for consideration by the Kansas Board for Discipline of Attorneys, pursuant to Supreme Court Rule 219. The disciplinary administrator affirmed that the respondent met all requirements set forth by the court.

HELD: After carefully considering the record, Court accepted the findings and recommendations that the respondent be reinstated to the practice of law in Kansas. Court ordered that the respondent be reinstated to the practice of law in the state of Kansas conditioned upon his compliance with the annual continuing legal education requirements and upon his payment of all fees required by the clerk of the appellate courts and the Kansas Continuing Legal Education Commission.

ORDER OF REINSTATEMENT
IN RE DANIEL HEATH LAMPSON
NO. 96,884 – AUGUST 27, 2012

FACTS: On December 8, 2006, this court suspended the respondent, Daniel Heath Lampson, from the practice of law in Kansas for an indefinite period of time. See In re Lampson, 282 Kan. 700, 147 P.3d 143 (2006). Before reinstatement, the respondent was required to pay the costs of the disciplinary action, comply with Supreme Court Rule 218 (2011 Kan. Ct. R. Annot 379), and comply with Supreme Court Rule 219 (2011 Kan. Ct. R. Annot. 380). On February 1, 2012, the respondent filed a petition with this court for reinstatement to the practice of law in Kansas.

DISCIPLINARY ADMINISTRATOR: On July 12, 2012, a hearing was held before a hearing panel of the Kansas Board for Discipline of Attorneys to consider the respondent’s request for reinstatement. On August 7, 2012, the panel filed its report setting out the circumstances leading to respondent’s suspension, a summary of the evidence presented, and its findings and recommendations. The panel unanimously recommended that respondent’s petition for reinstatement to the practice of law in Kansas be granted.

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

ORDER OF DISBARMENT
IN RE THOMAS L. THURSTON
NO. 10,980 – SEPTEMBER 28, 2012

FACTS: In a letter received by the clerk of the appellate courts dated September 19, 2012, Thomas L. Thurston, an attorney admitted to the practice of law in the state of Kansas, voluntarily surrendered his license to practice law in Kansas, pursuant to Supreme Court Rule 217 (2011 Kan. Ct. R. Annot. 371). At the time Thurston surrendered his license, a panel hearing was pending in accordance with Supreme Court Rule 211 (2011 Kan. Ct. R. Annot. 334). The complaint alleged that respondent violated Kansas Rules of Professional Conduct 8.4(b) (2011 Kan. Ct. R. Annot. 618) and Supreme Court Rule 203(c)(1) (2011 Kan. Ct. R. Annot. 280) after he was convicted of one count of sexual exploitation of a child and failed to report his arrest and conviction to the disciplinary administrator.
HELD: Court examined the files of the office of the disciplinary administrator and found the surrender of Thurston's license should be accepted and that he should be disbarred. Thurston is disbarred from the practice of law in Kansas, and his license and privilege to practice law are hereby revoked.

CIVIL

ABNORMALLY DANGEROUS ACTIVITY, ABSOLUTE LIABILITY, STRICT LIABILITY, AND STATUTE OF LIMITATIONS

EASTMAN ET AL. V. COFFEYVILLE RESOURCES REFINING & MARKETING LLC
CERTIFIED QUESTION FROM UNITED STATES DISTRICT COURT

NO. 105,805 – SEPTEMBER 7, 2012

FACTS: In 2007, Coffeyville Resources Refining and Marketing LLC (Coffeyville Resources) accidentally released about 90,000 gallons of crude oil into floodwaters of the Verdigris River in Coffeyville. In 2010, Benjamin and Marcita Eastman, as trustees of the Eastman Family 1999 Revocable Trust (the Eastmans), filed an action in federal court alleging the oil spill damaged their pecan grove. Eastman v. Coffeyville Res. Ref. & Mktg. LLC, No. 6:10-CV-01216-MLB (D. Kan. petition filed June 30, 2010). The Eastmans initially asserted a continuing nuisance claim but later asserted a statutory right to recover damages under K.S.A. 65-6203 which requires "any person responsible for an accidental release or discharge of materials detrimental to the quality of the waters or soil of the state" to "[c]ompensate the owner of the property where the release or discharge occurred for actual damages incurred as the result of the release or discharge." In the federal action, Coffeyville Resources admitted potential liability under K.S.A. 65-6203 but argued the Eastmans' claim was barred by the two-year statute of limitations in K.S.A. 60-513(a)(4). But the Eastmans contended they timely filed their action under the three-year statute of limitations in K.S.A. 60-512(2) which applies to "[a]n action upon a liability created by a statute other than a penalty or forfeiture." Specifically, the Eastmans argued K.S.A. 65-6203 creates an "absolute" liability different in kind from the strict liability doctrine applied under Kansas common law and therefore the three-year limitation period applies. The Hon. Monti L. Belot, U.S. District Court judge, District of Kansas, certified six questions to the Court under the Uniform Certification of Questions of Law Act, K.S.A. 60-3201 et seq. Four of those questions related to the Eastmans' continuing nuisance claim, but the Eastmans have abandoned that claim and now are pursuing only a claim under K.S.A. 65-6203.

 ISSUES: (1) Class action, (2) strict liability, (3) oil and gas, and (4) abnormally dangerous activities

HELD: Court held that the district court should not have granted the class judgment as a matter of law. The jury was instructed to determine whether BP engaged in an abnormally dangerous activity and the trial court erred by overturning the jury's finding. The abnormally dangerous activities test under the Restatement of Laws were the appropriate standards to apply to the plaintiff class's claims, and the jury decided the question. Court reversed the district court's entry of judgment for the class on its strict liability claim, and remanded this matter to the district court with directions that the jury's verdict be reinstated and final judgment entered for the defendants.

Based on its decision, Court did not address BP's claims that its activities or lack thereof did not constitute an abnormally dangerous activity as a matter of law or that the class failed to establish causation. Court also did not address BP's argument that the district court erred by conditionally granting a new trial as a matter of law because it lacked the authority to enter a conditional new trial order.

STATUTES: K.S.A. 20-3018; and K.S.A. 60-250, -259, -513, -2102, -6203

CONTRACTS, REFORMATION, BREACH, STATUTE OF LIMITATIONS, AND DECLARATORY JUDGMENT

LAW V. LAW COMPANY BUILDING ASSOCIATES

SEDGWICK DISTRICT COURT – AFFIRMED AND CASE REMANDED

COURT OF APPEALS – REVERSED

NO. 100,497 – SEPTEMBER 28, 2012

FACTS: Margaret Russell Law filed claims against The Law Company Inc. and Law Company Building Associates (LCBA) (collectively referred to as the Defendants) based on claims from a financial agreement relating to a commercial building in Wichita. Law entered into a contractual relationship with the Defendants through a series of transactions that occurred after Law received stock in The Law Company in 1979 as part of a property settlement with her former husband, who was a founder of The Law Company. The Law Company is a Wichita architectural, engineering, and construction firm. At the
request of some of the principals in The Law Company, Law agreed to exchange her stock for ownership of the Market Street Office Building occupied entirely by The Law Company. The Law Company and Law then entered into a 25-year landlord and tenant lease that expired on December 31, 2004. Under the lease, Law had the right to sell the Market Street Building or to lease the building to a third party at the conclusion of the 25-year lease term. Law and LCBA entered into a finance agreement where LCBA granted the “equity participation rights” in another property (Riverview Building), which entitled Law to, among other things, an agreement for LCBA to pay Law $406,836.19 and an 11 percent equity participation share in the gross proceeds of any future sale or refinancing or 11 percent of the liquidation proceeds upon the termination of LCBA. Law made her claim for contract reformation after the promissory note matured, the term of LCBA was extended, and the Defendants refused to pay her equity participation. Law raised claims for breach of contract, breach of the implied duty of good faith and fair dealing, reformation of contract, and declaratory judgment. The district court treated the Defendant’s motion to dismiss as a motion for summary judgment and granted the motion solely on the ground that Law’s claims were subsumed within her claim for contract reformation and barred by the five-year statute of limitations. The Court of Appeals reversed by finding the five-year statute of limitations began to run on the breach in 2005 and that all of Law’s declaratory judgment claims were independent of the reformation claim.

**ISSUES:** (1) Contracts, (2) reformation, (3) breach, (4) statute of limitations, and (5) declaratory judgment

**HELD:** Court held that the Court of Appeals’ ruling that Law alleged separate and independent claims for breach of the implied duty of good faith and fair dealing, breach of contract, and declaratory judgment are not subject to review because those rulings were not raised in the petition for review. Consistent with the Court of Appeals’ decision, the case is remanded to the district court for consideration of those claims. The district court’s decision on the single issue subject to the Court’s review – that Law’s reformation of contract claim is barred by the K.S.A. 60-511(1) five-year statute of limitations – is affirmed, the Court of Appeals’ decision reversing the district court on that issue is reversed, and the case is remanded to the district court for further proceedings.

**STATUTES:** K.S.A. 20-3018; and K.S.A. 60-212, -507, -511, -513, -514

### Divorce and Life Insurance

**In re Marriage of Hall**

**Johnson District Court – Reversed**

**Court of Appeals – Reversed**

**No. 101,834 – October 5, 2012**

**FACTS:** In divorce proceedings between Marc and Susan Hall, the court ordered Marc to pay maintenance and child support. In addition, despite Marc’s objection, the district court ordered Marc to “cooperate” with Susan’s attempts to obtain insurance on Marc’s life at Susan’s own expense. Court of Appeals affirmed by rejecting Marc’s argument that the district court impermissibly created and divided a property interest, that the district court’s order did not violate public policy, and that once Marc’s child support and maintenance obligations ended, Susan will no longer have an insurable interest in Marc’s life.

**ISSUES:** (1) Divorce and (2) life insurance

**HELD:** Court held that a court order requiring a child support obligor to cooperate with a child support obligee’s efforts to obtain insurance on the life of the obligor is against public policy, as expressed by the Kansas legislature in K.S.A. 40-453(a), if the obligor objects to the order. Consequently, it is an abuse of discretion to issue such an order when the obligor has stated an objection.

**STATUTES:** K.S.A. 40-450, -452, -453(a); and K.S.A. 60-1610

### Eminent Domain, Valuation, Assemblage Doctrine, and Change of Traffic Patterns

**Miller v. Preisser et al.**

**Pratt District Court – Affirmed in Part, Reversed in Part, Dismissed in Part, and Remanded**

**No. 103,938 – August 31, 2012**

**FACTS:** In 2008, Debra L. Miller, in her capacity as the secretary of transportation for the state of Kansas (KDOT), filed an eminent domain action seeking temporary and permanent easements on property owned by Lawrence Preisser and Tracy Chambers (Landowners). After the appraisers appointed in the eminent domain action awarded the Landowners $120,000 as damages, KDOT appealed under K.S.A. 26-508 in the district court and requested a trial de novo on the damages issue. Before trial, KDOT filed two motions, seeking exclusion of evidence relating to two potential damage theories; (1) the assemblage doctrine and (2) change of traffic patterns.

**HELD:**

- Court held that the value of easements at the time of the taking is a proper measure to be considered in determining damages.
- The exclusion of evidence regarding past sales was proper when the only issue was the value of the easements at the time of the taking.
- The admission of evidence regarding the property value of the easements after the taking was proper when the issue was the total damage to be awarded.

**STATUTES:** K.S.A. 60-212

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**Appellate Practice Reminders . . .**

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

**Significant Changes to Rule 6.09(b), Citation to Additional Authority**

Effective July 1, 2012, Rule 6.09(b) imposes conditions on citation to additional authority after a party’s brief is filed. It is still possible to notify either appellate court of additional authority by letter, but the timing of the submission now affects the content. What Rule 6.09(b) contemplate is the citation to recent authority or the occasional case, which was overlooked in research. The 6.09(b) letter is not a continuation of briefing.

- Not later than 14 days before oral argument (or submission to the court on a summary calendar no argument docket), persuasive and controlling authority that has come to the party’s attention after its last brief was filed may be cited by letter. There is no time limitation on the publication date of the authority cited.
- Later submissions are controlled by the date of publication of the authority. Within 14 days of oral argument, only newly published authority may be cited. After oral argument, but before decision, only authority published after the date of oral argument may be cited.
- Citation to additional authority can be helpful to an appellate court, but late citation to authority which should have been discovered earlier is not helpful. The new restrictions address that issue.
- Under any circumstances, there is now a 350-word limit on the body of the letter which contains citation to additional authority.
- Any response to a Rule 6.09(b) letter must be filed not later than seven days after service of the letter.

For questions about this rule or appellate procedure generally, call the Clerk’s Office and ask to speak with Carol G. Green, Clerk of the Appellate Courts, at (785) 296-3229.
The district court’s ruling is under appellate review. Under facts and legal timely appeal is filed, because a plaintiff’s action has not failed if the motion does not trigger the beginning of the six-month grace period if a member in class action timely filed against defendants in another case, district court should have treated motion to dismiss as motion (3) requirements of K.S.A. 60-518 interlocutory appeal was transferred to Kansas Supreme Court.

The Journal of the Kansas Bar Association

LIMITATION OF ACTIONS
SEABOARD CORPORATION V. MARSH INC.
JOHNSON DISTRICT COURT – AFFIRMED
NO. 104,294 – AUGUST 31, 2012

FACTS: Seaboard filed action against insurance brokers alleging various tort and contract claims, and a claim under Kansas Restraint of Trade Act. Defendants filed motion to dismiss the action as time barred and not saved by Kansas savings statute, K.S.A. 60-518. District court denied the motion, finding K.S.A. 60-518 preserved plaintiff’s right to bring this action because plaintiff was putative member in class action timely filed against defendants in another state and all requirements of K.S.A. 60-518 were met. Defendants’ interlocutory appeal was transferred to Kansas Supreme Court.

ISSUES: (1) Standard of review, (2) Kansas savings statute, and (3) requirements of K.S.A. 60-518

HELD: Standard of review is sorted out and stated. Under facts of case, district court should have treated motion to dismiss as motion for summary judgment.

K.S.A. 60-518 is interpreted. State and federal cases are extensive-ly reviewed. Under plain language of statute, K.S.A. 60-518 applies even if the first action was not filed in a Kansas state court.

District court correctly concluded the class action met all requirements in K.S.A. 60-518. A district court’s dismissal of a class action does not trigger the beginning of the six-month grace period if a timely appeal is filed, because a plaintiff’s action has not failed if the district court’s ruling is under appellate review. Under facts and legal arguments in this appeal, plaintiff’s decision to opt out of a class action, either formally or through filing an individual action, triggered the six-month grace period, and a second action was filed within that period. Split of authority by other courts and sparse guidance in Kansas noted on the “substantially similar” requirement. For K.S.A. 60-518 to apply, second action need not be identical to the first as long as the two actions concern the same conduct, transaction, or occurrence and the first action provides adequate notice to defendants. That requirement is satisfied in this case. A plaintiff who files an individual action after failure of a class action otherwise than on the merits can rely on K.S.A. 60-518 even if the plaintiff does not sue every defendant in the class action.

STATUTES: K.S.A. 20-3018(c); K.S.A. 50-101 et seq., and K.S.A. 60-207(a), -212(b), -212(b)(3), -212(b)(6), -215(c), -223, -223(a)(1), -256, -511, -511(1), -512(2), -513(a), -513(b), -516, -518

MEDICAL MALPRACTICE, BOARD OF HEALING ARTS, SUBPOENA, AND EXHAUSTION OF ADMINISTRATIVE REMEDIES
RYSER V. STATE OF KANSAS, KANSAS BOARD OF HEALING ARTS ET AL.
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 103,579 – SEPTEMBER 7, 2012

FACTS: Ryser is licensed to practice medicine in Kansas and Missouri. In August 2009, the Board opened a disciplinary investigation based on information that a patient Ryser treated in Missouri had filed a lawsuit against Ryser alleging medical negligence, fraud, and misrepresentation. As part of its investigation, the Board issued a subpoena requesting the production of documents related to Ryser’s treatment of the Missouri patient. In October 2009, Ryser filed a petition in district court under K.S.A. 65-2839a(b)(3)(B) seeking revocation of the subpoena. Ryser argued the subpoena did not seek evidence relevant to a lawful investigation because the Board lacked authority to investigate or discipline her based on her practice of medicine in Missouri. In response, the Board challenged the district court’s jurisdiction to review the subpoena, arguing Ryser failed to exhaust administrative remedies or to demonstrate she was entitled to interlocutory review of a nonfinal agency action as required by the Kansas Judicial Review Act (KJRA). Substantively, the Board argued it had authority to investigate Ryser’s practice of medicine and to issue the subpoena because Ryser is a Kansas licensee and the allegations in the Missouri lawsuit, if true, constituted grounds for discipline under the Act. The district court rejected the Board’s jurisdictional challenges and determined K.S.A. 65-2839a(b)(3)(B) permitted Ryser to directly petition the court for an order revoking the subpoena without first exhausting administrative remedies. The court then determined the Board had authority to investigate Ryser’s actions in Missouri and to issue the subpoena because Ryser is a Kansas licensee who was practicing medicine within the meaning of the Act.

ISSUES: (1) Medical malpractice, (2) Board of Healing Arts, (3) subpoena, and (4) exhaustion of administrative remedies

HELD: First, Court held that Ryser was not required to exhaust administrative remedies before petitioning the district court to revoke the subpoena under K.S.A. 65-2839a. Court held K.S.A. 65-2839a(b)(1) permits but does not require a person to seek relief from the Board of Healing Arts before applying to the district court for review of a subpoena. Neither the KJRA nor its administrative exhaustion requirement applies to the specific procedure set forth in K.S.A. 65-2839a(b)(3)(B) for judicial review of a subpoena issued by the Board of Healing Arts. Court held that although the KJRA generally governs the procedures for judicial review of final and nonfinal actions taken by the Board of Healing Arts, K.S.A. 65-2839a(b)(3)(B) provides a specific procedure for judicial review of
Board-issued subpoenas which differs significantly from, and cannot be reconciled with, the judicial review process contemplated under the KJRA. Court also concluded that the Board has jurisdiction to investigate Ryser's practice of medicine in Missouri under its general authority to take disciplinary action against "any licensee practicing under [the Act]" under K.S.A. 2011 Supp. 65-2838(a). Therefore, the district court correctly held that Ryser's practice of medicine in Missouri could provide "grounds for disciplinary action" under K.S.A. 65-2839a(b)(1), (3)(B) and an investigation for any possible violations under K.S.A. 2011 Supp. 65-2836.

STATUTES: K.S.A. 65-2801, -2802, -2836, -2838, -2837, -2839a(b)(1),(3), -2840a, -2851a, -2864, -2869, -2872; and K.S.A. 77-601, -602, -603, -607, -610, -612, -621, -622

ORAL CONTRACT, CONVERSION, BAILMENT, AND ATTORNEY FEES
SCHOENHOLZ V. HINZMAN
CLOUD DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS
COURT OF APPEALS – AFFIRMED IN PART AND REVERSED IN PART
NO. 101,063 – OCTOBER 12, 2012

FACTS: Rodney Schoenholz entered into an oral agreement with his sister, Janine Hinzman, for the bailment of farm animals and farm equipment on her land. Four years after their cooperative effort to breed horses broke down, Hinzman sold her farm and the horses. Schoenholz subsequently retrieved most of his equipment from the farm and sued Hinzman for conversion and breach of the bailment contract. Hinzman counterclaimed for the expenses of maintaining the equipment and caring for the horses. The district court awarded no damages. The Court of Appeals affirmed the rulings against Schoenholz but found the district court had erred in denying Hinzman compensation for caring for some of the horses and had abused its discretion in denying sanctions against Schoenholz.

ISSUES: (1) Oral contract, (2) conversion, (3) bailment, and (4) attorney fees

HELD: Court held the record on appeal supported the district court’s finding that Schoenholz did not abandon his property, and the record does not support the inappropriate reweighing of the evidence by the Court of Appeals. Schoenholz testified that he intended to retrieve his property whenever he could find a place to store his equipment and board his horses. That he made minimal – or no – effort to carry out the retrieval does not undermine his intention to preserve his ownership rights in the property. Since he did not abandon his property, he preserved his conversion claims. He still owned the horses in 2006 when Hinzman sold them, and the cause of action arose at that time, meaning that Schoenholz’s action in tort was not barred by the statute of limitations. Court also held that because Hinzman did not utilize the statutory mechanism to sell the horses, she had no legal right to refuse delivery of the horses to Schoenholz when he demanded them. He therefore had a claim for conversion, and the district court and the Court of Appeals erred by rejecting that claim. Court stated that on remand, it remains for the parties to argue and the district court to determine the existence and value of any claimed lien on the horses and whether the fact that other duties proscribed under the statute were not followed impacts the efficacy of any such lien. Court held that Schoenholz was not entitled to any damages to his tractor because Hinzman had no duty to service or care for the tractor as it sat out in the open on Hinzman’s farm. Court held the 30 days Hinzman had to return Schoenholz’s bale fork and link was not unreasonable. Court found no willful behavior on Hinzman’s part that would be sufficient to award sanctions. Last, Court found that Schoenholz lied repeatedly under oath about the existence of his tax returns, since he never filed any for the years in question. His attorney violated the district court’s express orders and then neglected to inform the Court of Appeals or this court that his client’s dishonesty was even at issue. Court agreed with the Court of Appeals that the district court abused its discretion by refusing to award attorney fees. The district court was required by statute to impose the sanction of fees, absent justification. Although Court of Appeals awarded $2,000 in attorney fees, there was no attorney affidavit. Court remanded to the district court for determining the amount of fees to be awarded.

STATUTES: K.S.A. 58-201, -207, -208, -209, -211; and K.S.A. 60-237, -512, -513

POST-CONVICTION DNA TESTING
HADDOCK V. STATE
JOHNSON DISTRICT COURT – AFFIRMED
NO. 101,508 – OCTOBER 5, 2012

FACTS: Haddock was convicted of the first-degree murder of his wife, Barbara, after her body was found crushed under a wood pile. Post-conviction DNA testing produced some results favorable to Haddock, some results that confirmed evidence at trial, and some results that were inconclusive because the small amount and the degradation of the DNA prevented DNA matching. Weighing the mixed results of the evidence, the district court concluded there was not a reasonable probability that the new evidence would have changed the outcome of the trial and denied Haddock’s motions for new trial.

ISSUES: Post-conviction DNA testing

HELD: Court agreed with the district court and held that while the evidence that the hair and eyeglasses of the victim had the DNA of two unknown people – one male and one female – could be used to suggest others may have also been present when Barbara was murdered, that evidence does not dispute the overwhelming evidence of Haddock’s guilt to which the state and district court point. Court held that in light of the evidence adduced at trial and through Haddock’s second motion for DNA testing, it concluded that a reasonable person could agree with the district court’s ruling that it is not reasonably probable that the post-conviction DNA testing results would change the jury’s verdict that Haddock premeditated the murder of Barbara.

STATUTES: K.S.A. 20-3018(c); K.S.A. 21-2512(f)(2), (3); and K.S.A. 22-3501(1)

QUIET TITLE AND RULE AGAINST PERPETUITIES
RUCKER V. DELAY
BARBER DISTRICT COURT – AFFIRMED IN PART AND REVERSED IN PART
COURT OF APPEALS – AFFIRMED IN PART AND REVERSED IN PART
NO. 101,766 – OCTOBER 19, 2012

FACTS: In 1924, Earl R. DeLay and his wife, Leah Griffith DeLay, executed a general warranty deed transferring title to certain lands in Barber County to Lurena Keener. The warranty deed contained the following reservation: “The grantor herein reserves 60 percent of the land owner’s one-eighth interest to the oil, gas, or other minerals that may hereafter be developed under any oil and gas lease made by the grantee or by his subsequent grantees.” Earl ratified an oil and gas lease in 1946, and two of his successors ratified an oil and gas lease in 1966. No other leases have been executed or ratified, and no oil or gas has ever been produced on the land. Earl and Leah’s successors in interest have paid taxes on 6 mineral acres, as their interest is expressed in the Barber County Clerk’s Severe Mineral Interest Book. In 2008, the current property owners, Donald R. Rucker and Barbara L. Rucker, filed a quiet title action against Earl and other heirs of Earl and Leah DeLay (the DeLays). The Ruckers alleged the reservation in the deed was a royalty interest
that violated the rule against perpetuities. The DeLays alleged the reservation created a mineral interest and the rule against perpetuities did not apply. The district court found: “The language here attempts to create an interest which has no leasing rights (nonparticipating) with no reservation of a right to enter and produce. The one-eighth is a traditional leasehold royalty a portion of which is attempted to be reserved forever but which may not ever come to fruition (if land is never leased or developed).” The district court held that the deed created a perpetual, nonparticipating, royalty interest that was subject to termination under Kansas case law. It held further that this royalty interest was void because it violated the rule against perpetuities. The Court of Appeals held that the deed created a royalty interest. It also reluctantly applied the rule against perpetuities to void the interest.

ISSUES: (1) Quiet title and (2) rule against perpetuities

HELD: Court declined to extend royalty interests reserved in the grantor. Court stated it is better to right the ship and apply the well-recognized property law principles excepting reservations from the rule against perpetuities despite any “conceptual” difficulties this may cause. Court stated that it need not determine in this case whether we should overrule our case law holding royalty interests created in a transferee are future interests that vest at production because that issue was not squarely before the Court. Court held that the DeLays’ royalty interest is not void under the rule against perpetuities because it was reserved in the grantors. Court reversed the district court’s order quieting the DeLays’ title.

STATUTES: K.S.A. 20-3018; and K.S.A. 59-3401, -3405, -3408

**TEACHER CONTRACTS AND ORAL AGREEMENT**
**USD NO. 446 V. SANDOVAL**
**MONTGOMERY DISTRICT COURT – REVERSED**
**COURT OF APPEALS – REVERSED**
**NO. 101,145 – AUGUST 31, 2012**

FACTS: Sandoval taught Spanish at Independence High School. On February 22, 2008, Principal Mitch Shaw informed her that he was recommending the district not renew her teaching contract for the 2008-09 school year. Sandoval met with a KNEA UniServ director.

At the March 10 board meeting, the school board took no action in open session. During the course of the meeting, the UniServ director called Sandoval and told her the board had made an offer. After some negotiating, Sandoval accept a counteroffer of 180 days of paid leave to qualify for KPERS disability benefits, which would require her to leave the classroom on March 28, 2008; paid insurance on the bottom tier for five years; and a lump-sum payment of $20,000 in the event that she did not qualify for disability benefits. The parties attempted to get an agreed settlement in writing. However, on March 12, Sandoval informed the UniServ director that she had changed her mind and wanted to proceed with a due process hearing. On March 24, 2008, the superintendent sent Sandoval a letter stating that the board had deferred nonrenewal of her contract from the March 10 meeting because it understood that an agreement had been reached. On March 28, 2008, Sandoval went to the school and taught her class as she usually did and she finished her teaching assignment for the 2007-08 school year. On April 14, 2008, the board adopted a resolution of nonrenewal of Sandoval’s contract, including a clause reserving the right to enforce the oral agreement that had been arrived at during the March 10 board meeting. After the end of the school term, the district filed a petition in Montgomery County District Court. The petition sought a declaratory judgment that Sandoval had entered into a binding oral contract with the district and had waived her statutory due process hearing. The Court of Appeals affirmed the decision in an unpublished opinion.

ISSUES: (1) Teacher contracts and (2) oral agreement

HELD: Court stated that the parties to a contract may mutually rescind their contractual obligations. Court held that assuming a contract existed, an essential term of the contract required Sandoval to leave the classroom by March 28 in order to qualify for KPERS disability benefits. Nevertheless, the district provided no substitute teacher beginning on March 28 and did not inform Sandoval that she was not to come to the school and teach her classes as of that date. Instead, she finished her teaching duties for the year, and the district paid her salary for that term. The board sent her a letter informing her that it would nonrenew her contract, and on April 14, 2008, the board adopted a resolution of nonrenewal. The actions by both the board and Sandoval were clearly inconsistent with the existence of a contract to terminate her employment as of March 28 and each acquiesced in the conduct of the other. The parties abandoned any intent to be bound by the agreement. Court concluded as a matter of law that no enforceable contract existed between the parties.

CONCURRING IN PART AND DISSenting IN PART: Justice Luckert agreed that the district court’s and Court of Appeals’ decisions should be reversed, but dissented that the case is appropriately resolved on summary judgment because of the conflicting intent of the parties.

DISSENT: Chief Justice Nuss dissented and would affirm the lower decisions that the uncontroverted facts establish that the parties entered into a binding oral contract on March 10, 2008.

STATUTE: K.S.A. 75-4317, -4319

**TORTS AND CAPS ON NONECONOMIC DAMAGES**
**MILLER V. JOHNSON M.D.**
**DOUGLAS DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND CASE IS REMANDED WITH DIRECTIONS**
**NO. 99,818 – OCTOBER 5, 2012**

FACTS: Miller sued her doctor, who mistakenly removed her left ovary during a laparoscopic surgery intended to take the right ovary, and a jury awarded her $759,679.74 in damages. But the district court reduced that amount by $425,000 because of a state law limiting noneconomic damages in personal injury lawsuits and a posttrial ruling finding her evidence of future medical expenses insufficient. Both sides appealed, with each claiming that the district court erred at various points in the proceedings.

ISSUES: (1) Torts and (2) caps on noneconomic damages

HELD: Court held that under the facts of this case it is held: (a) the comprehensive legislation comprising the Health Care Provider Insurance Availability Act, K.S.A. 40-3401 et seq., and K.S.A. 60-19a02 carry a valid public interest objective; and (b) the legislature substituted an adequate statutory remedy for modification of a medical malpractice plaintiff’s common-law rights under Sections 5 and 18 of the Kansas Constitution Bill of Rights. Court stated that although the applicable standard does not require it, there is evidence within the legislative history of K.S.A. 60-19a02 demonstrating a rational basis for limiting noneconomic damages and treating more egregiously injured plaintiffs differently by the setting of a statutory cap on such damages. Court held that it is “reasonably conceivable” under the rational basis standard that imposing a limit on noneconomic damages furthers the objective of reducing and stabilizing insurance premiums by providing predictability and eliminating the possibility of large noneconomic damages awards and the statutory cap of K.S.A. 60-19a02 does not violate equal protection guarantees. Court also held the statutory cap on noneconomic damages imposed by K.S.A. 60-19a02 does not violate the separation of powers doc-
trine, although the cap does limit when it would be sensible for a trial court to order a new trial. Court stated it has long recognized that the legislature may regulate the granting of new trials. Court did find that the district court based its ruling to alter or amend the judgment on factual mischaracterizations of the evidence and a failure to consider all the evidence Miller presented to support her claim for future medical expenses. The district court premised its decision to strike the jury’s award on those errors of fact. The district court’s post-trial order constituted an abuse of discretion, and the court remanded the case to the district court with instructions to reinstate the jury’s $100,000 award for future medical expenses. The court rejected Miller’s trial error claims of judgment as a matter of law, motion for a new trial, and limitation of expert cross-examination.

CONCURRING AND DISSENTING: Justice Beier concurred in part and dissented in part. Justice Beier agreed with the majority’s resolution of the constitutional issues and that the cap on non-economic damages does not violate the doctrine of separation of powers. However, Justice Beier would reverse and remand because K.S.A. 60-19a02 violates the right to trial by jury and right to remedy in the Kansas Constitution Bill of Rights.

CONCURRING AND DISSENTING: Justice Johnson agreed with Justice Beier’s concurring and dissenting opinion but wrote separately to share his view that the majority has incorrectly and unnecessarily limited jury involvement and allowed a segment of unfairly burdened Kansans to drown while maintaining higher profits for insurance companies and lower expenses for doctors.


CRIMINAL

STATE V. ARDRY

SEDGWICK DISTRICT COURT – REVERSED, SENTENCE VACATED, AND CASE REMANDED WITH DIRECTIONS

COURT OF APPEALS – REVERSED

NO. 101,311 – OCTOBER 5, 2012

FACTS: Ardry entered a guilty plea to aggravated indecent liberties with a child, a severity level 3, person felony. He simultaneously entered a plea to unrelated charges involving driving while intoxicated. The district court followed the parties’ recommendation and imposed a sentence of 216 months’ imprisonment based on Ardry’s criminal history score of B. The court also granted a downward departure to 36 months’ probation to be served at a community corrections residential center. Less than a week after completing the residential portion of his probation, Ardry violated his probation by losing his job, failing to report to his probation officer, testing positive for alcohol, and failing to attend his sex offender treatment. Ardry was denied acceptance into Labette Correctional Conservation Camp. The district court stated that he was required to find substantial and compelling reasons to reduce the original sentence and that any reasons for such a reduction would have to differ from those underlying the original dispositional departure. The court imposed the original sentence. Court of Appeals affirmed.

ISSUES: (1) Probation violation and (2) departure sentencing

HELD: Court held that K.S.A. 22-3716(b) allows the district court to impose any sentence less than the one originally imposed, including a shorter prison term, a shorter term of postrelease supervision, or any combination thereof. The statute does not require a district court to articulate reasons for the lesser sentence or to provide reasons that are different from those provided for the purpose of an original departure sentence.

STATE: K.S.A. 22-3716(b)

STATE V. ASTORGA

LEAVENWORTH DISTRICT COURT – AFFIRMED IN PART AND DISMISSED IN PART

NO. 103,083 – AUGUST 31, 2012

FACTS: Jury convicted Astorga of premeditated first-degree murder and other offenses. District court denied Astorga’s motion for a new trial and imposed hard 50 sentence for the murder conviction, with consecutive aggravated presumptive sentences on the remaining convictions. Astorga appealed claiming: (1) district court violated right to present theory of self defense by giving jury forcible felony instruction; (2) K.S.A. 21-3214(1) is unconstitutionally vague and limits a defendant’s ability to assert justification of self defense in some cases; (3) district court erred in denying motion for new trial based on juror misconduct; (4) district court erred in weighing aggravating and mitigating circumstances for hard 50 sentence; (5) district court’s imposition of aggravated presumptive sentences violated Appendix; and (6) first-degree premeditated murder and second-degree murder are identical offenses, thus identical offense doctrine requires sentence to be vacated and remanded for resentencing with lesser penalty.

ISSUES: (1) Forcible felony instruction, (2) constitutionality of K.S.A. 21-3214(1), (3) motion for new trial – juror misconduct, (4) hard 50 sentence, and (5) identical offense doctrine

HELD: Standard of review recently stated by Kansas Supreme Court in State v. Plummer (August 25, 2012) for appellate review of challenge to giving jury instruction is applied. Under facts of this case, district court correctly instructed jury on law of self-defense and its unavailability when the defendant is attempting to commit a forcible felony.

Astorga failed to preserve his challenge to constitutionality of K.S.A. 21-3214(1). Issue is not reviewed.

Under facts, Astorga’s failure to timely bring alleged juror misconduct to trial court’s attention precludes appellate consideration of the claim.

Court infers from absence of findings that district court found no mitigating circumstances existed and that aggravating circumstances outweighed the nonexistent mitigating circumstances. When imposing a hard 50 sentence, district courts are encouraged to make findings on the record regarding the existence or nonexistence of mitigating circumstances and the court’s weighing of such circumstances. Court declines to reconsider prior decisions upholding constitutionality of hard 40/hard 50 sentencing scheme.

Court lacks jurisdiction to review Astorga’s aggravated presumptive sentences. This portion of the appeal is dismissed.

Previous cases have rejected Astorga’s identical offense doctrine claim.

STATUTES: K.S.A. 2008 Supp. 21-3110(9), -3119(a); and K.S.A. 21-3211, -3211(a), -3211(b), -3211(d), -3211(1), -3214(2), -3214(3), -3214(4), -3401(a), -3402(a), -4635(b), -4635(c), -4635(d), -4636, -4636(a), -4636(b), -4636, -4637, -4704(e)(1), -4721(c)(1)

STATE V. BEAMAN

WYANDOTTE DISTRICT COURT – AFFIRMED IN PART, VACATED IN PART, AND REMANDED

NO. 103,361 – OCTOBER 19, 2012

FACTS: Beaman convicted in bench trial on charges of rape and aggravated indecent liberties with a child. On appeal he claimed district court erred in: (1) allowing Beaman to proceed in bench trial without informing him of right to jury trial; (2) refusing Beaman’s pro se request for continuance to allow defense counsel additional time to research Jessica’s Law sentencing issues; (3) denying Beaman’s motion for durational or dispositional departure; (4) sentencing Beaman to life sentence with no parole for 25 years when statute
permitting parole after 20 years should have been applied pursuant to rule of leniency; (5) imposing lifetime post-release supervision; (6) imposing electronic monitoring; and (7) imposing aggravated sentence without having aggravating factors submitted to a jury.

ISSUES: (1) Jury trial waiver, (2) denial of requested continuance, (3) departure motion denial, (4) illegal sentence, (5) post-release supervision, (6) electronic monitoring, and (7) submitting aggravating factors to jury

HELD: Waiver issue is considered even though raised for first time on appeal. While it would have been better practice for district court to have expressly told Beaman on record that he had a right to jury trial prior to engaging in verbal exchange about waiver, under facts and circumstances of this case, Beaman’s jury trial waiver was knowing and voluntary.

No abuse of discretion in denying motion for continuance. Mere speculation of possible issue for another motion is insufficient to justify a continuance.

No abuse of discretion in denying departure motion. Reasons advanced by Beaman for departure were either negated by prior cases, or did not justify departure from the hard 25 sentence.

Supreme court has rejected rule of leniency argument advanced by Beaman.

State concedes error in district court’s imposition of lifetime post-release supervision for the rape conviction. This portion of Beaman’s sentence is vacated.

Record is not clear whether sentencing journal entry ordered electronic monitoring as condition of parole, which is something district court has no authority to order. Sentence pronounced from the bench contains no such error. Case remanded to district court to issue nunc pro tunc order to correct sentencing journal entry error to reflect actual sentence pronounced.

Court continues to reject argument that aggravating factors have to be submitted to jury prior to sentencing a defendant to an aggravated term.

STATUTES: K.S.A. 21-3502(a)(2), -3504(a)(1), -4643, -4643(d) (1)-(6); and K.S.A. 22-3302(1), -3401, -3403, -3504(2), -3601(b) (1). -3717(b)(2), -3717(b)(5), -3717(d)(1), -3717(u)

STATE V. BELONE
DOUGLAS DISTRICT COURT – REVERSED AND REMANDED

FACTS: Belone convicted of second-degree murder, kidnapping, and other crimes related to beating death of his long time companion. Multiple issues raised on appeal, including claim that district court’s admission, pursuant to rule of forfeiture by wrongdoing, of victim’s statements to investigating officers violated Belone’s right of confrontation. In unpublished opinion, Court of Appeals found trial court erred because state did not show that Belone killed victim with intent to prevent her from testifying at trial, as required by State v. Jones, 287 Kan. 559 (2008), but error was harmless because overwhelming evidence from witnesses testifying about the attack and kidnapping. Review granted on confrontation claim.

ISSUE: Confrontation clause – harmless error

HELD: Court of Appeals’ holding that district court erred in admitting victim’s testimonial statements to the police is affirmed. However, applying harmless error standard as clarified in State v. Ward, 292 Kan 541 (2011), state failed to carry its burden of showing that there is no reasonable possibility that violation of Belone’s confrontation rights contributed to the verdict. Without that degree of certainty, error cannot be declared harmless. Reversed and remanded for new trial.

STATUTES: None

STATE V. BREEDLOVE
SEDGWICK DISTRICT COURT – AFFIRMED NO. 103,350 – SEPTEMBER 14, 2012

FACTS: In 1999, Kansas Supreme Court affirmed Breedlove’s conviction for murder when Breedlove was 17. In 2006, Breedlove filed motion to correct illegal sentence, claiming district court lacked jurisdiction because Breedlove was not initially charged in juvenile court and state never obtained authorization to prosecute him as an adult. Kansas Supreme Court agreed, reversed the murder conviction, and vacated the sentence. 285 Kan. 1006 (2008). State filed 2008 case in juvenile court on same charge and obtained authorization for adult prosecution. Jury again convicted Breedlove of first-degree murder. District court denied Breedlove’s speedy trial challenge, finding 90-day limit in K.S.A. 22-3402(4) (Furse) for retrial did not apply when a conviction is reversed and vacated for lack of jurisdiction. Breedlove appealed claiming: (1) speedy trial violation, (2) improper use of prior crime evidence, (3) use of testimony from prior void trial violated his right to confrontation, (4) prosecutor misrepresented evidence during closing argument, (5) violation of order in limine, (6) Allen-type instruction confused jury and suggested it both should and should not concern itself with what happens after its deliberations.

ISSUES: (1) Speedy trial, (2) evidence of other crimes, (3) reading transcribed testimony in first trial to jury in second trial, (4) prosecutorial misconduct, (5) violation of order in limine, and (6) Allen-type instruction

HELD: When a juvenile adjudication is reversed and vacated, and then subsequently certified for adult prosecution, speedy trial state, K.S.A. 22-3402 (Furse), does not apply until arraignment. Ninety-day limitation began upon Breedlove’s 2009 arraignment, and he failed to demonstrate that his trial 124 days later violated the speedy trial statute.

Breedlove failed to preserve objection to challenged bad acts evidence.

Breedlove preserved confrontation claim, but no violation found. Vacating the earlier trial did not render the sworn testimony from first trial void, did not remove constitutional protections in place in that first trial, and did not change credibility of the testimony. Prosecutor’s statements were within allowed comment on the evidence.

One of prosecutor’s statements in opening argument violated order in limine, but no prejudice to Breedlove under facts. Allen-type instruction examined, finding no reversible error.


STATE V. GARZA
GRANT DISTRICT COURT – REVERSED AND REMANDED
COURT OF APPEALS – AFFIRMED IN PART AND REVERSED IN PART NO. 102,953 – AUGUST 31, 2012

FACTS: Garza arrested for possession of marijuana and drug paraphernalia after police stopped car in which Garza was a passenger. Garza filed motion to suppress the drug evidence, claiming traffic stop for driving left of center, K.S.A. 8-1514(a), was illegal because applicable law was failing to maintain a single lane, K.S.A. 8-1522, and there was no evidence it was unsafe for car to leave its lane of traffic. District court granted Garza’s motion and dismissed the case, finding K.S.A. 8-1514 applied only to unmarked roads, and K.S.A. 8-1522 required a showing of element of danger which had not been made. Court of Appeals reversed in unpublished decision. It rejected Garza’s argument that it lacked jurisdiction because state appealed from dismissal order rather than taking interlocutory appeal from the suppression order. It also found district court relied
on wrong statute, state did not have to show it was unsafe for car to cross centerline, and there was sufficient evidence to find car crossed centerline. Garza’s petition for review granted.

ISSUES: (1) Appellate jurisdiction and (2) traffic infraction statutes

HELD: As in State v. Huff, 278 Kan. 214 (2004), notice of appeal was appropriate when dismissal was in same hearing the evidence was suppressed.

K.S.A. 8-1514 and K.S.A. 8-1522 are compared, finding violation of K.S.A. 8-1514(a) is absolute liability offense that does not require any criminal intent. District court erred in this case because officer’s testimony more correctly fit within parameters of K.S.A. 8-1514, and that was the only statute the state alleged had been violated. Reversed and remanded for additional findings based on application of K.S.A. 8-1514(a) to determine if motion to suppress should be sustained.

DISSENT (Johnson, J.): Under plain reading of unambiguous language in K.S.A. 8-1514(a) in Garza’s favor, would have district court on remand determine whether state proved the car failed to drive on right half of the roadway, rather than whether it crossed over the centerline. Also, citing more recent judicial restraint in declaring strict liability crimes, disagrees with majority’s declaration that K.S.A. 8-1514(a) creates an absolute liability offense.

STATUTES: K.S.A. 2008 Supp. 65-4152(a)(2), -4162(a)(3); K.S.A. 8-1514, -1514(a), -1522; and K.S.A. 22-2104,-2301(1), -2402, -2402(1), -3602(b)(1), -3602(e), -3603

STATE V. HILTON
ELLIS DISTRICT COURT
COURT OF APPEALS – DISMISSAL OF APPEAL
AFFIRMED

NO. 102,256 – OCTOBER 19, 2012

FACTS: Hilton sentenced to serve two consecutive 12-month probation terms. During first term district court revoked both probation and ordered service of underlying prison sentences. Hilton appealed, claiming error to revoke probation and order prison term in second case in which probation term had not yet commenced. Hilton had served both prison terms by the time the appeal was heard. Court of Appeals dismissed the appeal as moot. Review granted on Hilton’s petition for resolution of split of authority in Court of Appeals as to what renders a probation revocation appeal moot, citing State v. White, 43 Kan. App. 2d 943 (2009), and State v. Montgomery, 43 Kan. App. 2d 397 (2010). Hilton also claimed district court erred in revoking a consecutively imposed probation before its term began.

ISSUE: Mootness – probation revocation appeal

HELD: As in Montgomery decided by the Supreme Court decided this same date, Hilton’s appeal presented a moot issue subject to exceptions to mootness doctrine. This case fit squarely within the exceptions for moot issues capable of repetition and of public importance. Dismissal of the appeal reversed, and appeal remanded to Court of Appeals for reinstatement and consideration of the issue presented.

STATUTES: K.S.A. 21-4608; and K.S.A. 22-3716(e)

STATE V. HOPKINS
RENO DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
COURT OF APPEALS – REVERSED

NO. 100,851 – SEPTEMBER 28, 2012

FACTS: For Hopkins’ conviction of possession of cocaine, she was sentenced to 18 months’ probation with an underlying sentence of 11 months. In accordance Senate Bill 123 (S.B. 123), she was also ordered to complete mandatory drug abuse treatment as a non-prison sanction per K.S.A. 21-4729. Two months later Hopkins was sentenced in a different case for convictions of attempted aggravated robbery and obstruction of legal process. She received 36 months’ probation with an underlying sentence of 41 months. This robbery case’s sentence was ordered to run consecutive to her previously imposed sentence in her cocaine possession case. Completion of mandatory drug treatment under S.B. 123 obviously was not ordered, but the following provision appeared in her “Order of Intensive Supervision Probation”: “15. Agree to enter into evaluation, counseling, or treatment as directed by the Intensive Supervision Officer. Comply with all recommendations as clinically indicated. Costs and arrangements for payments are the defendant’s responsibility.” Hopkins absconded from her supervised probation. At the revocation hearing Hopkins stipulated to absconding, which violated her probation. She also admitted that per K.S.A. 21-4603d(n) she was barred from receiving jail time credit – toward her cocaine case’s sentence – for her treatment period. But she claimed there was no bar to the treatment period being credited toward her robbery case’s sentence. The district court denied her request, revoked probation in both cases, and ordered her to serve the two underlying sentences (41 months and 11 months) consecutively. The Court of Appeals affirmed.

ISSUES: (1) Probation revocation, (2) jail time credit, and (3) drug treatment

HELD: Court held that the district court erred in refusing to award the defendant jail time credit toward her robbery case’s sentence for her residential drug abuse treatment received while on probation as authorized under K.S.A. 21-4614a. While the residential treatment was only ordered as a condition of probation in her cocaine possession case per S.B. 123, Court held that the treatment need not be ordered in the same case in which the jail time credit is sought.

STATUTES: K.S.A. 20-3018(b); and K.S.A. 21-4603d, -4614a, -4705, -4729

STATE V. JENKINS
SEDGWICK DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED

NO. 100,396 – SEPTEMBER 7, 2012

FACTS: Jenkins convicted in municipal court on no contest plea to misdemeanor theft charge, five days after district attorney filed felony theft charges in district court because Jenkins had two prior theft convictions. Three weeks after his municipal plea, city prosecutor moved to vacate the misdemeanor conviction for lack of jurisdiction over felony crimes, citing State v. Elliott, 281 Kan. 583 (2006). Municipal court granted the motion. Jenkins then filed motion to dismiss felony theft charge in district court as second prosecution of same crime in violation of Double Jeopardy Clause. District court denied the motion, finding no violation of statutory and constitutional double jeopardy. Following conviction in district court bench trial, Jenkins appealed. In unpublished opinion, Court of Appeals affirmed, finding Elliott controlling – municipal court lacked jurisdiction because theft was felony theft under K.S.A. 21-3701(b)(6), and double jeopardy does not bar second prosecution where first prosecution lacked jurisdiction. Jenkins petitioned for review.

ISSUES: (1) Double jeopardy and (2) municipal court jurisdiction

HELD: Scope of municipal court jurisdiction and home rule authority examined. Cases reviewed involving conflict between state statute’s felony classification and city’s prosecution of misdemeanor. A city ordinance that conflicts with state statute by classifying offense as misdemeanor when legislature classified the crime as a felony does not vest municipal court with jurisdiction. Here, city ordinance created that conflict by allowing all thefts of property less than $1,000 to be prosecuted as misdemeanors even though same crime would be classified as felony under K.S.A. 21-3701(b)(6) when committed by person previously convicted of two or more thefts.
STATE V. KELLY
SEDGWICK DISTRICT COURT – COURT OF APPEALS’ ORDER SUMMARILY DISMISSING THE APPEAL IS REVERSED AND REMANDED WITH DIRECTIONS NO. 102,210 – SEPTEMBER 28, 2012

FACTS: Michael J. Kelly Jr. appeals from his convictions of possession of cocaine. Before trial, Kelly filed a motion to suppress the drug evidence, arguing the drugs were seized during an unlawful traffic stop. A district judge conducted an evidentiary hearing and denied Kelly's motion. After the district judge ruled, Kelly waived his right to a jury trial. Kelly's case then proceeded to a bench trial before a different district judge than the one who had denied Kelly's motion to suppress. At the bench trial, the parties stipulated to the admission of a laboratory report and an affidavit of a detective who investigated the case. The detective recited details of the traffic officer's arrest report, noting that Kelly had been stopped for failing to signal and had been arrested when he told the traffic officer his driver's license was suspended. A search incident to arrest revealed substances in Kelly's pockets that the traffic officer suspected were marijuana and cocaine. The laboratory report confirmed the suspicion. No evidence other than the laboratory report and the affidavit was admitted. The trial judge stated that he had "review[ed] the content of the court file" but did not specifically mention the motion to suppress. Kelly did not mention the motion either and did not state any objections to the judge’s consideration of the evidence. The trial judge found the evidence sufficient to convict Kelly as charged. The Court of Appeals summarily affirmed based on a lack of objection.

ISSUES: (1) Contemporaneous objection, (2) bench trial, and (3) stipulated facts

HELD: Court held that a defendant who is tried solely on stipulated facts timely interposes an objection to the admission of evidence by filing a motion under K.S.A. 22-3216(3) to suppress evidence and, in doing so, satisfies the requirements of K.S.A. 60-404, even if an objection to the evidence is not stated at trial.

DISSENT: Justice Nuss dissented, joined by Justices Biles and Moritz, and stated that for more than 100 years Kansas appellate courts have required timely and specific objections to the admission of evidence and the majority's opinion is a dilution of the contemporaneous objection rule.

STATUTES: K.S.A. 22-3018(b); K.S.A. 22-3602(e), -3216(3); K.S.A. 59-29a06; and K.S.A. 60-404, -421
K.S.A. 21-2512(e), and whether an evidentiary hearing is required. Court reversed and remanded for an evidentiary hearing at which Lackey had the assistance of counsel.

STATE V. MONTGOMERY
SHAWNEE DISTRICT COURT
COURT OF APPEALS – DISMISSAL OF APPEAL
AFFIRMED
NO. 102,119 – OCTOBER 19, 2012

FACTS: Upon Montgomery's admission of probation violations, district court revoked probation and ordered Montgomery to serve underlying 11-month prison term. Montgomery appealed. Court of Appeals dismissed the appeal as rendered moot by Montgomery's release from prison and supervision prior to appeal being heard. 43 Kan. App. 2d 397 (2000). Montgomery filed petition for review, claiming appeal was not moot because the revocation could be used in future to deny him probation or subject him to upward departure sentence.

ISSUE: Mooteess – probation revocation appeal

HELD: Discussion of collateral consequences in Spencer v. Kemna, 523 U.S. 1 (1998), is reviewed. Here, Montgomery does not challenge his violation of terms and conditions of probation, but merely complains of resulting punishment. Issue of propriety of sanction imposed by district court for admitted violation of probation becomes moot upon completion of the sanction and termination of state supervision, subject to recognized exceptions to mootness doctrine. Sanction imposed for an admitted probation violation is not sufficiently relevant to an assessment of amenability to probation in a future criminal proceeding so as to negate application of mootness doctrine. No reason shown or discerned to invoke exception to mootness doctrine in this case. Court of Appeals dismissal of the appeal as moot is affirmed.

STATE V. ROJAS-MARCELENO
LYON DISTRICT COURT – AFFIRMED
NO. 102,702 – SEPTEMBER 21, 2012

FACTS: Rojas-Marceleno convicted of rape, aggravated criminal sodomy, and aggravated indecent solicitation of a child. On appeal he claimed district court erred in: (1) denying motion to compel psychological exam of victim; (2) denying motion for bill of particulars; (3) failing to give limiting instruction after admitting evidence of prior traffic offenses; and (4) denying motion for new trial based on newly discovered evidence. He also claimed he was denied unanimous jury verdict on aggravated indecent liberties with a 4-year-old boy violates neither § 9 of the Kansas Constitution Bill of Rights nor the Eighth Amendment to the U.S. Constitution, under the facts of this case.

HELD: Discussion of collateral consequences in Miranda v. Arizona, 384 U.S. 436 (1966), is reviewed. Here,Rojas-Marceleno did not challenge his violation of terms and conditions of probation, but merely complains of resulting punishment. Issue of propriety of sanction imposed by district court for admitted violation of probation becomes moot upon completion of the sanction and termination of state supervision, subject to recognized exceptions to mootness doctrine. Sanction imposed for an admitted probation violation is not sufficiently relevant to an assessment of amenability to probation in a future criminal proceeding so as to negate application of mootness doctrine. No reason shown or discerned to invoke exception to mootness doctrine in this case. Court of Appeals dismissal of the appeal as moot is affirmed.

STATE V. ROSS
SALINE DISTRICT COURT – AFFIRMED

FACTS: Ross, who was 19 years old, had engaged in sodomy and oral sex with a 4-year-old boy. Ross admitted to oral sexual acts with the boy, although Ross denied engaging in pedesty. Ross entered a plea of guilty to one count of aggravated indecent liberties with a child, K.S.A. 21-3504(a)(3)(A). Ross had an extensive criminal history, with 14 convictions spanning a time from 2001 to 2009, including both adult and juvenile person felonies and misdemeanor convictions. The charge carries with it a presumptive life sentence with a mandatory minimum term of 25 years with lifetime post-release supervision. Ross argued in presentencing motions that departure from the presumptive sentence would be appropriate under his circumstances and that imposition of lifetime post-release supervision would constitute cruel and unusual punishment under both the Kansas and U.S. constitutions. The court entered a departure sentence of 162 months, but imposed the statutorily mandated lifetime post-release supervision term.

ISSUES: (1) Sentencing and (2) aggravated indecent liberties

HELD: Court held that a sentence of 162 months’ imprisonment with lifetime post-release supervision for a defendant who committed aggravated indecent liberties with a 4-year-old boy violates neither § 9 of the Kansas Constitution Bill of Rights nor the Eighth Amendment to the U.S. Constitution, under the facts of this case.

STATE V. SCHAEFFER
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 104,503 – OCTOBER 19, 2012

FACTS: Schaeffer convicted in 1994 on guilty pleas to first-degree murder, aggravated kidnapping, aggravated robbery, and weapons violation. Consecutive sentences, including two life terms and 15 years to life were imposed. His direct appeal of sentences out of time was permitted under State v. Ortiz, 230 Kan. 733 (1982). Appeal claimed district judge’s bias and prejudice against Schaeffer fatally infected sentencing. Appeal also claimed sentencing court erred in considering during sentencing the results of Schaeffer’s psychological examination by state expert without Miranda warnings.

ISSUES: (1) Sentencing judge’s bias, prejudice, or corrupt motive and (2) consideration of mental examination

HELD: District court judge’s excessive and ill-advised comments at sentencing are set forth, but do not require resentencing in this case.
case. While judge should have recused because comments regarding Schaeffer living in same town as members of judge’s family might cause a reasonable person to question the judge’s impartiality, this is not a case where prejudice may be presumed, and Schaeffer makes no showing of actual bias or prejudice. Mere fact of harsh consecutive sentences does not establish actual prejudice.

Resentencing is not required when a district court judge considers results from a defendant’s psychological examination as part of a presentence investigation report in a noncapital case, and the defendant initiated the examination. Schaeffer’s notice of intent to raise an insanity defense constituted consent to court-ordered mental examination by state expert, making Miranda warnings unnecessary.

STATEMENTS: K.S.A. 21-4606 (Ensley 1992); and K.S.A. 21-4604(b)(3) (Furse)

STATE V. WARREN
SEWARD DISTRICT COURT – REVERSED

FACTS: Warren’s conviction for aggravated indecent liberties and resulting sentence of life sentence with no possibility of parole for 25 years was based on evidence that Warren’s stepgranddaughter said she had seen Warren’s penis and that Warren told the granddaughter that her vagina was sexy. Warren’s ex-wife testified that Warren had previously pled guilty to indecent liberties with their daughter.

ISSUES: (1) Aggravated indecent liberties and (2) sufficiency of the evidence

HELD: Court held that because the state failed to present evidence that Warren engaged in any lewd fondling or touching of E.W. or himself, done or submitted to with the intent to arouse or satisfy the sexual desires of E.W., Warren, or both, his conviction for aggravated indecent liberties with a child is reversed.

STATUTES: K.S.A. 21-3504, -3508; and K.S.A. 60-417

STATE V. WILLIAMS
LABETTE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 102,615 – SEPTEMBER 21, 2012

FACTS: Williams convicted of severity level 4 aggravated battery for stabbing friend during altercation. Trial judge gave jury a general self-defense instruction. On appeal Williams claimed trial court should have sua sponte instructed jury on: no duty to retreat, use of force in defense of a dwelling, and lesser-included offense of severity level 7 aggravated battery. In unpublished opinion, split Court of Appeals panel affirmed, accepting state’s explanation that it proffered Williams’ failure to run and hide as proof that he was not afraid of victim, thus resorting to a deadly weapon was unjustified under subjective prong of self-defense.

ISSUES: (1) Standard of review, (2) no duty to retreat instruction, (3) use of force in defense of dwelling instruction, and (4) lesser-included offense instruction.

HELD: Court critically examines its handling of unpreserved appellate challenges to jury instructions, and states a more precise analytical framework and more accurate standards of review. K.S.A. 22-3414(3) establishes preservation rule for instruction claims on appeal. No party may assign error to district court’s giving or failure to give a particular jury instruction, including a lesser-included crime instruction, unless: (a) that party objects before the jury retires to consider its verdict, stating distinctly the matter of which the party objects and the grounds for objection; or (b) the instruction or failure to give the instruction is clearly erroneous. If an instruction is clearly erroneous, appellate review is not predicated upon an objection in the district court. To determine whether there is clear error, reviewing court must first determine whether there was any error at all. To make that determination, appellate court must consider whether the subject instruction was legally and factually appropriate, employing an unlimited review of the entire record. If the reviewing court determines that district court erred in giving or failing to give a challenged instruction, then clearly erroneous analysis moves to a reversibility inquiry, wherein court assesses whether it is firmly convinced that jury would have reached a different verdict had the instruction error not occurred. Party claiming a clearly erroneous instruction maintains burden to establish degree of prejudice necessary for reversal.

Even if error in failing to give no duty to retreat instruction, court is not firmly convinced the instruction would have made a difference in the jury’s verdict.

No error in failing to give defense of dwelling instruction because that instruction not applicable to facts of case.

Showing for great bodily harm examined, finding error to not give lesser-included offense instruction on severity level 7 aggravated battery, but clear error standard not met.

STATUTES: K.S.A. 21-3218, -3414(a)(1)(A), -3414(a)(1)(B); K.S.A. 22-3414(3); and K.S.A. 60-251(b)

STATE V. WILSON
OSBORNE DISTRICT COURT – AFFIRMED IN PART AND DISMISSED IN PART
NO. 102,931 – SEPTEMBER 28, 2012

FACTS: A jury convicted Wilson of premeditated first-degree murder, aggravated burglary, burglary, and criminal possession of a firearm in the murder of Scott Noel. Scott’s wife Carol found him bound and gagged and shot in the back of the head. Wilson contends the district court abused its discretion in admitting an audio recording of a 911 call made by the murder victim’s wife and in admitting evidence of seven uncharged burglaries allegedly committed by Wilson for the purposes of proving identity and plan under K.S.A. 60-455. Wilson further asserts the prosecutor committed misconduct by commenting on facts not in evidence and by im-
properly shifting the burden of proof to Wilson and that the cumulative
effect of these errors deprived him of his right to a fair trial.
Wilson also asserts multiple sentencing errors: (1) the district court
erred in finding two aggravating circumstances and imposing a hard
50 sentence, (2) the hard 50 sentencing scheme is unconstitutional,
(3) the district court’s order requiring lifetime offender registration
fails to conform to the governing statutory provisions, and (4) his
Sixth and 14th amendment rights were violated by the court’s use of
his prior criminal history and imposition of an aggravated grid-box
sentence without proof beyond a reasonable doubt to a jury.

ISSUES: (1) Admission of evidence, (2) prior crimes evidence,
(3) prosecutorial misconduct, (4) shifting burden of proof, and (5)
sentencing

HELD: Court held the 911 recording was relevant to corroborate
Carol’s testimony regarding the scene as she found it and whether the
scene had been contaminated, a defense raised by Wilson at trial. The
recording additionally was relevant to the issue of premeditation, an
essential element of the state’s case, because on the tape, Carol “de-
scribed that her husband was lying on the floor, with his hands tied
behind his back, and had been shot in the back of the head.” Court
stated that having listened to the recording, the district court did not
abuse its discretion in finding that at least up to the time the court
stopped the recording, the probative value of the evidence outweighed
its potential for producing undue prejudice. Court also held the dis-
trict court did not abuse its discretion in finding that evidence of the
seven uncharged burglaries met the probativity element of relevance
to prove the disputed material fact of identity. Court also found no
prosecutorial misconduct for comments that were unsupported by the
evidence suggesting that Wilson and an accomplice acted together
and Wilson was the lookout for one of the burglaries. Court found
that even if outside the evidence, the comments were not prejudicial
because the witness identified Wilson from a lineup. As far as bur-
den shifting goes, Court held the prosecutor stressed that the jury
should give whatever weight and credit it could to Wilson’s testimony.
Further, the prosecutor pointed out that “even under Wilson’s ver-
sion of events,” there was no explanation for why cigarette butts with
Wilson’s DNA on them were found at two of the crime scenes. With
that qualification, Court concluded the prosecutor’s comments were
within the wide latitude allowed the prosecutor in discussing the evi-
dence and did not improperly attempt to shift the burden of proof
to Wilson. Court found no cumulative error. Court rejected all of
Wilson’s sentencing challenges.

STATUTES: K.S.A. 21-4636; K.S.A. 22-4901, -4902, -4906; and
K.S.A. 60-455

Court of Appeals

Civil

Contract and Arbitration

Heartland Surgical Specialty Hospital LLC v. Reed
Johnson District Court – Affirmed
No. 106,660 – October 19, 2012

FACTS: Heartland Surgical Specialty Hospital LLC (Heartland)
and Reed were involved in litigation over compensation for admin-
istrative services that Reed claimed were owed to him. The parties
entered an agreement, a portion of which included a non-compete clause.
Heartland filed a claim in arbitration for Reed’s violation of the non-compete clause. The arbitrator dismissed all but one of
Heartland’s claims. Heartland filed a motion in the district court to
vacate an arbitration award against it in favor of Dr. Reed. The court
denied the motion and confirmed the award. Heartland appealed,
arguing that the court erred in its ruling because Heartland was de-
nied an evidentiary hearing during the course of the arbitration and
the arbitrator engaged in ex parte contact with Reed’s counsel that
should result in vacating the award.

ISSUES: (1) Contracts and (2) arbitration

HELD: Court concluded that under the rules of arbitration the
parties agreed would apply, the arbitrator had discretion whether to
set a hearing or dispose of the case otherwise and, under the facts
present here, both parties had sufficient opportunity to present their
evidence and arguments. Court also concluded that any contact be-
tween the arbitrator and defendant’s counsel did not corrupt the
process to the point that the award should be vacated.

STATUTE: K.S.A. 5-405, -412(a), -418

Contracts and Concurrent Jurisdiction

HR Technology Inc. v. Imura International
U.S.A. Inc. et al.
Sedgwick District Court – Affirmed
No. 106,786 – October 5, 2012

FACTS: In this case, the district court dismissed a lawsuit based
upon the grounds (among others) of concurrent jurisdiction with
the federal court. At first, three corporations started to litigate their
contractual disputes in state court in Johnson County. Then, by
agreement, the companies moved their disputes to federal court in
Kansas. After protracted battles in federal court, one of the parties,
HR Technology Inc. (HRT) filed this petition in Sedgwick County
District Court, making guaranty claims against Imura Internation-
al U.S.A. Inc. These guaranty claims arose from the counterclaim
made by one of the parties in the federal litigation questioning the
validity of HRT’s patents. The district court held HRT’s claims were
barred by the compulsory counterclaim rule, the doctrine of res ju-
dicata, the rule against claim splitting, and the doctrine of concur-
rent jurisdiction.

ISSUES: (1) Contracts and (2) concurrent jurisdiction

HELD: Court stated that the state district court could decline
to hear the lawsuit as a matter of comity between the state and
federal courts. Court found that the Kansas Supreme Court has
recognized that the rule of comity between courts of concurrent
jurisdiction rests upon the principles of wisdom and justice, to
prevent vexation, oppression, and harassment, and eliminate un-
necessary litigation and the multiplicity of suits. Court held there
was no abuse of discretion and the district court did not err when
it granted summary judgment to Imura. Court affirmed dismissal of
the lawsuit.

STATUTES: No statutes cited.

Mandamus – Municipalities

Ramcharan-Maharajh v. Gilliland
Osage District Court – Affirmed
No. 106,906 – September 7, 2012

FACTS: Osage City authorized contracts to participate in fed-
eral rails-to-trails project. Four years later, Ramcharan-Maharajh
submitted petitions for referendum vote on that project. County
clerk declined to review signatures because there was no legal ba-
sis for petition to compel an election. Ramcharan-Maharajh sought
mandamus in district court to compel clerk to accept, verify, and
certify names on the petition. District court dismissed the petition.
Ramcharan-Maharajh appealed.

ISSUE: Referendum and a city’s home rule authority
Held: Referendums distinguished from initiative process. No statute authorizes the referendum sought in this case. No evidence of any contract between Ramcharan-Maharajh and city to put a referendum on the ballot, and such an agreement would contravene public policy because a Kansas city cannot agree to hold a referendum not provided for by statute. U.S. Constitution does not require states to provide for initiative or referendum rights, and First Amendment does not require that government take action in response to a citizen's petition.

Statutes: K.S.A. 2011 Supp. 25-3601, -3601(a); K.S.A. 12-137, -3013; and K.S.A. 60-801

MORTGAGE AND FORECLOSURE
METLIFE HOME LOANS V. HANSEN ET AL.
DOUGLAS DISTRICT COURT – AFFIRMED

Facts: MetLife Home Loans, a Division of MetLife Bank, N.A. (MetLife) claimed to be the holder of both the promissory note (Note) and the corresponding mortgage (Mortgage) on property owned by Hansens. There is no dispute that the Note was in default. Due to the default, MetLife sought to foreclose on the property to collect on the Note. The Hansens argued that because the Note and the Mortgage took divergent paths, i.e., the Note was separately sold one or more times. Finally, the Mortgage allowed the Lender to foreclose on the Mortgage by judicial proceeding. The Note also specified that the Mortgage secures the repayment of any debt of justice.

Held: First, the parties agreed that KDOR would proceed first with presentation of evidence to COTA, even though NCRI agreed that it bore the burden of proof as to the validity of the assessment. Court held that KDOR's sales tax assessment against NCRI, as reflected in the final notice of assessment, was entitled to a presumption of validity under K.S.A. 79-3610, and COTA neither erred in failing to immediately rule on NCRI's motion for judgment nor in presuming the validity of the assessment. Court rejected NCRI's argument that the presumption was rebutted (1) by the KDOR attorney's admission that the assessment does not represent actual tax liability; (2) because the sampling technique employed was flawed; and (3) because KDOR knowingly imposed sales tax on out-of-state transactions. Court found NCRI failed to demonstrate that COTA arbitrarily disregarded undisputed evidence or manifested bias, passion or prejudice and NCRI did not rebut the negative finding. Court also rejected NCRI's constitutional challenge to K.S.A. 79-3610 as a violation of the Commerce Clause and Due Process Clause because it imposed a sales tax on out of state transactions. Court found that for purposes of compliance with Due Process and Commerce Clause dictates, apportionment of state sales tax liability auditing technique of an entity conducting business both within and outside a state can be achieved by a sampling if reasonably designed after consultation with the taxpayer to determine tax deficiency within the best judgment and information available to the taxing authority. K.S.A. 79-3610 is a reasonable approach to measuring sales tax liability when a portion of the sales occur beyond the state. Court found COTA erred in refusing to honor a stipulation of the parties and the matter was remanded for a full hearing before COTA to address the circumstances surrounding a disputed invoice, whether there was a mutual mistake in offering and agreeing to the stipulation, and other factors deemed by COTA to be in the interests of justice.

Statutes: K.S.A. 60-216(e), -250, -621; and K.S.A. 79-1609, -2005, -3226, -3610

WORKERS COMPENSATION – CORPORATIONS
HALL V. KNOLL BUILDING MAINTENANCE INC.
WORKERS COMPENSATION BOARD – AFFIRMED
NO. 107,191 – SEPTEMBER 7, 2012

Facts: Hall was injured while working for Knoll Building Maintenance (Knoll Corp.). ALJ denied Hall's workers compensation claim, finding Kansas Workers Compensation (KWC) Act did not apply because all shareholders in Knoll Corp. are members of the same family. KWC Board reversed in part and remanded, finding exclusion for family members set forth in K.S.A. 44-505(a)(2) did not apply to Knoll Corp. because corporations cannot have a family by marriage or consanguinity. KWC Fund petitioned for review.

Issue: Interpretation of K.S.A. 44-505(a)(2) and K.A.R. 51-11-6

Held: Family member exclusion in K.S.A. 44-502(a)(2) only applies to natural persons and is not applicable to artificial entities such as corporations because they are separate legal entities distinct from those who own shares in the corporation. K.A.R. 51-11-6 is
not in conflict with K.S.A. 44-505(a)(2). Whether a family business that decides to incorporate should be entitled to KWC family member exclusion benefit is policy decision for legislature.


ZONING

HACKER V. SEDGWICK COUNTY

SEDGWICK DISTRICT COURT – AFFIRMED

NO. 107,214 – SEPTEMBER 14, 2012

FACTS: County Board of Zoning Appeals (BZA) granted variances in 1990 for Hein’s lawn care business to continue operating in rural residential zone. In 2010, Hein sought three variances to expand employees, parking, and storage. Over objections by neighboring landowner and businesses (Hacker-Gronniger), BZA granted all variances. Hacker-Gronniger appealed to district court under K.S.A. 12-759(f) and 12-760. After district court remanded for BZA to specially address criteria of whether hardship was self-created, BZA again granted the variances. District court rejected BZA’s finding that reasonable growth of existing business was not a self-created hardship, and vacated the variances. BZA appealed, and also argued Hacker-Gronniger lacked standing to appeal BZA’s decision to district court.

ISSUES: (1) Standing and jurisdiction, and (2) unnecessary hardship

HELD: K.S.A. 12-759 and K.S.A. 12-760 are interpreted. Appeals from BZA to district court are governed solely by decision the more specific statute, K.S.A. 12-759(f). Test for standing, in Tri-County Concerned Citizens Inc. v. Board of Harper County Comm’rs, 32 Kan. App. 2d 1168 (2004), is applied, finding Hacker-Gronniger have standing under K.S.A. 12-759(f) to challenge the BZA decision.

No Kansas case directly addresses whether self-created business growth can ever constitute an unnecessary hardship. Other courts reject that position. Court concludes as matter of law that self-created business growth is not an exception to general rule that unnecessary hardship required for property owner to obtain a zoning variance may not be self-created. District court properly determined that BZA’s finding of unnecessary hardship in this case was not supported by substantial evidence.


CRIMINAL

IN RE K.B.

SEDGWICK DISTRICT COURT – AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH DIRECTIONS

NO. 107,063 – SEPTEMBER 14, 2012

FACTS: In separate cases, the state filed juvenile complaints alleging that K.B. committed one count of indecent liberties with a child and one count of purchase or consumption of an alcoholic beverage by a minor and then also one count of rape. K.B. pled guilty to an amended charge of misdemeanor battery. The alcohol charge was dismissed. The district court adjudicated K.B. a juvenile offender in each case and transferred the cases to Sedgwick County, where K.B. lived, for sentencing. In a later case, K.B. pled no con-
test to one count of criminal discharge of a firearm at an occupied dwelling. The district court adjudicated K.B. a juvenile offender and transferred the case to Sedgwick County for sentencing in all three cases. At the hearing, the state noted that the two batteries had stemmed from allegations of a sexual nature. K.B. denied any sexual contact with either victim. The district court found that the batteries were sexually motivated, ordered sex offender registration, and recommended that K.B. complete sex offender treatment as a condition of his direct commitment to the Juvenile Justice Authority and aftercare. K.B. filed a motion to correct illegal sentence in which he argued that there was insufficient evidence to support the district court’s conclusion that his offenses were sexually motivated. At the hearing, the state conceded that the sexual motivation finding was improper and should be vacated along with the order for sexual offender registration, but argued that the district court had the general authority to order counseling, and therefore the sex offender treatment recommendation was not contrary to statute. The district court denied K.B.’s motion.

ISSUE: Sexual offender registration

HELD: Court found the state failed to present any evidence of sexual motivation underlying the batteries committed by K.B. Court held under the facts of this case, the district court lacked substantial competent evidence to determine, beyond a reasonable doubt, that misdemeanor batteries committed by a juvenile offender were sexually motivated when the district court relied solely on unsworn statements in a presentence investigation report. An affidavit referred to in the PSI report was not included in the record on appeal. Court concluded that the appropriate disposition of this issue is to vacate the district court’s order that K.B. register as a sex offender and remand for an evidentiary hearing for the district court to determine whether the batteries were sexually motivated, if the state seeks such a finding. Court also found there is no language in the statute that requires a district court to find that a juvenile offender is a sex offender before recommending sex offender treatment. Accordingly, the district court was authorized to recommend that K.B. complete sex offender treatment as a condition of his direct commitment and aftercare. On remand, however, the district court may reconsider whether sex offender treatment is an appropriate recommendation if the parties present evidence on whether the batteries were sexually motivated.

STATUTES: K.S.A. 22-4902(b), -4904; and K.S.A. 38-2361(a) (4), (10), -2369(a)(3)(B)

STATE V. LUNQUIST

JOHNSON DISTRICT COURT – AFFIRMED

NO. 106,480 – SEPTEMBER 21, 2012

FACTS: Defendant Jessica Lunquist contends Prairie Village police officers had no lawful basis to search her car without a warrant even though she met with an undercover agent in the car to facilitate illegal drug sales twice in three days, the second time just before she was arrested. The Johnson County District Court denied Lunquist’s motion to suppress a small amount of marijuana police discovered during the search of her car. The court later convicted her of felony possession of marijuana as a repeat offender.

ISSUES: (1) Search and seizure and (2) motion to suppress

HELD: Under the facts of this case, police officers lawfully searched the defendant’s car under the motor vehicle exception while it was parked in a commercial lot and shortly after they arrested the defendant for drug trafficking.


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