Keynote Address
Thursday, June 14, 2012
Sheraton Overland Park Hotel
at the Convention Center
Overland Park, Kan.

Justice Alan Page

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- Established the Page Education Foundation
- Member of the famed “Purple People Eaters,” the Minnesota Vikings’ fierce defensive unit of the 1970s
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Focus

Real Property Interests Subject to Oil and Gas Interests
By Teresa James

Real Property Interests Subject to Oil and Gas Interests

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Pro Football Hall of Famer and Justice Alan Page to be 2012 Keynote Speaker

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Kansas Bar Association, Topeka, Kan.
Another month of meeting great lawyers from around the state on my local and specialty bar visits. I began this month dining with the Ellis County Bar Association. They meet monthly in Hays at the Rooftop Restaurant, where they have met for years. The Association has always reserved a conference room set off from the public restaurant so that clients would not assume that their cases were being fixed by the attorneys over lunch. I was highly entertained with stories about controversies over the years, many of which would not be proper to publish, others of which are just hilarious. Apparently there was a running controversy about whether the Great Lakes or Lake Baikal in Russia contained a greater volume of fresh water. This issue was quite controversial and had members of the bar researching at the public library each month, with pleas more impassioned than the last, until that meeting when the definitive source of National Geographic declared the “Blue Eye of Siberia” the winner.

Now then, attorneys do not discuss their cases at the Ellis County Bar Association meetings. Weddings, yes. Travel, yes. College sports, yes. Lake Baikal, yes. Cases, no. One particular member of the bar disregarded the rule that cases were not discussed and tried to discuss the matter of an unpaid judgment with opposing counsel every month. This conduct resulted in passage of the “Siruta Rule.” As with many things, one bad apple spoiled the bunch. Yes, the “Siruta Rule” prohibited Mr. XXXXX, Sr. from discussing the “Siruta” case. But, it prohibited Mr. Bird from discussing children’s sports and politics. And, it prohibited Mr. Braun from mentioning Europe or the “word ‘weddings.’” The intent of the rule was clear, “… anyone who intentionally or negligently raises any point of conversation which the reasonable and prudent man would believe would result in any attendee to monopolize the dialogue (or monologue) should be punished in some fashion.” Many thanks for the free lunch and the great company of, among others, Hon. Tom Toepfer, Randy Clinkscales, Chris Sook, Corinne Petrik, Glenn Braun, John Bird, and President Carol Park.

I then attended the Thirteenth Judicial District County Bench/Bar meeting in El Dorado. Chief Administrative Judge David Ricke has started quarterly Bench/Bar meetings, which serve as a good time to catch up with friends and colleagues, and also allows for free conversation among the bench and bar to discuss matters of procedure and process to improve administration of justice in the district. Jim Hargrove saw to it that I was treated to some delicious chocolate...
dipped strawberries for dessert. Joe Penney, Butler County Bar president, demonstrated excellent hospitality, as did David All, Tim Connell, Darren Patterson, and Rob Lane, among others.

I also had a delightful time in Garden City, where the Finney County Bar Association meets every Friday. If you find yourself in Finney County on a Friday and they like you, you might be able to tag along. Linda Lobmeyer, the president of the Finney County Bar, was elected in absentia. If you don't show up, you might be voted in as president. I thoroughly enjoyed my conversation with Doug Crotty, Gene Gaede, Hon. Robert Frederick, and Seth Lowry. My thanks to our friends and colleagues in Garden City, who were wonderful company and gracious hosts.

KBA President Rachael Pirner may be reached by email at rpirner@ksbar.org, by phone at (316) 630-8100, or by posting a note on our Facebook page at www.facebook.com/ksbar.
W(hile a full-time law student at the University of Minnesota School of Law, Alan Page was playing professional football with the Minnesota Vikings. His football career is nothing short of amazing and his legal career has led him to being the first African-American elected to a state office in Minnesota – the Supreme Court.

Drafted in the first round in 1967, Page’s football career is storied, leading Notre Dame to a national championship in 1966, helping the Vikings to four conference titles, being named most valuable player by the NFL in 1971, defensive player of the year in two seasons, selected to nine straight Pro Bowls, and amassing astonishing statistics for his position as a defensive tackle. He played in 238 straight NFL games, including four Super Bowls, recovered 23 fumbles, and recorded 173 sacks.

While excelling on the field, Page was also a leader with the NFL Players Association at a time when the NFL was not recognizing the union and the leaders were routinely traded or released. Page, John Mackey, and Kermit Alexander fought for better pay, benefits, and free agency.

After serving the NFLPA as a representative, he would enter law school full time while still playing full time for the Vikings. Page always had an interest in law as a child. He said he was planning for when his football career would end.

“With the NFLPA, I spent time working with lawyers and it gave me insights into how lawyers thought,” he said. “It gave me a comfort level after law school in the labor and employment area at the law firm and the attorney general’s office.”

In 1979, Page joined the Minnesota law firm of Lindquist & Vennum as an associate while still playing in the NFL (although now with the Chicago Bears); the firm specialized in labor issues. He said he didn’t pay attention to any talk from other lawyers as he wasn’t doing law for them. “It was a job I had,” Page said. “For other lawyers, they were going to treat me how they were going to treat me.” In addition, he worked in the Minnesota Attorney General’s Office from 1985 until 1993, when the interest in serving on the bench entered into his mind.

When a vacancy on the Minnesota Supreme Court opened up, Page prepared to run for the seat until the governor extended the term of the aging justice, thus, eliminating the vacancy. Page challenged the decision in court and won the decision and forced the state to put his name on the ballot. He campaigned throughout the state and became the first African-American elected to state office in Minnesota.

“We had a sense that the law was on our side as a candidate,” he said. “The goal was to prevail and we didn’t care if it was one vote or 100,000 votes, just the trust and confidence of the voters.”

When he ran for his second term in 2004, he received the highest percentage of votes of any candidate statewide in history.

Page’s career with the Minnesota Supreme Court as an associate justice, he said, is still a work in progress. He said that justices they deal with the most difficult cases in Minnesota that they are working to try and get right.

“Ultimately, what is the right answer?” he said of trying to decided a case.

In addition to both his football and legal achievements, Page created the Page Education Foundation, which he and his wife, Diane, founded in 1988. The foundation provides mentoring and financial assistance to college students of color in return for service in their communities. To date, more than 4,000 students have been awarded grants, who have, in return, given more than 300,000 hours of their own time to young children.
Lessons from the Road

By Vincent M. Cox, Cavanaugh & Lemon P.A., Topeka, vcox@cavlem.com

It’s hard for me to believe that it has been more than six years since I was sworn-in as a newly minted Kansas attorney. While that is not an incredibly long amount of time by any measure, it has been long enough for me to learn a number of lessons, both the hard way and the easy way. I’ve had the pleasure of practicing law in counties all across the state, and I’d like to share some of the rules and guidelines that I’ve learned along the way:

1. Know Your Local Rules

The first thing I do when I get a case in a new jurisdiction is to find out if there are local rules. Most counties have them, some do not. Many publish their local rules in West’s Kansas Court Rules for Judicial Districts, but some do not. Sometimes you have to go to a court’s website, or call the clerk of the court, to get a copy of the local rules.

Many of the local rules are minor, but many are very important to comply with, especially if you don’t want to get called on the carpet by the judge or opposing counsel. You will find rules that require signatures in blue ink, and pleadings submitted without staples. You will find rules regarding whether reply briefs and sur reply briefs are allowed, and the number of days within which they have to be filed. You will find rules regarding page limitations for briefs. Judges are not happy when you exceed established page limitations. Additionally, some counties, like Shawnee County, have specific rules regarding discovery, and require or allow the use of standard discovery requests.

2. Know Thy Judge

It took me a while to learn that a little information on a judge can go a long way. Now, whenever I get a case with a new judge, I will ask around about what the judge’s preferences are, etc. It is a great idea to ask other attorneys in your firm, other attorneys that you know, or local attorneys that regularly practice before the judge about any information they can share.

It’s also important to know that most of the district courts in Kansas are multi-county districts, and the judges are covering multiple counties. Make sure you know where your judge has his or her office, so you can mail chamber’s copies of briefs to the correct location. It will not always be in the same county where your case is located. Most judges in multi-county districts want chamber’s copies mailed to their home office, because briefs filed in the other counties are not readily available to them.

3. Beware of the Telephone Court Appearance

Appearing for court hearings by telephone often makes a lot of sense. Most of the district courts around the state have adopted telephone conferences for certain procedural hearings, like scheduling and discovery conferences. While many times you are allowed to appear by telephone, you should always ask yourself: Should I appear by telephone? A number of factors need to be considered before answering this question: (1) Does the judge actually like lawyers to appear by phone? (2) Is opposing counsel appearing by phone? (3) Are there any contested issues that are important to your case or your client?

My advice is, if you have an issue that you think might be contested, you probably want to appear in person. Also, beware of factor number 2. I have had attorneys tell me they were going to appear by phone, but then appear in person on the day of the hearing because “they were in the neighborhood.” Nothing is worse than appearing by phone when the other attorney is personally in front of the judge.

4. Know the Rules of Pretrial Conferences

This question is familiar to many young and new attorneys: “Hey, can you cover a pretrial conference for me?” This question is simple enough, and it is regular practice for attorneys to cover court hearings for each other. However, the pretrial conference is a special case.

Kansas Supreme Court Rule 140(c) states that the “final pretrial conference will be conducted by an attorney who will participate in the trial of the case.” In other words, the attorney appearing for the pretrial must appear at the trial. While some judges are relaxed in the enforcement of this rule, many are not. So, before you cover a pretrial conference for another attorney, a few key questions need to be asked: (1) What is the likelihood this case will go to trial? (2) If the case does go to trial, is the client comfortable with the attorney covering the pretrial trying the case? and (3) Is the client willing to pay for two attorneys to appear at the trial? You have to make sure that you understand Rule 140, and that the attorney you are covering for also understands the rule.

This is just a handful of guidelines that I have learned along the way. I think the most important thing is to know the local rules, and to do whatever you can to learn about the district court where you are practicing. You just can’t assume that all the courts in the state operate the same way. If you follow this rule, maybe all your lessons will be learned the easy way.

About the Author

Vincent M. Cox is an associate with the Topeka firm of Cavanaugh & Lemon P.A., where he maintains a civil litigation practice. He received his bachelor’s degree from Benedictine College in 2002 and his juris doctorate from Washburn University School of Law in 2005, where he was a member of the Washburn Law Journal. Cox is a member of the Topeka and Kansas bar associations and is past president of the Topeka Bar Association Young Lawyers Division.
The Diversity Corner

The Race to Admissions?

By Karen Hester, Director of Student Affairs and Diversity, University of Kansas School of Law, Lawrence, khester@ku.edu

Is it 2028 already? I ask because as some of you may recall, Justice Sandra Day O’Connor wrote in her majority opinion of Grutter v. Bollinger (2003) that one day (in maybe 25 years), the use of racial preferences in college admissions will no longer be necessary. But since the Supreme Court will now hear a case on racial preferences, it’s like déjà vu all over again. I hope you will keep abreast of this case as the outcome may have a direct impact on our profession. If it’s been a while since you’ve thought about admissions and higher education, use this puzzle to help jog your memory (and have some fun). The remaining letters leave a clue – the name of the upcoming case. Good luck!

About the Author

Karen Hester is the director of Student Affairs & Diversity at University of Kansas School of Law. Prior to joining KU in 2005, she practiced elder law, including estate planning and probate. Hester has a Bachelor of Science in mathematics, a Master of Science in student personnel and counseling, a Juris Doctor, and a Master of Law in taxation.
This month’s column speaks to three topics near and dear to me.

1. The KBA Convention. This year’s convention is June 13-15 in Overland Park at the Sheraton on College Blvd. Like last year, this is a joint convention with the state’s judges, so it should be an informative and well-attended event. If your clients, like most, want to hire counsel who has some familiarity with the judge hearing their matter, attending this year’s convention is a no-brainer. As an added bonus, you can see the Kansas City Royals play Wednesday, June 13 or Thursday, June 14 against the Milwaukee Brewers. The Royals are about to have their best season in years.

2. Civility and Professionalism. This year I’m revisiting a topic that’s important to all of us – the state of civility in the Kansas bar. I’m organizing a CLE on Friday afternoon – June 15 – from 1:30-2:20 p.m. in the Cottonwood Ballroom at the Sheraton. I’m using a format I employed two years ago at the bar convention in Wichita, with modest tweaking. The panel will be made up of a cross section of Kansas attorneys, all of whom served our country in either the JAG Corps or in the armed services.

3. World War II Veterans. Since my recent series on veterans, I continue to be amazed by the dedication these men showed at such a young age. Something I read in the national press a couple of weeks brought this back to mind. Recently, the media reported a story with this headline: “Army blunders as British boy, 17, fights in Afghanistan.” The story described how a teenage British soldier “slipped through tight army controls to fight on the front line in Afghanistan, the Ministry of Defence says. Adam Wilkie, who was just 17 years old when he was deployed to Helmand Province, lied about his age to sneak past checks. Combat troops are supposed to be 18, but the army admitted ‘human error’ led to the blunder in 2010.”

Yet many who enlisted in WWII were not even 18. John Bausch, of Topeka, for instance, enlisted when he was 15 to join his father when his dad’s outfit was called into service. “We were only supposed to be in service for one year and I planned to go back and finish high school,” says John. However, the one year stretched to five, and John and his father first served in the United States and then went through five campaigns in the European Theater during World War II. One of those campaigns included the Battle of the Bulge. There are other media reports of other veterans enlisting at 15 and 16 years old and serving.

Many other Kansas attorneys enlisted at 18. Emerson Shields is one. Arnold Nye is another. And also Aubry Bradley, Bob Bates (who passed away January 6), just to name a few.

And then you have the case of Charles Svoboda, who graduated from Lawrence High School at age 17. “With WWII in full swing, and I knew that I was going to be drafted. I had always wanted to fly and the Navy Air Corps was seeking applicants in Kansas City. A month before my high school graduation, I came to Kansas City to apply, and I spent five days taking tests, mental, psychological, physical, and intelligence. I succeeded in passing and was sworn in as an aviation cadet the following week.” Svoboda’s family was already one step ahead of him.

“My dad had been in World War I, as an officer, and held a reserve commission. When Pearl Harbor was attacked, he had orders to report to the Navy Marine base. He went on to fight in the Pacific. In addition, I had twin brothers both drafted in the Army, and they were fighting in Europe and fought in the Battle of the Bulge. So I got consent from my parents at age 17. I remember phoning my father who was in Seattle, Washington, with the Marines and he didn’t hesitate. I was sworn in a month before I graduated.” Can you imagine how Chuck’s mother felt – two twin sons, her baby boy, and her husband all engaged in world war?

Svoboda is one of the veterans joining me for my CLE panel. Come meet him and the rest of your bar professionals in Overland Park in June. See you there.

About the Author

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

Spell Check Is Not Your Friend (and Other Tips for Effective Proofreading)

By Joyce Rosenberg, University of Kansas School of Law, Lawrence, jorose@ku.edu

“P

roofreading? Really? It seems kind of basic.” I was talking to my legal writing colleagues at KU Law about the subject for this column. We teach our first-year students the importance of attention to detail in their written work. From the beginning of law school on, lawyers know it’s essential. And yet, perhaps the lesson can’t be repeated enough.

Proofreading goes far deeper than just cosmetic appearance. It’s about even more than making a good first impression. Cautious proofreading actually improves your advocacy. It makes a brief easier to read. It makes the points clearer. It improves the writer’s credibility, a key component of persuasion.

By contrast, careless proofreading can lead to big trouble. For instance, in one case, U.S. District Judge Gregory A. Presnell found the plaintiff’s papers “riddled with unprofessional grammatical and typographical errors that nearly render[ed] the entire Motion incomprehensible.” Judge Presnell edited the papers in red pen, attached the marked copy to the order, and required the lawyer to give his client a copy. In another example, multiple technical errors were partly to blame for the U.S. Court of Appeals for the Seventh Circuit upholding dismissal of a complaint. The court noted many punctuation and grammar problems. The complaint’s “rampant grammatical, syntactical, and typographical errors contributed to an overall sense of unintelligibility.”

No one wants to be on the receiving end of an opinion that focuses on the lawyer’s poor attention to technical details. Aside from the embarrassment of such an order — which, in both of the above cases, made legal news nationwide — the lawyers must have been horrified at the possible damage to their clients’ cases, not to mention to their own reputations.

Proofreading may be a basic skill, but it’s vital. So proofread meticulously. Here are some tips for more effective proofreading.

1. Give yourself time and distance from your document. After working with a document for hours or days on end, it can become difficult to see the mistakes. Step away from the brief. Work on something else. Go for a walk. Come back to your brief with fresh eyes ready for error-spotting. Of course, all of that requires time. So try to leave enough time between finishing a brief and filing it. A last-minute process can result in sloppier work.

2. Read your document backwards. Even with the benefit of time, it can be tough to spot small errors in a document you are very familiar with. We tend to see what we meant to write, not what’s actually on the page. Reading from the last sentence to the first removes the context, so it reduces the familiarity that can cause missed errors.

3. Make more than one pass at proofreading. Try proofing once on the computer screen and twice in hard-copy form. The triple-checking improves the odds of catching mistakes. It’s also a form of due diligence: Even if some errors slip through, you will have done your best to catch them.

4. Read the document aloud. Read to a willing colleague, or to your dog, or to yourself. The audience doesn’t matter. The point is to make you focus on the document in a new way. Reading aloud may catch errors you can hear better than see. For example, reading aloud can help identify run-on sentences and sentence fragments.

5. Do not trust spell check. It might catch some mistakes, but relying on it is a recipe for embarrassment. Spell check won’t catch “statue” when you meant to write “statute.” It won’t realize that you meant “their” but typed “there.” And it won’t point out that you accidentally left the “I” out of “public.”

It’s probably unreasonable to expect perfection. Even with cautious, diligent proofreading on your side, you may miss some errors. Nevertheless, if you treat proofreading as an essential part of your writing process, you will have done your best to present a clear, credible, and polished document.

About the Author

Joyce Rosenberg teaches Lawyering Skills and directs the Externship Clinic at the University of Kansas School of Law. She can be reached at jorose@ku.edu.

Footnotes

1. My husband is really hoping that the first word of this column will be “proofreading.” No such luck, dear: I practice what I preach.


5. Id.


7. In Nault, the lawyer complied and fixed the errors, and the litigation proceeded. Carnahan, supra note 3. In Stanard, however, the errors were more severe, and included missed deadlines and other failures to comply with rules and orders. The case was dismissed and the Seventh Circuit referred the matter to the Attorney Registration and Disciplinary Commission of Illinois. Stanard, 658 F.3d at 801-02.


10. Many writers recommend proofreading only in hard-copy form. See id.

11. Id.
Back in 2010, Chief Justice Nuss outlined our Supreme Court’s vision for the Kansas judicial system naming it Project Pegasus after the winged horse of Greek mythology. Describing the components of Project Pegasus in his 2012 State of the Courts address, Nuss said, “As you may recall, Project Pegasus consists of two parts: (1) a weighted caseload study to measure the actual workloads of all district courts in our 105 counties and (2) a Blue Ribbon Commission to review the judicial branch operations.” (Chief Justice Nuss’ full address may be found at www.kscourts.org.)

The Pegasus has taken flight as the reports of the Blue Ribbon Commission and the weighted caseload study are out (also available at www.kscourts.org). The Pegasus is no longer mythical but is actually altering the legal landscape, beating out winds of change with its powerful wings. Those changes and aspirations are of interest to attorneys from law practice management and technology perspectives because many of the proposals revolve around these concepts.

Law Practice Management

The assumptions of Project Pegasus are that the system of justice can be made more cost-effective through examination of the “…optimal combination of inputs and technological efficiency discussed in most microeconomic textbooks.” Blue Ribbon Commission Report, Page 42. In other words, what tools and procedures can the Supreme Court deploy to be better law practice managers? To that end, the Commission identified some items of interest to attorneys:

1. More Magistrate Judges – Use more magistrate judges employed by the judiciary (not counties) and require incoming magistrates to be lawyers. Appeal of magistrate rulings should be to the appellate courts rather than a district court judge. The cost of magistrates runs approximately $92,000 versus $162,000 for district judges.

2. Fewer Court Reporters – Leverage audio recording technology to replace court reporters with transcriptionists or trial court clerks. Court reporters cost about $58,000 compared to $40,000 for transcriptionists or $35,000 for trial court clerks.

3. End One Judge Per County – Eliminate the one resident judge per county requirement. Allow the Judiciary to “load balance” judges according to demand. This item is with the legislature in SB 423 with debate on how broadly to grant that authority, what oversight should be required, and questions about services to rural Kansans.

4. Increase All Docket Fees – The Blue Ribbon Commission advises open authority to the Supreme Court to increase all docket fees either by statute or by Court Rule.

5. Implement Motion Fees – Addition of docket fees for motions, especially summary judgment motions, is urged with the theory that motions which may benefit a party should bear a fee.

Technology

Electronic filing is the dominant technology concern of the Blue Ribbon Commission and receives the most attention. It is also the recommendation currently wending its way through the legislature as SB 425. The Blue Ribbon Commission and SB 425 seek:

1. Mandatory E-filing – E-filing should be mandatory across districts, filing types, and filers within three years.

2. User Fees – The Blue Ribbon Commission diverged from the Supreme Court E-filing Commission recommendations, which suggested electronic filing be free, instead proposing unlimited authority to set a service charge for filing and a viewing fee. SB 425 was modified to cap that at $10 for filing and document view fee at $.10 per page. It is notable that there is no “free look” yet for parties, as provided in the federal system.

Incidentally, the Blue Ribbon Commission report spends some time discussing the considerable staff and resource benefits experienced by the Shawnee County electronic filing program in place since 1997. It is mentioned that a system only half as effective as Shawnee’s would save the expense of 24 clerk positions – notable because the Shawnee County system is not mandatory, does not charge a filing fee, and does not charge a view fee.

Business Planning

As the Pegasus takes flight, attorneys must arrange our practices to prepare our clients. Changing where courts are located, who works in them, how we access the courts and information, and what it costs has a real impact on who will show up at our own doors for help, what we can do for them, and the strategies we use. Project Pegasus promises some bold advances; we have to make sure our clients are not bucked off on the way to Mount Olympus.

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.
As graduation looms, many soon-to-be J.D.’s take a quick look at the legal job market and decide their best bet is to hang out a shingle and go into business for themselves. I certainly did — at first. A thorny job market can make starting your own business — whether a law firm or a cupcake bakery — seem attractive. You can be your own boss, set your own schedule, and keep the profits entirely to yourself. On closer look, though, solo practice may offer more risks than rewards for the new attorney. A better option might be to build legal expertise through volunteer legal work with established legal-services providers, by taking time to shadow attorneys in different fields, or applying law-related skills in management.

“Buy Now, Pay Later”

The rule is, once you are licensed, you have the same rights and responsibilities as any other lawyer admitted to the Bar. There is no special dispensation for earnest young attorneys who hang out a shingle and try their best. Yet the young attorney might be fooled into thinking that somehow the risks are lower at the beginning of his or her career. That belief might arise from the relatively low cost of the claims-based malpractice insurance policy he or she decides to (should!) purchase. This, in turn, stems from the fact that the attorney does not have any potential liabilities for any period prior to licensure.

A young attorney may further undervalue the risks of mistakes or client unhappiness because of (a) a lack of prior experience from which to extrapolate it, and therefore (b) a tendency to assign a “0” to any nebulous or unknown hazard. Furthermore, the attorney may feel his or her mission is to build up as large a client base as possible because of (a) an excitement to begin working; (b) a need to build up a network of clients for referrals; and most importantly, (c) because payment for services may be deferred. Thus, despite an accountability equal to a much more experienced attorney, the young attorney may underestimate risk because of an eagerness to get started, the availability of cheap insurance, or an inability to quantify risk.

The potential for disaster for young attorneys is therefore one of professional responsibility and liability, because of the weighty and sanctionable rules that attach to those who advocate for others in a court of law. Yet the danger also lies that they may simply have bitten off more than they can chew. Or that, after gathering together a broad range of clients to generate revenue, they now find themselves in front of an unappetizing smorgasbord of landlord-tenant disputes, divorces, and employment grievances they feel unable to handle.

“Uneasy Lies the Head that Wears the Crown”

Another potential area of quicksand for the young attorney is the management of his or her firm. Let us not forget that, just like the cupcake baker, a young attorney who hangs out a shingle becomes a small-business owner. Particularly if the attorney is used to regular employment rather than entrepreneurship, he or she might be surprised at the time, money, and risk that goes into starting and managing a business. Therefore, a cost-benefit analysis at the starting gate might make becoming your own boss seem less attractive than at first blush.

I can relate. Taking orders from someone else — and letting them take a good chunk of profit off my labor — used to chafe a lot more before I went into business for myself. As a freelance translator and consultant, I started to long for the days when someone else worried about drumming up business, chasing bad debts, and figuring out taxes. When I entered law school, it was with the idea of starting my own legal-translation firm. I had big dreams of joining my translation experience to a law degree, and doubling profits. At a legal-translation workshop at the University of Trent, Italy, this summer, those dreams were quickly resized. I found out I had overestimated the market size and the time to break even if I entered it. I expanded my job search and left the “solo” dreams behind.

Thus, the attorney interested in solo practice must decide whether he or she has “entrepreneurial intent” as well as a desire to practice law. Should that recent grad team up with friends and the “solo practice” becomes a “small firm,” an entire host of business-planning issues, from buyouts and dissolutions, to profits and loss sharing, come into play, as well.

A Simple Proposition

No question, the job market — for bakers and lawyers alike — is a prickly one. The economic climate tends to put job-seekers and currently employed attorneys in an adversarial posture. The former, hungry to get a job (I’m licensed, I’m talented, hire me!), and the latter, fighting hard to stay ahead of the curve (Too busy! You have no clients! Best of luck!). The relationship could be more amicable. New grads who have not secured employment at graduation can take one of the routes mentioned above: get solid training through volunteer

Footnotes

2. Id.
3. From lecture delivered by Dean Jeffrey Thomas, at the Solo and Small Firm Workshop Series, University of Missouri at Kansas City (UMKC) Law School, Jan. 20, 2012.
4. I must say, however, that the how-to videos I found out of sheer desperation on the IRS website are fairly entertaining if not downright campy. They seem to have updated them since then. http://www.irsvideos.gov.
For those hardy enough to take on the challenges of solo practices, right out of the starting gate, the following resources may be helpful:


(recommended by a solo practitioner at a Women in Law meeting, the University of Kansas, Fall 2011)

(2) SCORE, the “Service Core of Retired Executives,” a “resource partner” for the Small Business Administration, offering workshops and other resources for the entrepreneur, www.kansascity.score.org.


(4) Library resources: see, e.g., the Information Resources for Solo and Small Firms webpage by Prof. Paul D. Callister, UMKC Law Library http://www1.law.umkc.edu/faculty/callister/smallfirm/.

(5) and of course, the alumni network and career services office at your law school.

About the Author

**Emilia Carlson** is a 3L at KU Law. She holds a bachelor’s degree from Northwestern University and a graduate degree in arts management from the University of Florence, Italy. She has a background in theatre and festival management, having worked as an interpreter with the Spoleto Festival in Italy and for the Festival of China at The Kennedy Center.

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5. Christine Campbell, of Kansas Legal Services, mentioned such training at a Women in Law meeting at the University of Kansas, Fall 2011.
One of the most thought-provoking questions I have ever considered is found in the Bible when Cain answers God with: “Am I my brother’s keeper?” (Gen. 4:9). The Kansas Lawyers Assistance Program (KALAP) has been wrestling with the modern-day version of that quandary presented by lawyers who are suffering from professional problems brought about as a result of substance abuse and/or mental illness.

In my world, these brothers’ and sisters’ problems are not theirs alone. They haunt all of us who care about our brothers and sisters in the law and who are fortunate enough to have escaped the disabilities these twin devils cause. Particularly sad and frustrating are those cases in which the lawyers could be helped if they could afford professional evaluation and/or health care. That may sound strange to those of us fortunate enough to have health insurance or rainy day funds. But the facts of life are that many people who share our professional license are not that fortunate.

An examination of the disciplinary opinions handed down by the Supreme Court makes it clear that the profession and the public would be better served by early intervention in many cases in which a lawyer suffers from depression and/or substance abuse problems. Although lawyers who report to KALAP are protected by confidentiality rules, it can be generally stated that many of the problems which are presented could be either eliminated or detoured by early evaluation and treatment — if only the lawyer could afford that approach. Unfortunately, most individuals caught in the trap of those illnesses can afford neither the evaluation nor the treatment that would reduce the problems brought about by those maladies. Can you imagine the frustration of the KALAP staff when they recognize that a lawyer could be helped if there was just an angel willing to step forward and loan some funds to help address the problem I have described?

KALAP has decided to answer yes! We are our brothers’ and sisters’ keepers. We do want to help them when we can and we think there are many of those in our profession who will step up, including me. I want to help. KALAP has formed a 501(c)(3) foundation to raise money that will assist lawyers caught in the trap of despair caused by mental illness and/or substance abuse. We envision the creation of a loan fund to which a lawyer could apply for an advance that would allow evaluation and/or treatment.

My wife (Gloria Farha Flentje) and I have agreed to serve as the fundraising chairs for this endeavor. My wife is married to a “recovering alcoholic” (me) who has been fortunate enough to have achieved contented sobriety more than 35 years ago. But, as with all families, we have had people close to us fail because they did not have the resources to address their personal problems. We know that there are many of you who have suffered similar tragedies involving families and friends.

We ask your help in raising the money to assist our brothers and sisters at law who are less fortunate. Remember the popular ballad that became a worldwide hit for The Hollies in 1969 and again for Neil Diamond in 1970? — “He Ain’t Heavy; He’s My Brother.”

That expression is so true today as we say — Yes, we are the keepers of our brothers and sisters; and Yes, we can do this if we all work together, giving of our resources to help them. If we share the load, it will not be heavy. Won’t you help?

Please step up to the plate when you are asked to donate to the KALAP Foundation. Better yet, donate and volunteer to help the Foundation raise the money. You will never regret it.

About the Author

Jack Focht, Wichita, currently practices as special counsel to Foulston Siefkin’s health care and litigation practice groups in the areas of health care law, fraud and abuse, white collar crime, civil rights, employment law, professional responsibility, government investigations, and business litigation; he has more than 50 years of experience as an attorney. His practice has ranged from high-profile criminal cases to complex civil litigation. He served as president of both the Wichita and Kansas bar associations and his peer memberships include the National Association of Criminal Defense Attorneys, the Association of Professional Responsibility Lawyers; and he is a Fellow of the American College of Trial Lawyers. Focht is a longtime member of the KALAP board.

He Ain’t Heavy, Mister — He’s My Brother!

By Jack Focht, Foulston Siefkin LLP, Wichita, jfocht@foulston.com
Making ksbar.org Interactive and Working for You

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

In March’s KBA Journal, we shared with you an overview of our brand new website. In this article, I would like to show you how to get the most out of your KBA membership through our interactive website.

Member Portal: As a member you can now access all kinds of information through your member portal. Here are the steps you can take to get important KBA information.

1. Go to www.ksbar.org
2. On the right side of the home page there are two ways you can log in to your portal. The first is by clicking on the member’s login in the upper right corner of the home page. The second way (and most prominent on the page) is the blue box in the middle of the right side of the home page. Both logins will take you to your portal.
3. Once in your portal, you have control of your profile. There is a filler photo area on the right side of the portal page, by selecting “change image” you can upload a photo of yourself. By clicking on view/edit profile, you will be able to update important contact information.
4. Above the “Background Information” are two important check boxes. The first is “I consent to receive KBA information.” This box, by default, is checked so you are able to receive the KBA eJournal plus other valuable information. One of the important portions of the profile page is a brand new benefit to members who belong to sections. The second check box is “Check to participate in public listing, displaying your primary contact information.” We offer a public listing searchable from our home page of attorneys with their preferred contact information listed.

What will I see on my member portal page?

In addition to your preferred contact information and photo, your portal will have important information for you. You will see if you have any open invoices, be able to print receipts, see calendar information for a KBA CLE in which you are enrolled, and all your financial interactions with the KBA. Did you forget if you ordered the new KBA Family Law Handbook? Go to your portal and you will not only see if you ordered the book, but you will be able to print out a receipt.

Important news items will also appear on your portal page. General KBA news and member-specific news will appear on your portal. If you belong to a section, section-specific news will show up in your portal. That information will include upcoming CLEs, bookstore releases, meetings and other section-specific information.

The Group Participation portion of the portal will list what you are involved in with the KBA. Under group participation you will see the committees, sections, or boards of which you are a member.

There is also a Custom Search module on your portal where you will be able to look up other KBA members by several means. You can search to see if someone new to your firm is already a KBA member and if not, encourage them to join. You can search by sections and committees as well.

“Check to participate in public listing, displaying your primary contact information”

I mentioned this above in the editing of your portal page, but this is a great benefit not offered before. When you belong to any one of our 25 sections, you have the opportunity to be listed in a public listing with only your preferred contact information displayed. This will give the public a way to search for an attorney in the area of practice they need in the area of the state they need. This is not only a benefit to our section members, but it also offers a public service. In order to participate in the public listing, you MUST check the box in your edit profile page that says “check to participate in public listing, displaying your primary contact information.”

Questions

Please contact Meg Wickham, KBA member services director, at mwickham@ksbar.org or at (785) 234-5696.

www.ksbar.org
Changing Positions

Stacey L.K. Blakeman has joined Trevisio & Rockwell LLC, Lawrence.
Robin K. Carlson and Angela Nichols have been promoted as partner at Stinson Morrison Hecker LLP, Kansas City, Mo.
Kelly M. Cochran and Caleb M. Kirwan have joined Waldeck, Goldstein & Patterson P.A., Prairie Village.
Martha J. Coffman has joined the Office of Judicial Administration, Topeka, as general counsel.
Patricia N. Colloton has been appointed by Gov. Sam Brownback to serve on the Kansas Advisory Group on Juvenile Justice Delinquency Prevention, Leawood.
Jessica B. Daniel has joined St. Francis Community Services, Wellington, as staff attorney.
Paul E. Davis has been appointed by Gov. Sam Brownback to serve on the Kansas Dealer Review Board, Lawrence.
Michael D. Fielding and Angela G. Harse have been promoted as partners at Husch Blackwell LLP, Kansas City, Mo.
Jennifer D. Hall has joined Clinkscales Elder Law Practice P.A., Hays.

Ronald C. Mason has been hired as the vice president and trust officer for the Personal Trust Services, First Wealth Management Department at First National Bank, Hutchinson.
Joshua A. Ney has joined the Kansas Security Commissioner's Office, Topeka, as staff attorney.
Michelle A. Russell has been promoted to top legal officer at YRC Worldwide Inc., Overland Park.
Teresa L. Shulda has become a partner at Foulston Siefkin LLP, Wichita. Lindsey A. Smith and Amelia G. Yowell have become associates at the firm’s Wichita office.
John F. Wilcox Jr. has been promoted to managing director at Dysart Taylor Cotter McMonigle & Montemore P.C., Kansas City, Mo.

Changing Locations

Harry C. Cundiff III and Christopher M. Gaughan have started a firm, Gaughan & Cundiff LLC, 4400 College Blvd., Ste. 190, Overland Park, KS 66211.
Brian T. Goldstein, Meagan L. Patterson, and John M. Waldeck have started a new firm, Waldeck, Goldstein & Patterson P.A., 5000 W. 95th St., Ste. 350, Prairie Village, KS 66207.
Michael J. Kuckelman, Kathryn A. Lewis, and Stephen J. Torline have started a firm, Kuckelman, Torline, Kirkland & Lewis, 10740 Nall Ave., Ste. 250, Overland Park, KS 66211.
Alexander B. Mitchell has started his own practice, Alex Mitchell Law Office, 5838 W. 21st St. N., Ste. 100, Wichita, KS 67205.
Timothy W. Ryan has started a practice, Jacobson & Ryan L.C., 555 Poyntz Ave., Ste. 290, Manhattan, KS 66502.

Miscellaneous

David W. Frantze, Kansas City, Mo., has been named as council president for 2012 by the Heart of America Council, Boy Scouts of America.
The Hon. Robert E. Nugent, Wichita, was inducted as a Fellow of the American College of Bankruptcy.

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.
2012 Outstanding Speakers Recognition

The Kansas Bar Association would like to extend a special thank you to and recognition of the following individuals who gave so generously of their time and expertise in speaking at our Continuing Legal Education seminars for January through March 2012. Your commitment and invaluable contribution is truly appreciated.

Stephan T. Ariagno, Ariagno Kerns Mank & White LLC, Wichita
Kate Baird, Office of the Disciplinary Administrator, Topeka
Grant D. Bannister, Knopp & Bannister P.A., Manhattan
Diane Lynn Bellquist, Office of the State Bank Commissioner, Topeka
David E. Bengston, Stinson Morrison Hecker LLP, Wichita
Matthew J. Brooker, Law Offices of Matteuzzi & Brooker P.C., Overland Park
Amy Brozenic, Lathrop & Gage LLC, Overland Park
Anne E. Callenbach, Polsinelli Shughart P.C., Overland Park
Frank A. Caro Jr., Polsinelli Shughart P.C., Overland Park
Brenda J. Clary, Kansas Insurance Department, Topeka
Wes Crenshaw, Ph.D., ABPP Family Psychological Services LLC, Lawrence
Edward P. Cross, President, Kansas Independent Oil and Gas Association, Topeka
Katherine A. Crowley, Missouri Court of Appeals, Kansas City, Mo.
Tracy T. Diel, Office of Administrative Hearings, Topeka
Kristina Dietrick, Creative Business Solutions, Topeka
Brett A. Flachsbarth, Kansas Department of Labor, Topeka
Clint M. Goos, Morris Laing Evans Brock & Kennedy Chtd., Wichita
Danielle M. Hall, Kansas Bar Association, Topeka
David N. Harger, Wise & Reber L.C., McPherson
Kathleen A. Harvey, Kathleen A. Harvey P.A., Overland Park
Jerry Hawkins, Hite Fanning & Honeyman LLP, Wichita
Stephan T. Ariagno, Ariagno Kerns Mank & White LLC, Wichita
Stanton A. Hazlett, Disciplinary Administrator for the State of Kansas, Topeka
Scot A. Hill, Stinson Morrison Hecker LLP, Kansas City, Mo.
Marshall Honeyman, Lathrop & Gage LLC, Overland Park
Robert M. Hughes, Bever Dye L.C., Wichita
Prof. Janet Thompson Jackson, Washburn University School of Law, Topeka
Cindy L. Kelly, School District Attorney - USD 501, Topeka
Jeff Kennedy, Martin Pringle Oliver Wallace & Bauer LLP, Wichita
Randall M. “Randy” Kessler, Kessler & Solomiany LLC, Atlanta
Mark Knackendoffel, The Trust Company of Manhattan, Manhattan
Eric G. Kraft, Duggan Shadwick Doerr & Kurlbaum P.C., Overland Park
L.J. Leatherman, Palmer Leatherman White & Dalton LLP, Topeka
David Margulies, Margulies Communication Group, Dallas
Michael D. Matteuzzi, Law Offices of Matteuzzi & Brooker P.C., Overland Park
William P. "Bill" Matthews, Foulston Siefkin LLP, Wichita
Anne McDonald, Kansas Lawyers Assistance Program, Topeka
Timothy E. McKee, Triplett Woolf & Garretson LLC, Wichita
Mira Mdivani, The Mdivani Law Firm, Overland Park
Lisa A. Mendoza, Office of Kansas Attorney General Derek Schmidt, Topeka
Brent A. Mitchell, Martin Pringle Oliver Wallace & Bauer LLP, Wichita
Valerie L. Moore, The Law Offices of Valerie L. Moore LLC, Lenexa
Ronald W. Nelson, Ronald W. Nelson P.A., Lenexa
Keven M.P. O’Grady, Ferree Bunn O’Grady & Rundberg Chtd., Overland Park
C. William Ossmann, Kansas Department of Social and Rehabilitation Services, Topeka
Prof. John C. Peck, University of Kansas School of Law, Lawrence
Kathy M. Perkins, Kathy Perkins LLC, Lawrence
Prof. David E. Pierce, Washburn University School of Law, Topeka
John Rasmussen, Kansas Association of School Boards, Topeka
Larry R. Rute, Association in Dispute Resolution LLC, Topeka
Hon. T. Kelly Ryan, Johnson District Court, Division 17, Olathe
Rekha Sharma-Crawford, Sharma-Crawford Attorneys at Law LLC, Kansas City, Mo.
W. Michael Sharma-Crawford, Sharma-Crawford Attorneys at Law LLC, Kansas City, Mo.
Linda J. Sheppard, Kansas Insurance Department, Topeka
Mary M. Snyder, Office of Kansas Attorney General Derek Schmidt, Topeka
Gordon B. Stull, Stull Law Office P.A., Pratt
Karl R. Swartz, Morris Laing Evans Brock & Kennedy Chtd., Wichita
Arthur J. Thompson, Office of Judicial Administration, Topeka
Molly M. Wood, Stevens & Brand LLP, Lawrence
Angel R. Zimmerman, Valentine Zimmerman & Zimmerman P.A., Topeka
Real Property Interests Subject to Oil and Gas Interests:
Practical Suggestions for Resolving Potential Legal Conflicts Between Purchasers or Developers of Real Property and the Owners of Oil and Gas Interests to Which the Property is Subject
By Teresa James
I. Introduction

Modern development in traditionally agricultural or rural areas has brought with it a variety of interesting legal issues and challenges. Oftentimes, plans to construct new homes, businesses, and commercial developments come into conflict with traditional oil and gas interests that were granted decades ago. When those early oil and gas interests were conveyed, the drafters of the conveyance documents obviously could not have conceived the full nature and extent of development that might occur decades later on that very property and adjacent properties. The competing interests of oil and gas developers and producers versus the interests of modern-day residential and commercial developers are significant and warrant serious consideration.

Issues may arise in many and varied circumstances:

• a prospective purchaser desiring to purchase the fee interest in property discovers from a title commitment that the property is subject to a mineral deed;

• a prospective purchaser anxious to close on the purchase of what appears to be barren ground discovers that the property is encumbered by an oil and gas lease;

• a builder in the course of excavating the basement of a new home discovers an abandoned well beneath the surface;

• property owners plan to construct a detached garage near their existing home, but when they place a One Call prior to commencing construction, learn that the proposed construction would overlap an existing pipeline easement;

• a municipal government plans to construct a major thoroughfare in a newly developed area, but discovers it would be on top of an existing pipeline easement.

This article focuses on the legal and practical implications of pre-existing oil and gas interests upon real estate purchasers and developers of properties encumbered by such interests. It is intended to assist lawyers who represent real estate purchasers and developers to identify, avoid, and resolve legal problems that may arise during the course of negotiation, acquisition, or development of real property subject to such oil and gas interests. It is not intended as a treatise on the intricacies of traditional oil and gas law in Kansas, nor does it address the negotiation for and/or leasing of properties for oil and gas exploration and production. Rather, as the title suggests, this article is intended to provide a basic understanding of what lawyers should know and what questions they should ask when their clients contemplate the purchase or development of Kansas real property subject to pre-existing oil and gas interests.

It is always better practice to identify specifically any such potential conflicts and to resolve them before the real estate is purchased or the development commenced. While this may seem obvious, in the case of property, for example, encumbered by a pipeline easement, prospective purchasers may be anxious to proceed with closing the real estate purchase on the assumption that any potential issues can be resolved later. A decision to close the deal under those circumstances could prove devastating and costly, if the easement prohibits buildings or structures on the very portion of the property where the prospective purchasers intend to build their dream home or a major retail outlet.

II. The Property Interest at Stake must be Properly Identified

“A mineral interest is an interest in the ‘minerals, including oil and gas, in place or in and under the land.’” In Kansas, the mineral interest is considered real property, and when it is transferred there is a severance of the fee. The right to sever title of a mineral estate from real estate has been recognized by Kansas courts for a hundred years. Severance is the act of separating mineral or royalty interests from other interests in the land, either by grant or reservation.

More precisely, a landowner may sever the mineral interest in real property: (1) by executing a mineral deed conveying only the mineral estate to a third party; or (2) by executing
a deed or other conveyance of the land, and reserving the mineral estate from the conveyance, thus retaining the mineral interest. As to the latter method, however, special care should be taken to ensure that any such reservation is clearly and precisely described in the conveyance document.9

Two separate estates exist after severance, each held by a separate and distinct title in severalty, which is then a freehold estate that can be inherited independent of the other.10 Separate and apart from the surface ownership, the owner of a severed mineral interest owns the rights to explore, develop and produce the minerals underneath the property,11 and the implied right to enter onto the overlying surface of the land to make reasonable use of the land to do so.12

As a preliminary matter, it is absolutely essential that the purchaser and seller have a clear understanding and agreement concerning whether the real estate conveyance will include the mineral interest and, if so, to what extent. Although this is a fundamental point, the issue can be complex if the minerals have been severed. A grantee under a deed can acquire no greater title than his or her grantor had,13 nor may a grantor except or reserve in a deed an interest that he or she does not own at the time of the deed.14

Title work should reflect any mineral deed or conveyance in the chain of title that accomplished a severance of the mineral interest, as well as any deed that reserved the mineral interest from an earlier conveyance of the property. But, the inquiry does not end there. A landowner may convey all or part of the land. It may be divided vertically or horizontally, and full title may be conveyed, or a fractional interest in the whole or in any part of the land may be conveyed.15 Thus, for example, the fee owner may convey or reserve only the minerals to a certain depth underneath the property;16 only the minerals above or below certain geological formations;17 only the minerals within certain geological sands or formations;18 only a fractional share of the minerals;19 or only certain specified minerals but not others.20

A conveyance limited to specific depths or formations underground may be for purposes of underground gas storage. The gas storage operator may acquire by mineral deed or conveyance all of the minerals (or only the gas, leaving rights to the oil and other minerals in the owner-lessor) in the desired depths or specified geological formation(s), as well as a gas storage lease or easement in those same depths or formations. Typically, such gas storage leases or easements will grant the gas storage operator exclusive rights to inject, store, and withdraw gas within the described depths or formations. Such leases or easements may allow the owner-lessor of the property to drill through the gas storage formation(s) to produce minerals from deeper formations, subject to specified conditions and precautions. They may also give the owner-lessor rights to receive free or reduced-cost gas from the gas storage operator to the principal dwelling or to buildings on the property, if the owner-lessor lays a line and connects to the storage operator’s pipeline. Because underground gas storage fields often times encompass thousands of acres, the gas storage operator may or may not require surface rights on any given tract within the gas storage boundaries. Obviously, a prospective purchaser should review the terms of the gas storage lease or easement carefully to determine the extent, if any, of surface rights granted to the gas storage operator, as well as any rights to free or reduced cost gas, or any other rights, granted or reserved to the owner-lessor.

The very nature of the oil and gas interest being conveyed may not be clear from an initial reading of the conveyance document. Even the title of the document may not accurately describe the interest being conveyed.21 A classic example of the difficulty in distinguishing certain types of oil and gas interests is illustrated by those cases that address the issue of whether a mineral interest or merely a royalty interest has been

10. See K.S.A. 58-2202, which states in part: “[E]very conveyance of real estate shall pass all the estate of the grantor therein, unless the intent to pass a less estate shall expressly appear or be necessarily implied in the terms of the grant.”
18. See Reese, 983 F.2d at 1519 (court rejected argument that lessee’s gas storage rights were limited to the Bartlesville Sand).
19. For example, an undivided one-half interest.
20. For example, all the oil but not the gas, or vice versa.
conveyed. Making the proper distinction is very important. Royalty is the right to share in oil and gas when it is produced, whereas a mineral interest includes the right to oil and gas in place along with the right to develop the resources, or to lease them for development.

It is, therefore, important for a number of reasons that a prospective purchaser or developer of real property understand the current mineral ownership of the property. From a sheer valuation standpoint (that is, placing a value on the interest being acquired) it is important for the prospective purchaser or developer to understand the nature and extent of the interest being acquired. For example, if the property being purchased is subject to a prior conveyance titled a royalty deed, it will be important to determine whether the reserved interest in the property is really a royalty interest, or instead a mineral interest. If there are proven mineral reserves underneath the property or contiguous acreage, then obviously the value of the property could be significantly greater when purchased with the minerals than without.

Additionally, if a prospective purchaser or developer desires to lease the property for future oil and gas exploration and development, then he or she will want to ensure that all of the minerals are being acquired. On the other hand, and perhaps even more importantly, he or she may want to ensure that all of the minerals are being acquired, so as to prevent anyone else from leasing the property for future oil and gas exploration and development. This is of major importance because, as discussed infra, a separate mineral owner could grant an oil and gas lease resulting in drilling or other activities that negatively impact the prospective purchaser’s use and development of the property.

In most instances the mineral interest owner does not have the expertise or the necessary equipment and resources to undertake exploration and drilling operations, so the owner will transfer the rights to explore, develop, and produce the minerals to another party that specializes in such activities. The instrument typically used to accomplish those purposes is an oil and gas lease.

An oil and gas lease usually entitles the lessee (that is, the party leasing from the mineral interest owner) to retain a share of the produced minerals. Although the percentages may vary, the lessee has traditionally retained a 7/8th share of the production, with the lessor (that is, the mineral interest owner) receiving a 1/8th share of the production referred to as a royalty interest. Royalty interests of 3/16th and 1/4th have become increasingly common. The lessee’s share of the oil and gas lease is known as the “working interest,” and is the lessee’s interest in oil and gas produced after deduction of the royalty paid to the landowner. It is important to note that the working interest owner bears the expenses of exploration, drilling, and producing oil or gas. An “overriding royalty” interest may be carved out of the working interest in the oil and gas lease. That is an interest in oil and gas produced at the surface, free of the expenses of production, and unique in that its duration is limited by the duration of the lease from which it is created.

An easement is defined simply as an interest in the land of another. Regardless of whether a mineral interest is created by deed or by reservation, an easement is implied to use the surface in such ways and to such an extent as is reasonably necessary to produce and recover the oil and gas underneath the property. Out of necessity, mineral ownership implies a right to use the land surface over the minerals because without rights of ingress, egress, and access generally, mineral ownership would be of no economic value. Additionally, the oil and gas lease may contain a pipeline easement or right of way provision. Or, a separate pipeline easement agreement or right of way agreement may be granted to the mineral lessee.

A title commitment should identify any oil and gas lease(s) on the property by book and page reference to such documents in the register of deeds office. Copies of such leases should be obtained and reviewed carefully. That will be important because oil and gas leases have traditionally granted the lessee broad rights. For example, an oil and gas lease form used historically by lessees grants the following (or similar) rights:

[Lessee] hereby grants, leases and lets exclusively unto lessee for the

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22. Compare Drach v. Ely, 237 Kan. 654, 703 P.2d 746 (1985) (court held that a mineral interest rather than a royalty interest was conveyed); and Rucker v. De Lay, supra note 3 (court held that a royalty interest rather than a mineral interest had been conveyed).
24. See discussion supra at notes 22 and 23.
purpose of investigating, exploring, prospecting, drilling, mining and operating for and producing oil, liquid hydrocarbons, all gases, and their respective constituent products, injecting gas, water, other fluids, and air into subsurface strata, laying pipe lines, storing oil, building tanks, power stations, telephone lines, and other structures and things thereon to produce, save, take care of treat, manufacture, process, store and transport said oil, liquid hydrocarbons, gases and their respective constituent products and other products manufactured therefrom, and housing and otherwise caring for its employees. 29

That form was obviously drafted generations ago, and some of the provisions presumably would not be necessary or pertinent today (i.e. the right to house the lessee’s employees on the leased property or to build power stations anywhere on the property). An alert lessor’s attorney negotiating a new oil and gas lease today would undoubtedly strike such unduly burdensome provisions from the lease form. However, innumerable so-called Producer’s 88 oil and gas leases with varying terms have been entered into over the years and continue to encumber Kansas properties today.

Because of the potentially broad rights that may be granted under an oil and gas lease and any associated easement agreements, a prospective purchaser or developer of property in which another party owns the mineral interest or which is subject to a pre-existing oil and gas lease must proceed with caution. This article presumes that the real estate purchaser or developer is not interested in developing the property for oil, gas or other minerals. Instead, the purchaser or developer is focused on residential or commercial development of the property. Thus, when title work reveals an oil and gas lease of record, the goals of the attorney for the purchaser or developer are to (a) verify that the lease is no longer a valid encumbrance against the property, or obtain a release, 30 and (b) verify that any past oil and gas related activities have not negatively impacted the real estate.

This article will not address the nuances of evaluating an oil and gas lease to determine whether it is valid and subsisting. Because of the unique nature of oil and gas leases, the unusual terms of art contained in such leases, and the implied covenants that are read into every oil and gas lease, an attorney with oil and gas expertise should be engaged to review any oil and gas lease that appears in the chain of title. The following paragraphs identify key factors to be considered and the key questions to be asked by a prospective purchaser or developer in such circumstances.

The habendum, or term clause of the lease, establishes the duration of the leasehold interest, and other clauses in the lease may limit or extend the term stated in the habendum clause. 31 A typical habendum clause provides for a definite term – for example, three, five, or 10 years – which may be extended for “so long as oil or gas is produced from the leased land.”

The definite term is called the “primary term” and the indefinite period, during which the lease may be kept alive by actual production or contractual substitutes for production, is called the “secondary term.” 32 By statute, a recorded lease is ineffective as constructive notice of the lessor’s interest beyond the definite primary term stated in the lease. 33 The statutory provision is intended to prevent expired but unreleased oil and gas leases from clouding the landowner’s title.

Absent a contractual provision in the oil and gas lease to the contrary, production anywhere on the leased acreage will extend the lease as to all of the leased acreage. 34 Additionally, if the lease contains provisions for the “pooling” or “unitization” of the leased acreage with other acreage, then production on that other acreage could extend the lease, even without production from the leased acreage itself. 35 If the lease is extended by production or the occurrence of another contingency stated in the lease, the lessee can extend the constructive notice effect of the recorded lease by filing an affidavit in accordance with statutory requirements, before the expiration of the primary lease term. 36 Because production in paying quantities is the usual contingency that will extend the lease beyond the primary term, the affidavit is commonly referred to as an “Affidavit of Production.” 37 However, even without the filing of a timely affidavit, the lease may be continued by the lessee’s actual physical occupancy of the lease that arguably provides notice, or by the filing of an affidavit after the end of the primary term stating under oath that the contingency required in the lease was achieved during the primary term. 38

The oil and gas lease usually will contain a drilling/delay rental clause, which makes the validity of the lease during the primary term conditional on the lessee either commencing drilling operations on the leased acreage or making a “delay rental” payment to the lessor. 39 However, the drilling of a well
without actual production, or the payment of delay rental in and of itself, will not extend the lease beyond the specified primary term. 40

Production “in paying quantities” must be achieved by the end of the primary term in order to perpetuate the lease beyond the primary term. 41 When used in the habendum clause of an oil and gas lease or a defeasible term mineral interest, the term “paying quantities” requires production of quantities sufficient to yield a profit to the lessee over operating expenses, regardless of whether drilling or equipping costs are ever recovered, and even though the operation as a whole may result in a loss to the lessee. 42 An objective mathematical test is applied; the lessee’s good faith judgment regarding the profitability of the lease is immaterial. 43 If production in paying quantities is not being obtained when the primary term ends and the secondary term begins, then the lease terminates automatically (an argument might be made that there is an exception to this rule when a well “capable” of producing in paying quantities is completed, but not producing, at the end of the primary term).

If production ceases during the secondary term, the issue shifts from paying quantities to whether the cessation of production is temporary or permanent. 44 The doctrine of temporary cessation has been recognized in Kansas as dictating that a mere temporary cessation of production because of necessary developments or operations does not result in the termination of the oil and gas lease, despite the requirement of production to satisfy the habendum clause. 45 So long as the cessation is of the oil and gas lease, despite the requirement of production developments or operations does not result in the termination primarily upon the duration of the cessation in production, combined with the cause or reason for the cessation. 50

If a prospective purchaser is considering the purchase of property subject to an unreleased oil and gas lease, it will be important to determine whether the lease is still valid and ongoing. This is because the lease, if valid and ongoing, could negatively impact or prohibit the prospective purchaser from using or developing the property as intended. Even though there may be no visible signs of past or present production on the property, there are many questions to be answered. Has a well or wells been drilled on the property in the past? Has there been any historical production from the property? What surface rights were granted to the lessee? What rights were granted to explore, drill, and produce the property? Does the lease grant the right to build structures on the property? Does the lease grant the right to lay and maintain pipelines on the property? Does the lease include pooling or unitization provisions?

Of course, the first step is to carefully review the express terms of the oil and gas lease. In most instances, it would be wise to have an experienced oil and gas lawyer review the lease. They should also review the records for the legally described leased acreage in the register of deeds office for the county where the property is located. The documents reviewed should include, for example, any unit agreements or declarations to determine whether the leased acreage is included in a unit such that the lease may have been extended by production on acreage outside the lease but within the unit. Information should be obtained from the current owner and prior owners of the property, if possible, regarding any oil and gas lease(s) on the property, as well as any current or past operations or production. 51 The prospective purchaser or developer should also walk the property, looking for wells, old well sites, tanks, pipeline markers, or any other evidence of current or past production. Additionally, the resources and public records available through the Kansas Corporation Commission and the Kansas Geological Survey should be utilized, as discussed in Section V, below.

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43. Pierce, supra note 21, at 9-26, citing Reese Enterprises Inc. v. Lawson, 220 Kan. at 314. For a thorough discussion of the income and expenses to be considered in making the paying quantities determination see Pierce, supra note 21, 9-25 through 9-28.
51. Richard Hemmingway, Law of Oil and Gas, 3rd Ed., Appendix IV, pp. 978-79 provides a very practical and useful list of questions that should be asked and information that should be obtained regarding property that is or may have been leased for oil, gas, or other mineral exploration and development.
IV. Releases of Forfeited Oil and Gas Leases Should be Obtained

There are two alternative statutory procedures available to a landowner who desires to clear title to property of a forfeited oil and gas lease, when the lessee fails or refuses to record a release of the lease.52

First, K.S.A. 55-201 provides a “self-help” procedure by which the landowner may serve written notice upon the lessee in accordance with the statutory requirements. A form which satisfies the notice requirement of K.S.A. 55-201 is set out in the statute. Twenty days after serving notice, the landowner may file an affidavit with the register of deeds in the county where the real property is located setting out the basis for the forfeiture and stating that the lease has been forfeited and is void.53 If the lessee fails to give written notice to the register of deeds within 30 days after the filing of the affidavit that the lease is not forfeited and that the lessee still claims the lease is in force and effect, then the register of deeds will record the affidavit. The effect of the recorded affidavit is to essentially render the recorded lease of no further force and effect.54

By following the procedure, the landowner may successfully terminate the forfeited lease, without the necessity of a quiet title action, when the lessee fails to cancel the lease and fails to respond to the notice of forfeiture.55

However, in order for K.S.A. 55-201 to apply, it must appear that the lease has actually become forfeited.56 That can present problems when the basis for the alleged forfeiture is the violation of “implied” covenants of the lease.57 The holding in Christiansen v. Virginia Drilling Co.58 would seem to defeat the self-help purpose of K.S.A. 55-201 in such situations.

K.S.A. 55-201 permits notice by publication but the better practice, in order to ensure that due process requirements are met, is to have the lessee personally served with notice by registered mail, if the lessee's address is known or can reasonably be ascertained. If the lessee responds to the notice and the landowner is forced to file suit to obtain a release of the lease, then the landowner may recover in such lawsuit his or her costs, reasonable attorney's fees, and any additional damages proven.59 The benefits of providing notice could, therefore, be significant.60

Second, the landowner may simply file suit to obtain a release of the forfeited lease, without first going through the K.S.A. 55-201 procedure.61 However, before doing so, the landowner should always make written demand upon the lessee at least 20 days prior to filing suit.62 This is because the landowner will not be allowed to recover costs, attorney's fees, or other damages associated with obtaining the release of the lease, unless 20 days prior oral or written demand is made (written demand is strongly recommended for evidentiary reasons).63

V. Any Unplugged or Improperly Plugged Wells must be Located and Addressed

Even if the lease is no longer valid and in force and effect, it is important to determine whether a well or wells were ever drilled on the property and, if so, whether any such wells were properly plugged. A landowner is generally not a “legally responsible” person obligated to bear the cost of plugging unplugged or improperly plugged wells on his or her property.64 Nonetheless, he or she will want to identify and determine the locations of any such wells and adjust their development
plans, accordingly, if necessary. That is because unplugged or improperly plugged wells can cause contamination, sink holes, and other environmental problems. In addition, there are substantial risks and potential liabilities associated with constructing a building or other structure over an unplugged or improperly plugged well. For example, even though the landowner is generally not liable for plugging such wells, if one is discovered and identified as a source of pollution, then the landowner could be required to remove any structure constructed over the well so that it can be properly plugged and the source of the contamination eliminated.

Counsel for the prospective purchaser or developer can quickly determine whether or not any oil or gas has been produced and sold from the property at least as far back as the mid-1980s by going to the Kansas Geological Survey (KGS) website, www.kgs.ku.edu, clicking on the “Energy” or “Oil and Gas” links, and entering the legal description (section, township, range, and county) of the property at issue. The KGS website will show the lease(s) associated with the legally described acreage and a wealth of additional data and information regarding each lease, including: the operator, number of wells, historical monthly sales volumes, annual sales, cumulative sales over the life of the lease, the producing zone and whether the lease is producing gas and/or oil. Specific well information can also be found on the KGS website for individual wells, namely the API (American Petroleum Institute) well number, elevation, total depth, spud date, plugging date if applicable, and the current status of the well. The main KGS office is located on the University of Kansas campus in Lawrence. Additional well records, data, and information not available online may be available there or at the KGS office in Wichita.

Another valuable source of data and information is the Kansas Corporation Commission (KCC). An operator is required to file an Intent to Drill with the KCC prior to “spudding” each well, showing the location of the proposed well, the anticipated depth of the well, whether it is being drilled for gas or oil, and other pertinent information. After the well is drilled and completed the operator is required to file an ACO-1 form (completion report) with the KCC, showing the date, depth and completion method. Although older records may not be entirely accurate or sufficiently detailed, the Intent to Drill and ACO-1 forms are likely to provide the most precise well location information, often stated in terms of how many feet from the lease lines the well is located. Finally, if the well is ultimately plugged, the operator is required to file a Plugging Report with the KCC, showing the plugging date and details. The KCC Conservation Division, located in Wichita, maintains an extensive library of these well drilling and completion records and related documentation, which are available to the public in paper files (with the exception of some completion information or related data that may have been designated as confidential). Some more recent records are also available online at the KCC website, www.kcc.state.ks.us.

Counsel for a prospective purchaser or developer of property, with known or suspected past drilling and/or production activities, should utilize these KGS and KCC resources. In theory, the KGS and KCC databases should allow counsel (or a geologist or petroleum engineer retained by counsel) to identify all wells drilled on the property at issue, how and when the wells were drilled on the property, their approximate locations, depths, and whether they were properly plugged. In reality, recordkeeping was very poor until more recent years and there are oftentimes maps or other information identifying the existence of wells for which there is no Intent To Drill, ACO-1, Plugging Report, or other useful documentation.

If through records review or by physical inspection of the property, evidence of any unplugged or improperly plugged wells is discovered, the appropriate district office of the KCC (based upon geographic location) should be contacted. District offices are located in Chanute, Dodge City, Hays, and Wichita, and a map showing the area within each district is available at http://www.kcc.ks.gov/conservation/district_map.htm. Contact information for each district office is also available online at http://www.kcc.ks.gov/conservation/district_map.htm.

65. “Spudding” in has been defined as “the first boring of the hole in the drilling of an oil well.” Howard Williams & Charles Meyer, Manual of Oil and Gas Terms, 7th Ed. The term is applied generally, however, to gas and oil well drilling. The term presumably comes from the fact that a special “spudding bit” is oftentimes utilized initially and then regular drilling tools are substituted as the well goes down deeper to rock formations. Id.

66. The author would like to thank John McCannon and Lane Palmeate (KCC litigation counsel) for sharing their invaluable expertise concerning KCC resources and practices, as described in this section of the article, and Jeff Kennedy (managing partner of Martin, Pringle, Oliver, Wallace & Bauer LLP) for his invaluable expertise and input regarding the oil and gas leasing issues discussed in this section and in section III of the article, supra.
prospective purchaser or developer should report any abandoned wells on the KCC website, http://www.kcc.ks.gov/conservation/reported_abandoned.cgi. A formal complaint could also be filed with the KCC, however that will probably not be necessary, as the KCC can investigate abandoned wells on its own motion.\(^{57}\)

After a report is filed, the KCC will investigate to determine whether the well is polluting or likely to pollute any usable water strata or supply or cause loss of usable water, and whether a person legally responsible for the abandoned well exists.\(^{68}\) For purposes of the statute, any well that has been abandoned in fact and has not been plugged in accordance with the rules and regulations in effect at the time of plugging is deemed to be likely to cause pollution of any usable water strata or supply.\(^{69}\) The persons “legally responsible” for the proper care and control of an abandoned well include but are not limited to: (1) any operator of a waterflood or other pressure maintenance program deemed to be causing pollution or loss of usable water; (2) the current or last operator of the lease upon which such well is located, irrespective of whether such operator plugged or abandoned the well; (3) the original operator who plugged or abandoned the well; and (4) any person who without authorization tampers with or removes surface equipment or downhole equipment from an abandoned well.\(^{70}\)

A word of caution is in order here. As noted previously, the landowner or surface owner will generally not be legally responsible for abandoned wells on the property. However, there are notable exceptions to this general rule, namely when such person without authorization has tampered with the abandoned well, removed surface equipment or downhole equipment from the well, deliberately altered or tampered with the well thereby causing the pollution, or has assumed written contractual responsibility for the well.\(^{71}\) It is, therefore, imperative that when an abandoned well is located on the property at issue, that the prospective purchaser or developer do nothing to or with the abandoned well – no digging, removing of equipment, covering up, or any other activity that might affect the well. Instead, the prospective purchaser or developer should simply contact the KCC and allow KCC staff to investigate.

The KCC has issued orders in two separate dockets addressing questions of whether parties were “legally responsible” for abandoned wells.\(^{72}\) These orders should be read in conjunction with K.S.A. 55-179(b). If the KCC determines that the abandoned well is causing or is likely to cause pollution or loss and identifies a person believed to be “legally responsible,” then it will issue a show cause order requiring such person to show why the proper care and control over the well was not exercised, and ultimately may issue orders or penalties as provided by statute.\(^{73}\)

If the KCC determines that the abandoned well is causing or likely to cause pollution or loss and that there is no person still in existence who is “legally responsible” for the care of the well (i.e., because such person is insolvent or cannot be found), then the KCC is required by statute, as funds are available, to plug, replug or repair the well, and to remediate pollution from the well, whenever practicable and reasonable.\(^{74}\) In practical terms, this means the abandoned well will be added to the list of wells to be plugged with state funds, with well-plugging priority determined based upon location and risk of harm. The well-plugging assurance fund and the abandoned oil and gas well fund have been established to provide funds for the KCC to pay for such activities.\(^{75}\)

Finally, even if the KCC investigates and properly plugs abandoned wells on the property or determines that they were already properly plugged, the KCC will not warrant or guarantee the well or plug against failure at some time in the future. In such situations, the KCC is likely to issue a letter to the prospective purchaser or developer advising that, if a failure occurs in the future, the KCC will require access to the well for replugging or repairing it, in order to prevent pollution. Moreover, the KCC is likely to include a warning that it will expect the owner of the property or structure that limits access to the well to bear any extraordinary expense associated with gaining access to the well for repairs, replugging, or remediation. In other words, the owner could be required to tear down part or all of a structure built over an abandoned well, if at some point in the future it becomes necessary to access the well for replugging or remediation purposes. Thus, it will behoove a prospective purchaser or developer not to construct anything on top of an abandoned well, even after it has been properly plugged.

VI. The Nature and Extent of Any Easements must be Determined

By definition, an easement is a right, distinct from ownership, to use the land of another.\(^{76}\) A primary characteristic of an easement is that it burdens fall upon the person in possession of the land subject to the easement.\(^{77}\) Conceptually, the party acquiring an easement will ordinarily give consideration to the property owner in order to acquire legal rights to use the property for specific purposes set out in the easement agreement.

Under Kansas law, the tract of land burdened with an easement is known as the “servient” estate and the tract of land benefitted by the easement is known as the “dominant” estate.\(^{78}\) Generally, the easement will extend to “all uses directly

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68. K.S.A. 55-179.
69. K.S.A. 55-179(d).
70. K.S.A. 55-179(b).
71. K.S.A. 55-179(b) and (e).
72. Docket No. 07-CONS-155-CSHO (the “Quest Order”) and Docket No. 04-CONS-074-CSHO (the “Donna Lee Order”).
73. K.S.A. 55-179(c) and 55-162.
75. K.S.A. 55-166 and 55-192.
77. 201 Kan. at 530.
or indirectly conducive to advance the purposes for which it was obtained. 79

Because the easement is the dominant tenement, it is not subject to the will of the possessor of the land. 80 Thus, the owner of the servient estate is entitled to make whatever use of its property it would like, so long as that use does not interfere with the easement owner’s reasonable use of the dominant estate. 81 Stated another way, the owner of the servient estate may make any use of the property that is consistent with or not calculated to interfere with the exercise of the easement granted. 82 The character and extent of easement rights granted is determined by examining the language of the grant and the extent of the property subject to the easement. The agreement will almost always contain language consistent with the common law rule noted above, to the effect that the grantor-landowner has the right to continue to use the property in any way that does not materially interfere with the easement owner’s use of the property. The agreement may expressly prohibit the grantor-landowner from certain uses of the property subject to the easement. The agreement will usually allow the easement owner rights of ingress and egress, and sometimes will allow the use of existing roads. Sometimes the agreement will require the easement owner to pay the grantor-landowner for damages caused by the easement owner to fences, roads or other improvements on the property.

Even if there is no pipeline easement agreement of record, it is possible that the property might be burdened with a “prescriptive easement.” A prescriptive easement is essentially an easement acquired by adverse possession. 84 The party asserting a prescriptive easement right must prove he or she has been in possession of the property for at least 15 years and that the possession has been (1) open, (2) exclusive, (3) continuous, and (4) either hostile or under a belief of ownership. 85 The use cannot be pursuant to a license or any other “permissive” use of the property. 86

In Southern Star Central Gas Pipeline Inc. v. Greuel, 87 the court found that the underground utility (which had failed to record an executed 1917 easement agreement) satisfied the essential elements for a prescriptive easement, even though there were no pipeline markers or other visible signs of the pipeline on the surface of the land. The court found that the four essential elements had been met and noted the following compelling facts: (a) the pipeline company provided evidence that prior owners had on a number of occasions accepted payment for damages to the land incurred while work was performed on the pipeline, (b) the pipeline company had continuously operated the pipeline for more than 15 years, and (c) a map maintained in the country public records showed the pipeline on the Greuel property.

Numerous factors must be considered by the prospective purchaser of property that is subject to a pipeline easement. Does the easement agreement define and limit the easement to a specific width and location on the property? Does it place restrictions on the grantor-landowner’s rights to construct buildings, structures, or other obstructions on the easement? Does it impose building setback restrictions? Does it grant the easement owner the right to clear the easement of trees and other obstructions? Does it grant the right to lay multiple pipelines or to lay additional pipelines in the future? Is the easement owner required to bury the pipeline to a certain minimum depth? Is the easement owner required to pay for trees removed or for damages to crops, fences, and/or roads? If there is no easement filed of record but there are pipeline markers on the property or other evidence of a pipeline underlying the property, is there a possibility the property is burdened with a prescriptive pipeline easement?

The easement may be either what has been termed a “specific easement” or a “blanket easement.” A specific easement is limited to a specific width, length, and location that is expressly described in the instrument creating the easement, whereas the instrument creating a blanket easement does not specify the width or dimensions of the easement as it traverses the servient property. 88

Traditionally, blanket easements (meaning that the easement owner could lay its pipeline anywhere on the property subject to the easement grant) were common. If, for example, the tract subject to the easement agreement was a 40-acre tract, the pipeline could be constructed anywhere on that 40-acre tract. That made sense during the early years of pipeline construction, as pipelines were typically being laid in agricultural or rural areas. The owners of cultivated ground were probably more concerned that pipelines underneath their property be buried below plow depth than with the exact location on the property where the pipeline would be buried. Early easement agreements, therefore, were much more likely to include provisions expressly requiring pipelines to be buried below plow depth or so as not to interfere with cultivation of the property, than they were to specifically define the width and location of the pipeline. 89

83. Potter, 201 Kan. at 528, 531; Cunnings, 37 Kan. App. 2d 807 at Syl. ¶ 2.
84. Greuel, 2009 WL 1208065 at 4 (Kansas applies the adverse possession statute, K.S.A. 60-503, to determine the existence of a prescriptive easement).
87. Id.
89. The 1950 easement agreement at issue in Potter, 201 Kan. 528, supra, is illustrative of this point. The easement agreement in Potter did not restrict the pipeline to a specific location on the property, but it did expressly require the pipeline company-easement owner to “bury all pipe laid upon said land to a sufficient depth so as not to interfere with the cultivation of the soil.” For an excellent illustration of many of the types of traditional easement provisions discussed, supra, see the Potter opinion, which quotes the entire blanket easement agreement at issue in that case, verbatim.
One of the natural consequences of modern development is that it has become much more common for pipeline companies to define in the easement agreement a specific width and location of the pipeline easement on the particular tract of property. For example, the easement agreement may include a metes and bounds description of the centerline location of the pipeline to be constructed on the property and then specify that the permanent easement shall be a certain number of feet on each side of that centerline description. Oftentimes, a surveyed plat reflecting those measurements and the boundaries of the easement will be attached as an exhibit to the easement agreement. Again, this trend away from blanket easements makes sense because of the increased likelihood in modern times that the pipeline easement agreement will impact a developed area or an area where development is contemplated, rather than an agricultural area.

The easement holder will not be required to bear costs made necessary by the landowner’s subsequent development of the surface for his own profit. Courts have applied the same rule in situations involving proposed construction of state highways and roads over pipeline easements that necessitated relocation or modification of the pipeline. That makes sense given the fundamental rules regarding easements discussed supra, all of which flow from the basic principle that the easement owner holds the dominant estate.

The interpretation and enforcement of easements has been litigated in a number of Kansas cases. In Aladdin Petroleum Corp. v. Gold Crown Properties Inc., the easement in dispute was for a specific width and location, but the servient estate owner nevertheless constructed carports within the defined easement. The easement owner sued for mandatory injunction, seeking an order from the court requiring removal of the carports. The trial court refused to enforce the express terms of the easement, denied injunctive relief, and held instead merely that the easement owner would be granted reasonable access to the property. The Kansas Supreme Court reversed and granted the mandatory injunction requested, requiring removal of the carports from the defined easement, explaining:

In Kansas, the law is well settled that where the width, length, and location of an easement for ingress and egress have been expressly set forth in the instrument, the easement is specific and definite. The expressed terms of the grant or reservation are controlling in such a case and considerations of what may be necessary or reasonable to a present use of the dominant estate are not controlling.

Thus, when the easement agreement expressly grants an easement of a specific width and location, courts will enforce the express terms of the agreement, without considering how much easement area may be necessary or reasonable for the easement owner’s use of the property. In Mid-American Pipeline Co. v. Wietharn, the easement agreement expressly granted the pipeline company an easement for a specific width (60 feet) and prohibited construction on the defined easement that interfered with normal operation and maintenance of the pipeline.

Nevertheless, the pig farmer-landowner constructed multiple buildings within the easement boundaries over a 14-year period. The pipeline company finally sued for a manda-
tory injunction requiring removal of the buildings from the easement. The evidence clearly established the landowners’ violation of the easement and the pipeline company’s safety concerns. However, the district court balanced the equities and refused to require removal of the existing buildings (enjoining only future construction over the easement), because of the pipeline company’s delay in seeking relief and because of the damage removal of the buildings would cause to the pig farm.98 Instead, in an interesting twist, the court (citing equitable principles) ordered the pipeline company to move the pipeline from underneath the pig farm buildings, with the landowner to pay 40 percent of the moving costs up to $50,000.99 On appeal, the Kansas Court of Appeals found that even though the district court could have granted a mandatory injunction requiring removal of the buildings, the pipeline company’s delay in filing suit was grounds for denying such relief.100 The Supreme Court reversed the judgments of the district court and the Court of Appeals, rejected their balancing of the equities and order that the pipelines be relocated, and ordered instead that the existing buildings on the easement be removed.101

Wietharn is perhaps most notable for the fact that the pipeline company’s legal right to have its easement enforced was never an issue in the case. Instead, the only issue was how its easement rights should be enforced. The courts concerned themselves only with the question of what remedy should be granted the pipeline company. The Supreme Court found that it was not appropriate to balance the equities because the easement was specifically defined and the landowner constructed the buildings over the easement with knowledge that his actions violated the terms of the easement.102 Therefore, the Court ruled that the pig farm buildings must be removed from the easement, the pipeline to remain in place.

Similarly, the Tenth Circuit in *Mid-American Pipeline Co. v. Lario Enterprises Inc.*,103 granted a mandatory injunction requiring the removal of many feet of fill dirt and an asphalt racetrack that was constructed directly over an expressly defined (60 feet in width) pipeline easement.104 The trial court had denied injunctive relief, finding basically that what it assessed as a remote probability that the pipeline would need to be excavated did not warrant the substantial cost of relocating the pipeline. However, the easement agreement expressly prohibited the creation of any buildings or other structures on the right of way that would “interfere with the normal operation and maintenance of the pipelines.” On appeal, the Tenth Circuit found that the overburden and asphalt racetracks did materially interfere with the pipeline company’s easement rights. As in Wietharn, the court found that the landowner knowingly violated the easement and that the district court should not have balanced the equities.105 It granted the mandatory injunction requiring their removal, finding that “legal remedies [were] inadequate to redress ongoing or continuing violations … [and] the obstruction of an easement of itself is sufficient to show the irreparable nature of the injury and the inadequacy of the remedy at law.”106 The court did deny injunctive relief as to fences and barriers installed over the easement, finding that they were easily movable.

When, unlike Wietharn and Lario, the easement at issue is without a specific width or dimensions, easement owners seeking to enforce their rights must show that an encroachment upon the easement is of such a “material character” as to interfere with the easement owner’s “reasonable enjoyment” of its easement.107 That will typically result in a factual dispute over the necessary width or area around the pipeline necessary for the easement owner to reasonably enjoy its easement rights. It has, therefore, been said that rights under a blanket easement “are less precise and not as readily enforceable” as rights under a defined easement with a specified width, length, and location.108

Thus, in *Southern Star Central Gas Co. Inc. v. Cunning*,109 a blanket easement case, the court denied the pipeline company’s request for mandatory injunction requiring the property owner to remove an oversized metal garage building from within 41 inches of the high pressure natural gas line, finding that the garage did not materially interfere with the pipeline.110 In Cunning, the pipeline company sought relief soon after the offending building was constructed. The easement agreement at issue did not include a specifically defined width or location, nor did it contain a prohibition on buildings or structures. The court found that safety was not an issue and that the building located 41 inches from the pipeline did not materially interfere with the pipeline company’s ability to inspect, repair and maintain the pipeline. The court noted, however, that its holding did not mean that a 41 inch clearance from a natural gas pipeline would be considered adequate in every case.111

In stark contrast, in *Greuel* (another blanket easement case), the court found that the pipeline company owned a prescriptive easement and granted the company’s request for declaratory judgment defining the blanket easement as 66 feet in width. The court noted that defining the easement as 66 feet in width advanced the purposes for which the easement was originally obtained in 1917.112 That is consistent with the general rule that the character and extent of rights created by a grant of easement are determined by construction of the language of the grant and by the extent

98. *Id.* at 245.
99. *Id.* at 244.
100. *Id.* at 245.
101. *Id.* at 251.
102. *Id.* at 247-251.
103. 942 F.2d 1519 (10th Cir. 1991).
104. *Id.*
105. *Id.* at 1525.
106. *Id.* at 1529.
107. *Southern Star Central Gas Co. Inc. v. Cunning*, 37 Kan. App. 2d 807, quoting 221 Kan. at 588. “An obstruction or disturbance of an easement is anything which wrongfully interferes with the privilege to which the owner of the easement is entitled by making its use less convenient and beneficial than before. To constitute an actionable wrong it must, however, be of a material character, such as will interfere with the reasonable enjoyment of the easement.” (Emphasis in original) (quoting 28 C.J.S., Easements, § 96, pp. 778-79).
109. *Id.* at 807.
110. *Id.* at 818.
111. *Id.*
of the use made of the dominant tenement at the time of the grant. 113 Notably, in Greuel, the dispute over the width and extent of the pipeline easement arose before any construction or alleged encroachment on the pipeline easement occurred. 114

In the most recent Kansas easement case, the Kansas Court of Appeals vacated a judgment granting the landowner’s request for injunction, to enjoin ConocoPhillips from removing a 30-year old 60 to 70 foot tall oak tree in her backyard, located within 2 feet of ConocoPhillips’ pipeline. 115 ConocoPhillips sought to remove the tree as part of a tree clearing project that covered many miles. The easement at issue was a blanket easement. It was undisputed that the pipeline easement preceded the tree and that the landowner-plaintiff purchased the property subject to the recorded easement. The Court of Appeals found that the tree did materially interfere with ConocoPhillips’ easement rights, noting that: the evidence the tree roots could significantly harm the pipeline was undisputed; the close proximity of the tree to the pipeline would make excavation more difficult although not impossible; the tree impaired ConocoPhillips’ ability to aerially inspect portions of the pipeline; and ConocoPhillips could incur a Notice of Probable Violation from the Federal Energy Regulatory Commission, if it did not remove the tree. 116

VII. Appropriate Releases and Encroachment Agreements Must Be Obtained Prior to Construction or Development

There are several take-away points from these cases for practitioners representing would-be purchasers or developers of real property subject to existing pipeline easements. As a preliminary matter, it is imperative that the express terms of any easement(s) that burden the property be examined carefully prior to purchase and/or development of the property. Although there are many potential issues, two pivotal issues will be: (1) Is the easement limited to a specified width and location, or is it a blanket easement? (2) Does the easement contain express restrictions on the landowner’s right to construct buildings or other structures on the easement?

If the easement agreement is for a specified width and location, development plans for the property must take into account the fact that construction of any buildings or structures most likely will not be permitted within the defined easement area. Absent the negotiation of a mutually agreeable encroachment agreement (as discussed below), nothing should be constructed and no trees should be planted (small shrubs and removable fences may be exceptions, however, even these items should be discussed with the easement owner prior to planting/construction) within the defined easement area. Otherwise, the developer runs the risk of being forced to remove the encroaching structure or planting later, at its own expense.

If the easement agreement is a blanket easement, then it is imperative that the precise location of the pipeline be determined prior to purchase or commencement of development of the property. Obviously, any restrictions on building over or in the vicinity of the pipeline may impact or prohibit altogether the purchaser’s building and development plans. The prospective purchaser should contact the easement owners and request that they mark or stake the location of the pipeline on the property. Once that is done, the prospective purchaser should attempt to negotiate with the easement owner to define or limit the easement restrictions to a certain width or area around the pipeline.

The mechanism sometimes utilized for doing so is a “partial release.” The partial release may, for example, release the easement as to all but a certain defined width on either side of the pipeline and specifically define the restrictions on the property owner’s use of that defined easement area. Typically, any restrictions that existed in the original easement agreement will be preserved as to the defined easement area described in the Partial Release and additional express prohibitions or restrictions on any buildings, roads, or other structures within the defined easement area will be incorporated as well.

Even though the Easement Agreement or Partial Release may prohibit generally any construction within the defined width of the easement, the easement owner may be willing to allow limited specified encroachments upon the easement, subject to a written agreement imposing restrictions and conditions upon the encroachment. Such an agreement is commonly known as an “Encroachment Agreement.” For example, the easement owner may be willing to allow utility lines to cross over or under the pipeline, or to allow a road to cross the pipeline (but not run parallel to it within the defined easement), subject to conditions that: a specified amount of separation exist between the proposed utility line and the pipeline; a specified amount of “cover” remain over the pipeline; the property owner indemnify the easement owner for any damages or injuries sustained as a result of the encroachment; and/or the property owner will bear any costs of repairing the road encroachment in the event that the easement owner must tear up the road in order to access and repair its pipeline in the future. If the prospective purchasers desire to construct roads or utility lines in the vicinity of the pipeline or that would cross over the pipeline, then they should approach the easement owner and request an Encroachment Agreement, which should be negotiated, executed, and recorded prior to the purchase and development of the property.

113. See Potter, 201 Kan. at 531.
114. The Greuels discovered the pipeline easement, which Southern Star’s predecessor had mistakenly failed to record with the register of deeds when it was acquired in 1917, only after they purchased the subject property in 2007. See Greuel, 2009 WL 1208065 at 2-3. Southern Star initiated the lawsuit to establish its rights on a prescriptive easement theory.
115. Brown v. ConocoPhillips Pipeline Co., 2011 WL 4031514 (Kan. Ct. App. 2011). The case was not designated for publication. However, ConocoPhillips has filed a motion for publication, which is pending.
116. Id. Slip op. at 9-10.
VIII. Conclusion

There are many factors to be considered by a prospective purchaser or developer of real property subject to pre-existing oil and gas interests. Legal counsel for such parties should exercise an abundance of caution, undertake thorough due diligence, and resolve any issues relative to oil and gas interests before the real property purchase closes or the development commences. A cautious investigation up front could save the prospective purchaser or developer significant headaches and substantial costs in the future.

About the Author

Teresa James is a partner at Martin, Pringle, Oliver, Wallace and Bauer LLP, where she is a recognized authority on the acquisition of pipeline rights of way, fiber optic rights of way, underground gas storage easements, meter and regulator sites, and railroad rights of way. James represents natural gas and liquids pipeline clients, as well as other energy clients, in acquiring such interests and in disputes arising out of or related to such interests. She frequently represents energy clients in litigation before federal and state courts, regulatory bodies and has served as lead counsel in complex litigation involving underground gas storage rights, easements, condemnation, and pipeline-related matters.

She currently serves on the Kansas CLE Commission, was recently appointed to serve on the Bench-Bar Committee for the U.S. District Court for the District of Kansas, and is a past president of the Kansas Bar Association Oil, Gas, and Mineral Law Section. She is a University of Kansas School of Law graduate and is admitted to practice in Kansas, Missouri, the U.S. Courts for the District of Kansas and Western District of Missouri, the Tenth Circuit Court of Appeals, and the U.S. Supreme Court.

REMINDERS FROM THE KANSAS CLE COMMISSION

The Kansas Continuing Legal Education Commission is the office that tracks and reports your CLE credits to the Kansas Supreme Court for annual compliance. Noncompliance with the CLE hours, and/or fees, will result in additional fees owed and, if not resolved, the suspension of your license to practice law in Kansas.

The annual CLE requirement in Kansas is 12 hours of CLE credit, including 2 hours of ethics and professionalism, by June 30, 2012.

In addition to completing CLE hours, you are also required to pay the Kansas CLE Commission Annual CLE Fee. Notice of this fee will be mailed to your address of record in late April. This is the only notice you will receive. If you misplace your copy, you may log into your MyKSCLE account online at www.kscle.org and pay your fees using MasterCard or Visa. The payment must be received by July 1, 2012, for your CLE record to reflect compliance. Fees postmarked to the CLE Commission Office on or after August 1 of the year in which due shall be accompanied by a $50 late CLE payment fee.

Please remember, if you have created a MyKSCLE account, you can access your online transcript of hours, check the status of your CLE record, including CLE fees owed and pay your CLE fees online at www.kscle.org. This information is available 24 hours a day.

IMPORTANT – DON’T MISS – DATES:
June 30 – End of CLE year
   All CLE hours must be attended by this deadline to avoid further penalties.
July 1 – Annual CLE fee due.
July 31 – Last day to file hours attended prior to June 30, 2012, and pay the annual CLE fee without penalty.

NOTE: All paperwork must be postmarked on or before July 31 to avoid late filing penalties. Fax and email submissions will NOT be accepted.
ATTORNEY DISCIPLINE

SIX-MONTH SUSPENSION
IN RE RICHARD E. JONES
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 100,491 – FEBRUARY 15, 2012

FACTS: On October 17, 2008, the Supreme Court issued an opinion suspending Richard E. Jones from the practice of law in the state of Kansas for a period of six months. The court suspended imposition of that discipline, subject to Jones abiding by the terms and conditions of the probation as set out in the hearing panel’s recommendations during a two-year probationary period. In re Jones, 287 Kan. 101, 110, 193 P.3d 899 (2008). Court subsequently extended the probationary period in order to give Jones additional opportunities to comply with the terms and conditions of his probation.

HELD: In response to an order directing him to appear and show cause, on February 10, 2012, Jones came before this Court to explain why his probation should not be revoked and his license to practice law should not be suspended. Court considered the parties’ written pleadings and the statements made to the court in open session. The Court concluded that Jones failed to abide by the terms and conditions of his probation, and the Court consequently imposed the original discipline of suspension.

ORDERED: Jones is suspended from the practice of law in the state of Kansas for a period of six months beginning on the date of this order. Before reinstatement, Jones is required to comply with Supreme Court Rule 218 (2011 Kan. Ct. R. Annot. 379) and undergo a hearing pursuant to Supreme Court Rule 219 (2011 Kan. Ct. R. Annot. 380).

CRIMINAL

STATE V. ALLEN
JOHNSON DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED

FACTS: Allen was charged with two counts of possession of a controlled substance and one count of possession of drug paraphernalia. Allen pled to attempted possession of methamphetamine and there was language in the agreement that the plea was “expressly conditioned on defendant appearing for sentencing.” Allen failed to appear on the day of sentencing and later missed another sentencing date. The district court held the state was no longer bound by its promise to recommend probation.

ISSUES: (1) Plea agreement and (2) issues not raised in the district court

HELD: The Court of Appeals held that Allen’s argument that she substantially performed the agreement was not asserted before the trial court and that it could not be raised for the first time on appeal and that it actually took a warrant for her arrest to bring her before the court for sentencing. Court affirmed the Court of Appeals and held that the procedural bar raised by Allen’s failure to preserve her argument or issue by presenting it to the district court, which was an alternative and sufficient basis for the Court of Appeals’ affirmation, appeared nowhere in her petition for review, and consequently was not before the Court. Court found that holding stands, making any ruling the Court might arrive at on the merits of Allen’s claim worthless to her.

DISSENT: Justice Johnson dissented and concluded the majority appeared to suggest that an appellate court can declare an issue unreviewable as unpreserved but then proceed to nevertheless review the merits of the issue as an alternative basis to bolster its decision that the issue is unreviewable. Justice Johnson would review the merits.

STATUTES: No statutes cited.

STATE V. BURNETT
SEDGWICK DISTRICT COURT – AFFIRMED IN PART
AND DISMISSED IN PART
NO. 100,854 – FEBRUARY 10, 2012

FACTS: Burnett convicted of capital murder and aggravated kidnapping for participating in kidnapping and murder of pregnant 14-year-old. Life sentence with no possibility of parole imposed when jury could not reach unanimous verdict in penalty phase. Consecutive aggravated presumptive sentence imposed on aggravated kidnapping conviction. On appeal Burnett claimed: (1) verdict forms used in penalty phase did not allow jury to express fact findings sufficient to acquit on death penalty; (2) prosecutorial misconduct during closing argument by suggesting Burnett’s mere presence during aggravated kidnapping permitted jury to find him guilty on theory of aiding and abetting; (3) trial court erred in admitting autopsy photographs; (4) trial court erred in instructing jury that another trial would burden both sides; and (5) sentencing court violated Burnett’s constitutional rights when it imposed aggravated presumptive sentence for kidnapping conviction.

ISSUES: (1) Jury verdict forms, (2) prosecutorial misconduct in closing argument, (3) admission of autopsy photographs, (4) instructional error, and (5) sentencing

HELD: Burnett’s double jeopardy challenge to jury verdict forms is not ripe for appellate review because Burnett has not been punished twice, nor has state attempted to punish him twice for same offense. Burnett essentially seeks advisory opinion prohibiting state from seeking death penalty in some future case if his conviction and sentence in this case is ever overturned.

Considering prosecutor’s entire closing argument in context of
instructions to jury, prosecutor did not misstate, deliberately or otherwise, the law on aiding and abetting.

Although gruesome, the challenged photographs were relevant and admissible to assist medical examiner in explaining her testimony. As in State v. Salts, 288 Kan. 263 (2009), court erred in giving Allen-type instruction prior to jury deliberations, but no clear error. Highly unlikely jury would have returned different verdicts had instructional error not occurred. This single error does not support Burnett’s claim that cumulative error denied him a fair trial.

No jurisdiction to address Burnett’s challenge to his presumptive sentence. Apprendi claim is defeated by State v. Ivory, 273 Kan. 44 (2002), which the court declines to re-examine.

STATUTES: K.S.A. 21-3205(1), -3420(c), -3421, -3439(a)(2), -4721(c); K.S.A. 22-3414(3); and K.S.A. 60-407(f)

STATE V. DEAL

FACTS: Deal convicted of unintentional but reckless second-degree murder in death of victim from multiple blunt force head injuries. On appeal he claimed there was insufficient evidence to convict him of unintentional second-degree murder, claimed trial court erred in instructing jury on “no duty to retreat” and in denying continuance on Deal’s motions for new trial. He also claimed constitutional error in trial court imposing aggravated sentence in applicable sentencing grid box and using Deal’s criminal history to increase sentence. Court of Appeals affirmed Deal’s conviction and sentence. 41 Kan. App. 2d 866 (2009). Supreme Court granted Deal’s petition for review, which included claim that evidence of his intentional beating could not support conviction for unintentional but reckless second-degree murder.

ISSUES: (1) Sufficiency of the evidence, (2) “no duty to retreat” jury instruction, and (3) sentencing

HELD: Notwithstanding contrary language in previous Supreme Court decisions, K.S.A. 21-3402 focuses culpability on whether a killing is intentional or unintentional, not on whether a deliberate and voluntary act leads to death. That statute and State v. Robinson, 261 Kan. 865 (1997), are closely examined. Under facts of this case, evidence is sufficient to establish an unintentional but reckless second-degree murder in violation of K.S.A. 21-3402(b). Evidence most favorable to state establishes: the defendant went to the victim’s house; the victim became physically aggressive and tried to hit the defendant with a tire iron; and the defendant wrestled the tire iron away, and, without an intent to kill, struck blows to the victim’s shoulder, neck, and head.

Any error in “no duty to retreat” instruction did not mislead jury and was not reversible error, even if Court of Appeals did not address prosecutor’s statements to which defense objections were sustained. Claims of constitutional error in sentencing are defeated by prior decisions which are not revisited, and appellate courts lack jurisdiction to consider 61-month presumptive sentence.

STATUTES: K.S.A. 20-3018(b); K.S.A. 21-3201(c), -3401(a), -3401(b), -3402, -3402(b), -4721(c); K.S.A. 22-3414(3), -3602(c); K.S.A. 2006 Supp. 21-3218(a); and K.S.A. 21-3211 (Furse 1995)

STATE V. MAY

FACTS: Officer Mellick arrested Lindsay May for driving under the influence based on indicators of intoxication and May’s failure of a preliminary breath test. At the station, May agreed to submit to an Intoxilyzer breath test, but her initial efforts failed to provide an adequate breath sample, nevertheless, the machine issued an alcohol concentration reading on the insufficient volume of breath. The deficient sample result read 0.156. After the officer informed her that the insufficient breath sample constituted a test refusal under Kansas law, May requested an opportunity to retake the breath test. The trooper denied the request, but, at trial, the district court found that May had validly rescinded her test refusal. The trial court suppressed any evidence of a test refusal or of the test result on the
insufficient sample. The state filed an interlocutory appeal of the suppression, and a majority of a Court of Appeals panel affirmed the district court.

ISSUES: (1) DUI, (2) test refusal, and (3) request to retake test

HELD: Court stated that a person who is physically capable of doing so but fails to provide an adequate breath sample as directed by the law enforcement officer administering a breathalyzer test shall be treated as if the person refused to take the test. An initial refusal to take a breathalyzer test, including a refusal as a matter of law for providing an inadequate breath sample, may be changed or rescinded by subsequent consent. To effectively cure the initial refusal, the subsequent consent must be made: (1) within a very short and reasonable time after the prior first refusal; (2) when a test administered upon the subsequent consent would still be accurate; (3) when testing equipment is still readily available; (4) when honoring the request will result in no substantial inconvenience or expense to the police; and (5) when the individual requesting the test has been in the custody of the arresting officer and under observation for the whole time since arrest. Court held that May affected a valid rescission of her constructive test refusal. Court concluded that when the trial court finds that a person charged with driving under the influence of alcohol effectively cured an initial refusal to take a breathalyzer test but the law enforcement officer in charge of testing has not permitted the person to take or retake the test, the proper remedy is to suppress any reference to the testing proceedings, including the breathalyzer’s numerical result obtained from a deficient breath sample.


STATE V. O’REAR
WYANDOTTE DISTRICT COURT – REVERSED
COURT OF APPEAL – REVERSED
NO. 99,487 – FEBRUARY 17, 2012

FACTS: Bank security guard O’Rear shot bank customer who O’Rear mistakenly believed to be carrying weapon into bank. Jury convicted O’Rear of reckless aggravated battery. On appeal, O’Rear argued in part that trial evidence was insufficient to support his conviction because state failed to show he acted recklessly in intentionally shooting the victim. In unpublished opinion, Court of Appeals affirmed O’Rear’s conviction. Supreme Court granted review on all issues, but decided only O’Rear’s claim that state failed to present any evidence of reckless conduct.

ISSUE: Reckless aggravated battery

HELD: Under circumstances in which evidence establishes that a defendant intentionally shot another with the purpose of disabling the other and there is no evidence that the battery was unintentional, the evidence is insufficient to support a conviction of reckless aggravated battery under K.S.A. 21-3414(a)(2)(A). Court rejected state’s argument that intent to shoot was mitigated by O’Rear mistaking the facts and acting under mistaken and unreasonable belief that he needed to defend himself or others. Those facts did not change the intentional nature of O’Rear’s action to shoot and disable the victim. Conviction was reversed.

DISSENT (Luckert, J., joined by Rosen, J.): Would affirm the conviction. Disagreed with majority’s position of focusing on evidence contrary to the jury verdict rather than applying correct standard of review.

STATUTES: K.S.A. 20-3018(c); K.S.A. 21-32011(c), -3402, -3403(b), -3404(c), -3414, -3414(a)(1)(A)-(C), -3414(a)(2)(B); and K.S.A. 22-3602(c)

STATE V. RASKIE
JOHNSON DISTRICT COURT – CONVICTIONS
AFFIRMED, SENTENCE VACATED, AND REMANDED
NO. 102,847 – FEBRUARY 17, 2012

FACTS: Raskie convicted of two counts of aggravated indecent liberties with a child. Hard 25 life sentence imposed for the Jessica’s Law off-grid offense and 61-month sentence for the Jessica’s law offense. He claimed on appeal: (1) district court erred in admitting evidence of molestation “grooming items” not used

Appellate Practice Reminders . . .

Expanded Coverage of Supreme Court Oral Arguments

The Kansas Supreme Court has taken another significant step in its effort to provide greater public access to court proceedings by authorizing webcasts of all oral arguments, beginning this Spring. Cameras in the courtroom began as a pilot project in 1981 and quickly became an established practice. An audio stream of oral arguments has been available live on the Internet during oral arguments and archived at www.kscourts.org since 2004. The webcasts will also be available live and as an archive.

Two cameras are being permanently installed in the Supreme Court Courtroom. One camera will be located at ceiling level above the entry, facing the Supreme Court bench. The second camera will be located at the same height behind the bench, facing the podium and the spectator gallery. Both cameras will have pan, tilt, wide-angle, and zoom capabilities. They will be operated by a court employee from a station near the clerk’s table.

The Kansas Supreme Court is expected to become the 23rd high court to offer a video stream of oral arguments, although not all broadcasts in other states are live and archived.

The Court also plans to make the video capability available for presentation of educational programs to internal and external groups. Judges and court employees will be able to view programs from their court locations, saving the expense of time and travel for both presenters and participants. Law schools, bar associations, professional organizations, and community groups may also have interest in educational programming offered by the Supreme Court.

Video and audio transmission of proceedings from the Kansas Supreme Court Courtroom will provide all Kansans enhanced insight into the operation of their state’s highest court.

Ron Keefover, the Supreme Court’s public information officer, provided information for this article and has been instrumental in system installation.

For questions about these or other appellate procedures and practices, call the Clerk’s Office and ask to speak with Carol G. Green, Clerk of the Appellate Courts, at (785) 296-3229.
Appellate Decisions

STATE V. SUMMERS

WYANDOTTE DISTRICT COURT – CONVICTION AFFIRMED, SENTENCE AFFIRMED IN PART, AND VACATED IN PART


FACTS: Summers convicted of first-degree murder. Trial court imposed life sentence without possibility of parole for 25 years, and lifetime post-release supervision. Summers appealed, claiming trial court erred in: (1) admitting statements Summers made without Miranda warnings during police interview at Summer’s father’s house; (2) allowing victim’s wife and neighbor to testify that victim told them his friend “Homie” was coming over that evening; (3) handling prosecutor’s inappropriate question during cross-examination of a defense witness; and (4) imposing lifetime post-release supervision as part of Summers’ sentence.

ISSUES: (1) Admission of Summers’ statements, (2) admission of victim’s hearsay statements, (3) prosecutorial misconduct, (4) lifetime post-release supervision

HELD: Under circumstances determined by district court and supported by the record, Miranda warnings were not required because there was no custodial interrogation. District court did not err in denying Summers’ motion to suppress statements made to police during that witness interview.

Statement victim made to his wife regarding his plans for the evening, when those statements were made shortly after victim made


STATUTES: K.S.A. 21-3504, -3504(a)(3)(A); K.S.A. -4643, -4643(a)(1), -4643(d); K.S.A. 22-3601(b)(1); and K.S.A. 60-404, -404(m), -464

STATE V. SUMMERS

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his plans, fits easily within K.S.A. 60-460(d)(3) hearsay exception. Trial court did not err in admitting this statement. Victim’s statement to neighbor is cumulative evidence, thus no need to decide whether trial court abused its discretion in admitting that statement.

Prosecutor’s question that implicated Summers and defense counsel were lying was inappropriate, but trial court sustained defense counsel’s objection which cured any possible prejudice.

State concedes error in sentencing because sentencing court has no authority to order term of post-release supervision in conjunction with off-grid indeterminate life sentence. That portion of Summers’ sentence is vacated. Remainder of Summer’s sentence is affirmed.

STATUTES: K.S.A. 21-3401; and K.S.A. 2006 Supp. 60-460(d)(3)

**COURT OF APPEALS**

**CIVIL**

**CONTEMPT**

**IN RE JTR**

**SEDGWICK DISTRICT COURT – SENTENCED VACATED NO. 105,505 – FEBRUARY 24, 2012**

FACTS: The mother of two minors failed to obey a no-contact court order by visiting her children who were the subjects of child in need of care petitions. As a result, the State accused her of indirect civil contempt of court. Civil contempt proceedings are remedial in nature, seeking the party’s compliance with the court’s orders. Here, the district court found her to be in contempt of court and simply sentenced her to serve five days in jail as punishment for violating the court’s order.

ISSUE: Contempt

HELD: Court found the appeal was not moot even though the mother’s parental rights had been terminated. Court stated the mother could still be forced to serve the five days in jail upon return of jurisdiction to the district court and the district court’s threat of increased punishment on subsequent contempt violations was conceivable. Court held that because the court gave the contemnor no way to purge herself of contempt, the sentence was wholly punitive and entirely criminal. The court failed to give the contemnor “the keys to the jail.” The court had no authority to impose a criminal contempt sentence in a civil contempt proceeding. Court vacated the penalty. Court stated that even if it viewed the action as an indirect criminal contempt of court proceeding, reversal was necessary because the contemnor was forced to testify against herself in violation of the Fifth Amendment to the U.S. Constitution and Section 10 of the Kansas Constitution Bill of Rights.

STATUTE: K.S.A. 20-1201, -1202, -1204a

**GUARDIANSHIP, LEAST RESTRICTIVE SETTING, AND NURSING CARE**

**IN RE GUARDIANSHIP OF BENHAM NORTON DISTRICT COURT – AFFIRMED NO. 105,889 – FEBRUARY 17, 2012**

FACTS: Benham is a 79-year-old woman residing in an adult care nursing facility in Norton. Benham’s husband and sister live in Norton. Benham was admitted to the facility due to inadequate care provided by her husband. Guardianship and conservator proceedings were commenced on behalf of Benham and the district court determined there was clear and convincing evidence that Benham’s guardian has properly chosen the Norton adult care facility as the least restrictive setting that was reasonably available to her.

ISSUES: (1) Guardianship, (2) least restrictive setting, and (3) nursing care

HELD: Court stated that generally under K.S.A. 59-2205, the court has the authority to appoint a guardian ad litem in any probate proceedings. K.S.A. 59-3063(a)(3) allows the court to appoint a guardian ad litem if requested in writing by the ward, conservatee, guardian or conservator, or upon motion by the court. Court stated that a ward has the burden of proof when challenging the guardian’s decision that the ward has been placed in the least restrictive setting appropriate to the needs of the ward that is reasonably available. Court held that based on the evidence in the record on appeal, substantial competent evidence supported the district court’s findings and its conclusions of law. Court affirmed the decision that Benham is residing in the least restrictive setting appropriate to her needs, which is reasonably available.

STATUTE: K.S.A. 59-2205, -3063, -3075

**TAXATION AND NOT-FOR-PROFIT**

**IN RE TAX APPEAL OF BOY SCOUTS KANSAS COURT OF TAX APPEALS – REVERSED AND REMANDED WITH DIRECTIONS NO. 105,072 – FEBRUARY 17, 2012**

FACTS: The Quivira Council of the Boy Scouts of America (BSA) is a not-for-profit, tax-exempt organization that qualifies for federal income tax exemption under Internal Revenue Code § 501(c)(3). From 1960 through 1974, BSA obtained seven contiguous parcels of largely unimproved land — approximately 3,100 acres of land and a 500-acre lake — in Chautauqua County. The ranch is operated as the Quivira Scout Ranch and has been exempt from ad valorem taxation since its acquisition under the provision exempting property used “exclusively for educational, charitable and/or benevolent purposes.” In 2009, the Chautauqua County appraiser put the ranch back on the tax rolls, effective January 1, 2009, and no longer recommended the tax exemption because BSA had leased a portion of the land for cattle grazing and allowed guided turkey and deer hunts on the property during hunting season. In addition to these non-Scouting uses, fishing was permitted under limited circumstances. Private individuals (approximately 30 people per year) were allowed to fish at the ranch during a one-year period as recognition for contributions/donations to the Boy Scouts of $1,000. Finally, BSA entered a lease with Kansas Electric Power Cooperative Inc., allowing placement of communication equipment on a water tower located on the ranch for annual payments of $840. After an evidentiary hearing, COTA denied BSA’s requests for exemption from ad valorem taxation.

ISSUES: (1) Taxation and (2) not-for-profit

HELD: Court held that the predominant purpose and use of the ranch was for humanitarian services despite the fact that camps are held for only six weeks in the summer and weekends during the fall and spring. The cattle grazing, hunting, fishing, and conservation practices do not interfere with the predominant purpose of the ranch, and the revenue the activities generate is used to offset operational expenses and provide scholarships for youth. Accordingly, the nonexempt uses should be considered “minimal in scope and in substantial in nature” and should not result in the loss of exemption because such uses are merely “incidental to the purpose of providing humanitarian services.”

STATUTES: K.S.A. 77-621; and K.S.A. 79-201 Second, -201 Ninth, -201 Fourth
that “it was done with the intent to hold such person: to inflict bodily harm or to terrorize the victim, or another” did not present alternative means. Court stated that is did not believe the reference to “another” established an alternative means. Even if Clary had intended to harm another, the means were the same — by inflicting bodily injury or terror. So including “another” in the instruction did not create more than one way to commit aggravated kidnapping. Court concluded the inclusion of “another” in the jury instruction was surplusage and given the record, court was confident the jury was not confused. Since Clary did not challenge the evidence showing his intent to inflict bodily injury upon or to terrorize E.H., his conviction was supported by sufficient substantial competent evidence. Court held that a witness’s testimony that Clary would rape someone else unless E.H. went to the hospital for an examination was not reversible error. The trial court instructed the jury to disregard the witness’ statement. Court stated the record contained hundreds of pages of testimony and the strength of the evidence against Clary weighed heavily against a finding of prejudice. Last, court rejected Clary’s argument that the trial court should have granted his request for lesser-included instructions on kidnapping and criminal restraint for his aggravated kidnapping charge. Court stated the evidence did not support either lesser charge. DISSENT: Judge Green dissented and would have held that the State failed to present sufficient evidence of each alternative means on the charge of aggravated kidnapping and the use of the language “or another.”

STATUTES: K.S.A. 21-3420, -3421; and K.S.A. 22-3414

STATE V. WARREN
RENO DISTRICT COURT – AFFIRMED IN PART, SENTENCE VACATED, AND REMANDED WITH DIRECTIONS
NO. 104,489 – FEBRUARY 17, 2012

FACTS: When a small amount of marijuana was found in inmate Waddell Warren’s socks, he was convicted of introducing a controlled substance into a correctional facility and sentenced to an additional 122 months in prison. Warren asked that he be given a shorter sentence than called for under the sentencing guidelines, but the district court ruled that a lesser departure sentence — based on an argument that the amount of drugs was very small and thus less than typical for the offense — could not be considered.

ISSUES: (1) Jurisdiction, (2) sentencing, and (3) detainers

HELD: Court stated that under K.S.A. 21-4721(c)(1), Kansas appellate courts do not have jurisdiction to hear the appeal of a presumptive criminal sentence. But court held that when a district court misinterprets its own statutory authority and explicitly refuses to consider a defendant’s request for a discretionary, nonpresumptive sentence that the district court has statutory authority to consider, the appellate court may take up the limited question of whether the district court properly interpreted the sentencing statute. Court held that when sentencing a defendant for illegally possessing contraband in a prison in violation of K.S.A. 21-3826, the district court may, in an appropriate case, grant a departure sentence based on the small quantity of contraband involved and the statutory authority of K.S.A. 21-4716(c)(1)(E), which allows a departure sentence when the degree of harm from the crime is significantly less than typical for such an offense. Court stated that under the Uniform Mandatory Disposition of Detainers Act a prisoner is generally entitled to be tried on a Kansas charge within 180 days of the prisoner making a formal request for final disposition of the charge. Court held that the deadline may be extended for good cause shown during a court hearing if the prisoner or his or her attorney are present and the prisoner’s attorney has received notice and an opportunity to be heard. On the facts of this case, in which the prisoner sought continuance of a timely trial setting so he could change lawyers, court held here was no violation of his speedy-trial rights.

STATUTES: K.S.A. 21-3826, -4716, -4721; and K.S.A. 22-3716, -4301
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