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

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You may be aware that the Kansas Bar Association maintains a statewide Fee Dispute Resolution Committee. The Committee is made up of attorneys who are KBA members who represent a broad spectrum of the Bar, both in type of practice and type of law firm, as well as office location, who volunteer to serve on confidential arbitration panels to resolve fee disputes between clients and their lawyers.

Presently, we are in desperate need of additional arbitrators and are contacting all certified mediators and arbitrators in the state to solicit interest in this important public service.

Attorneys who agree to participate in such proceedings appreciate its value as the majority of most claims are adjudicated amicably without escalating to the point of a formal complaint being made with the Disciplinary Administrator.

Volunteer mediators are eligible for travel reimbursement and we also plan to offer complimentary mediation training next spring to all participants.

If you are interested in joining the Fee Dispute Resolution Committee, please e-mail the KBA Executive Director, Jeffrey Alderman, at jalderman@ksbar.org or call him at (785) 234-5696.
Advocation on Behalf of the Entire Legal Profession

Member benefits attract people interested in joining bar associations. Many of the benefits of belonging to the Kansas Bar Association (KBA) are well-known, including our free electronic research tool Casemaker, the Journal of the Kansas Bar Association, attending the annual meeting, first-rate CLEs, and outstanding practitioner handbooks, among many others. What is more difficult to articulate, but extremely vital is the benefit that you receive from other less visible and tangible efforts. One of the most important of which is the work taken on by the KBA’s Legislative Committee as they advocate on behalf of all lawyers, not just KBA members.

Historically, the Legislative Committee has been one of the most active and influential committees of the KBA. It is charged with two main responsibilities: (1) to consider legislative positions and make recommendations to the Board of Governors (Board) on new bills; and (2) to endeavor to secure enactment of legislation approved by the Board. These are two very different missions and require different skill sets and talents. The committee has accomplished those responsibilities admirably over the years.

The first charge is to study and make recommendations about legislation. Our committee, led this year by Greg Musil, has a very diverse membership including judges and corporate counsel, as well as liaisons to many of our substantive sections. Members of the committee must stay abreast of pending legislation, especially those coming within their areas of expertise. We encourage all KBA members to help us monitor proposed bills. Due to the ever-changing nature of legislation during the Legislature’s session, the committee must be nimble and able to respond quickly. Recommendations are made to the Board and those recommendations are then acted upon.

After which, the focus shifts to securing the enactment of the legislation or opposing it. Members of the committee either testify when requested or find those who can. That testimony is invaluable in our attempts to educate a Legislature that seems to have fewer and fewer lawyers every year. The testimony, however, is only part of the process.

The KBA must also undertake efforts to lobby support for their positions. Those lobbying efforts have shifted over the years.

While much of the effort is from volunteers, the KBA could not be effective without the assistance of others. The KBA Director of Governmental Affairs, Joseph Molina, and KBA Contract Lobbyist, Whitney Damron, lead our efforts and do tremendous work under and outside of the Capitol Dome.

Molina provides day-to-day oversight of the legislative process and passes information on proposed legislation to members of our committee while helping facilitate their work. Damron also tracks bills of interest and provides access to the important decision-makers in the Legislature. Damron, a lawyer and KBA member, has been a lobbyist for more than 20 years and is widely recognized as one of the leading voices in Topeka.

Last year, under the leadership of former KBA President Tom Wright, the KBA organized the KSBAR Political Action Committee (PAC), which is led by a Board of Directors that has members from each political party. Wright and many others believed the time had come for Kansas lawyers to organize to effectively lobby the Legislature about matters of common concern and interest. Of course, the PAC needs funding for success. Once that can be achieved, these efforts should make Molina’s and Damron’s jobs much easier and allow us to obtain much needed influence among key legislators.

All of this begs the question about what actually is accomplished by the committee. A lot, rest assured.

Last year, the committee spent countless hours fighting attempts to change the way our appellate judges are selected. Our Bar will continue to maintain its efforts to keep the judiciary at its highest levels independent from the political whims of the day. This year promises yet more attempts to change the system that works so well in Kansas.

The KBA is also vigilant about attempts to tax lawyer services and those of other professionals. Given the continuing budget crisis, this is likely to come up again. The committee will continue to oppose these and other types of taxes.

The committee also deals with various issues that perennially seem to crop up in the Legislature: Loser pay rules, revisions to the probate and corporation codes, sentencing and other criminal issues, changes in subrogation rules, and other court-user fees.

As noted above, much of the work is done by lawyer volunteers though some of our efforts require money. Being a KBA member and contributing to the PAC helps pay for this work. I wish that more lawyers who aren’t members would realize the valuable work that occurs on their behalf by the association. We would like their support of our efforts for the good of the entire profession.

Let us know your thoughts.

Tim O’Brien may be reached by e-mail at tobrien@ksbar.org, by phone at (913) 551-5760, or post a note on our Facebook page at www.facebook.com/ksbar.
There are few things that absolutely every single young lawyer needs. There is an enormous spectrum between the different careers young lawyers find themselves in. Regardless of the type of law you practice or the area of law you find yourself practicing in, every young lawyer needs one thing: a mentor. Ideally, you should have more than one. I have been fortunate to stumble upon numerous mentors in my six years of practice, each of them lending enormous help and guidance in different areas of my life. I cannot, nor would I want to, imagine my life without any one of them!

My boss during a legal internship in Wichita has played a vital role in my legal career and I am lucky to count her as one of my dear friends. After that summer we stayed in touch and she continued to help me find my path. Even though she worked at a different firm, she attended my first trial, giving me pointers on cross-examination and ideas on my case during breaks. When I had my first child this past January, she offered to babysit whenever I needed help (an offer I have accepted on some Saturday mornings when I just can't fit it all in).

My husband is an attorney. Out of the goodness of her heart, my husband’s boss has provided me with profound mentoring and guidance. Last year, as president of the Wichita Women Attorneys Association, I had to write a quarterly column. This mentor proofread my columns, told me where I hit the mark, and where I missed. She has helped me on countless occasions with bar association activities in planning, executing, and maximizing the potential of any group I might belong to. She continues to prod me to exceed my goals in these professional associations and constantly provides me with new ideas and ways to improve my work.

Within my firm I have several mentors. There are mentors that I go to when I have a tough legal issue to brief. Recently while working on an extensive brief on a very narrow issue, I mentioned the assignment in passing to one of my mentors and generally asked his thoughts. This mentor (who reviews all new published cases each week) found a decision directly on point. Even though this wasn’t his case, the next morning, I had a printed copy of this pleading on my chair. I have a mentor who has helped me when I have a client who has been difficult to work with. I have a mentor who will just let me vent when I’ve had a rough day. I have a mentor who helps me with case strategy in ways I never imagined, helping me see that most of my cases are like chess games and I need to be thinking four or five steps ahead.

Now obviously to some extent, there are quite a few similarities between a mentor and just a plain old friend. But I think a mentor is both. A mentor is someone who has, to whatever extent, walked the same road as you. They already walked a mile in your shoes and they probably have insight into what stretches of that mile are tough. Like a friendship, it’s important to realize that relationships are two-way streets. You can’t just accept their counseling and provide nothing in return. Within my firm, my mentors are the people I work hard for. On each of their cases I try my best to produce an exceptional product (whether it be in written brief or oral argument on motions) so that they know their cases are in good hands. To my mentors outside my firm, I jump at any opportunity to support them in their legal and personal endeavors, including volunteering for tasks they ask for help with and lending a hand when their lives have complications.

So now that you understand how important mentors are, the question becomes, how do you get one? There are countless ways to find a mentor. Here are some ideas that I have seen work well.

- Apply for a formal mentorship through the Kansas Bar Association. On the KBA Young Lawyers Section members-only portion of the Web site, there is an application for a mentorship program. The KBA will take your request for a mentor and match you with another lawyer whose profile you describe. You can access this application by logging onto www.ksbar.org; Members’ Only, then “Sections,” “Young Lawyers Section,” and “Protégé Application.”

- Get involved in your local bar association. The only way to meet lawyers more experienced than yourself is to go out and shake hands. You will be surprised at how quickly you will make a connection with another lawyer more experienced than yourself by just putting yourself out there. Foster these connections by following up with those lawyers who left a good impression on you. Send them an e-mail, ask them to lunch, seek them out at the next local bar meeting. They will be flattered that you remember them and quite likely feel compelled to get to know you.

(Continued on Page 11)
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Why Don't We All Get Along

By John D. Jurcyk, McAnany, Van Cleave & Phillips P.A., Roeland Park, Kansas Bar Foundation President

Reading KBA President O’Brien’s column in the September KBA Journal about the attendance issues at our annual meeting gives me pause to think. The values of camaraderie and friendship cannot be overstated and the tools to foster those values should be used by our members.

In the past few months, several high profile situations have arisen among celebrities, which only reinforce our need to get along. Does the name of the U.S. Open women’s tennis championship quickly come to mind? Or, is the greatest memory of that event Serena Williams’ outburst and berating of a linesman? Perhaps the saddest thing about that outburst was some commentary I read, which suggested it was not bad for tennis and was good because it breathed life into a sport desperately lacking mainstream attention.

The most memorable moment of the MTV Video Music Awards was not the accomplishment of a young star. Rather, it was Kanye West jumping onto stage and rudely interrupting the presentation to Taylor Swift.

Was our nation shocked when South Carolina Congressman Joe Wilson shouted “you lie” during a presidential speech on health care legislation? I think not. T-shirts were created immortalizing Wilson's famous insult and reports are that donations to the congressman’s campaign coffers following the event exceeded $1 million.

Experts point to a variety of reasons for the apparent fall in civil standards. CBS News has come up with a report on “America the Rude-iful.” In the abstract, no one thinks we are a better country when this type of behavior occurs. As lawyers, we need to act as leaders in the cultural battle to retain civility.

It is not all bad news. As practicing lawyers, we find that our relationships with our colleagues are much more civil than those displayed on television. While the civility of America is getting some attention because of the actions of celebrities, it is clearly not a new problem. As a youth, our first president, George Washington, had some of the volumes of his schoolwork that still survive today. The second of those volumes contains a section titled, “Rules of Civility and Decent Behavior in Company and Conversation.” Washington penned 110 rules, which were originally compiled by the Jesuits in France in 1595. Several of those rules speak to us as lawyers to this day. The first rule is one we can all hold to our heart. It states, “Every action done in company, ought to be with some sign of respect, to those that are present.” As a lawyer we will have greater satisfaction in working with a worthy adversary. Respect for our opponent is not a sign of weakness and does nothing to hamper the cause of our clients. Washington’s 58th rule stated, “Let your conversation be without malice or envy, for 'tis a sign of a tractable and commendable nature: and in all causes of passion admit reason to govern.”

As lawyers we sometimes take on causes of passion for ourselves. In all matters, our ethical code mandates that we zealously advocate for our clients and their passions. It is not required that we do so without civility. In fact the opposite is true. Rule 3.4 of the Kansas Rules of Professional Conduct mandates treating an opposing counsel and party with fairness.

Civility in our profession is not an issue that is limited to lawyers. The public and the citizens have a right to insist that we have civility in our legal and judicial systems. Our clients expect us to be tough and mean and it is our job to educate them on the long-term ramifications of such tactics. Honest candor and civil discourse with our opponents is not a sign of weakness and we need to educate our clients that that is the case. Until our clients admire the relationship that adverse counsel had in the “Perry Mason” show and above that demonstrated in “Boston Legal” or “L.A. Law,” we will continue to have a need to be leaders in this area.

The Bar Association is doing what it can to help. I attended this year’s joint meeting with judges, and it was a rare social occasion when there was an opportunity to meet with both sides. I was recently invited to participate in the Wichita Bar Association’s Judges Day. The collegial feel of those members at their meeting was a wonderful experience. As William Shakespeare said in his play, “The Taming of the Shrew,” “Do as adversaries do in law. Strive mightily, but eat and drink as friends.”

Shakespeare got it right, and the annual meeting of the Kansas Bar Association is just one opportunity for us to practice what his writings held as a good thing. I encourage all lawyers to be active in their local bar associations and develop social relationships with opposing counsel. Attend our Bar Association’s annual meeting. The time away from the stress of practice, the camaraderie with the Judiciary and members of the Bar, along with the legal education received will benefit all concerned. We will create leaders on the issue of civility. We will do our best to behave in that fashion and condemn behavior that does not comport. It is in our interest for the future of our profession and our clients’ interest to do so. We are privileged to be members of the legal profession. That privilege carries a responsibility to secure the profession’s future. That future becomes a lot more uncertain without our leadership in the areas of civility.

About the Author

John D. Jurcyk, McAnany, Van Cleave & Phillips P.A., Roeland Park, is a longtime member of the KBF and became a member of the Kansas Bar Association in 1984.
Advance Notice
Elections for 2010
KBA Officers
and
Board of Governors

It’s not too early to start thinking about KBA leadership positions for the 2010-2011 leadership year.

OFFICERS

KBA President-elect: (Current – Glenn R. Braun, Hays)
KBA Vice President: (Current – Rachael K. Pirner, Wichita)
KBA Secretary-Treasurer: (Current – Gabrielle M. Thompson, Manhattan)
KBA Delegate to ABA House: Linda S. Parks is eligible for re-election.

The KBA Nominating Committee, chaired by Thomas E. Wright, Topeka, is seeking individuals who are interested in serving in the positions of President-elect, Vice President, Secretary-Treasurer, and KBA Delegate to the ABA House of Delegates. If you are interested, or know someone who should be considered, please send detailed information to Jeffrey Alderman, KBA Executive Director, 1200 SW Harrison St., Topeka, KS 66612-1806, by Friday, Jan. 15, 2010. This information will be distributed to the Nominating Committee prior to its meeting on Friday, Jan. 29, 2010. In accordance with Article V, Elections, Section 5.2 of the Kansas Bar Association Bylaws, candidates for the above positions may be nominated by petition bearing 50 signatures of regular members of the KBA with at least one signature from each Governor district.

BOARD OF GOVERNORS

There will be four positions on the KBA Board of Governors up for election in 2010. Candidates seeking a position on the Board must file a nominating petition, signed by at least 25 KBA members from that district, by Friday, March 5, 2010. If no one files a petition, the Nominating Committee will reconvene and nominate one or more candidates for any open position(s). KBA districts open for election in 2010 are:

• District 1: Incumbent Kip A. Kubin is eligible for re-election. Johnson County.
• District 7: Incumbent Laura L. Ice is not eligible for re-election. Sedgwick County.

For more information

To obtain a petition for the Board of Governors, please contact Kelsey Hendricks at the KBA office at (785) 234-5696 or via e-mail at khendricks@ksbar.org. If you have any questions about the KBA nominating or election process or about serving as an officer or member of the Board of Governors, please contact Thomas E. Wright at (785) 271-3166 or via e-mail at twright21@cox.net or Jeffrey Alderman at (785) 234-5696 or via e-mail at jalderman@ksbar.org.
The Membership Spotlight has primarily focused on the tangible benefits of your KBA membership over the last few issues. However, one of the most important benefits of your KBA membership is intangible and the size of your benefit depends upon you and how you choose to use it and grow it. The benefit of which I am writing is the personal connections you make with other members within the KBA.

Over the last few months several members and nonmembers have asked me why they should remain/become members in the KBA when they can network in online groups, such as Facebook, LinkedIn, and Twitter at little or no cost to themselves. Of course, I mention the tangible benefits of being a KBA member, but I also point out that while these online groups do offer networking opportunities they do not offer the personal connections that the KBA does.

Yes, you can “connect” with someone online and instant message that person, text them, e-mail them, or you can tweet about what is happening in your life and your followers can keep up with you that way, but this is cold and impersonal; you are not interacting with the other individual in a fulfilling way. At KBA CLEs and at the KBA Annual Meeting, our members have the opportunity to see former law school classmates and “catch up” with friends and acquaintances in person. When I am at these events, I see smiles on KBA members’ faces as they greet their friends and acquaintances with handshakes and pats on the back, as they wave at each other in the hallways. I hear laughter over jokes and young lawyers receive the benefits of lessons learned from war stories told by veteran attorneys. This is the personal connection that trumps the Internet connection.

This is one of the most important benefits of your membership: the opportunity to interact personally with others in your profession and to create relationships that are lifelong. As I said at the beginning, the size of the benefit depends upon each member and what each member is seeking from the KBA. So I ask: How many KBA personal connections have you made? How many can you make in the coming year?

Got Mentors?
(Continued from page 7)

• Don’t make assumptions about what a mentor is. A mentor is not someone “x” number of years older than you nor does a mentor even have to be a lawyer! A mentor can be someone who merely provides insight into whatever situation you find yourself because of their experiences. Any and all lawyers who have been in your office longer are potential mentors.

• Talk to your bosses about things other than the specific assignment you are handling. Tell them about a good or bad experience you may have just encountered (whether it be with a judge or a client); ask their advice on how to handle an issue and generally pick their brain. As you engage them, they will be more likely to spend time helping you advance your career.

• Say yes! When someone invites you along to anything – lunch with colleagues, golf with friends, conferences with clients, dinner at their house with their family, SAY YES! An invitation from a mentor is the first step to expanding the relationship beyond its formal constraints. Even if the invitation is outside your comfort zone or if you are busy with other matters, SAY YES. The first few years of your practice, it is vital.

Hopefully each of you is already building a support network of mentors. If not, hop to it. Mentors don’t find themselves. And you will never know how much you need or rely on mentors until you have them.

Jennifer Hill may be reached at (316) 263-5851 or by e-mail at jhill@mtsgh.com.
KU Law: A Practical Experience

By Jason Brinkley, University of Kansas School of Law

I grew up around lawyers – my dad and aunt (Jeri Davis, KU ’79) are both attorneys – so I knew firsthand what it looked like to practice law, but I had no concept of what it took to get there. As I began to apply to law school, my dad began to tell me stories of what the next three years of my life would be like – “There will be reading, some more reading, and when you should be sleeping, you will be reading.” Now my dad went to law school at the University of Wyoming, so his stories also included frigid temperatures, massive snow storms, and gale force winds, therefore I attributed some of his memories of constant reading to the fact that he was continuously snowed in at the library.

However, it wasn’t just my dad telling me what my life would be like for the next three years, I also had lawyer friends who told me, “Call me when you leave the library in three years – it will be great to catch up.” Worse yet, they told me that even with all the reading and library time I wouldn’t learn anything about the practice of law or how to be a lawyer. Thus, as I made my way to Green Hall for the first day of class, I resigned myself to that fact, and informed Sara (my wife) and Lexie (our dog), that the next three years of my life would be spent in the Wheat Law Library learning legal theory and not learning what it meant to practice law. Fortunately for me, that is not what I found at KU – instead I found practical instruction and opportunities.

One of the things that makes KU great is its professors. Whether it is Professor Martin Dickinson teaching tax law; Professor Webb Hecker teaching business associations; Professor Michael Davis teaching property law; Professor Christopher Drahozal teaching contracts; Professor Stephen McAllister teaching constitutional law; or Judge Terry Bullock instructing students about “getting your ticket punched” or the “hottest hot potato of your career” in professional responsibility. KU has great professors and, more importantly, their lessons are practical. However, when it comes to practical instruction no professor, in my opinion, does it better than Professor John Peck.

When I came to law school I wanted to be – and still do – a water lawyer, so I knew I was going to take Peck’s Water Law class. I had read about some of Peck’s work and was excited to learn that he was a very practical teacher – at the time I didn’t know how practical – but I knew the class was going to be a great learning experience. Having worked on water issues in Colorado, I had some idea about the fundamentals of water law. Moreover, I understood there are other intricacies involved in the field (i.e., mind-numbing mathematical equations) which was a problem for me because I have never claimed to be a mathematician – I mean, I am in law school for a reason. I was, however, assured by practicing attorneys not to worry about the math because I could always find an engineer to explain those details.

With this assurance, I went to Water Law ready to learn. The topics were endless – the nuances of the Prior Appropriation Doctrine, riparian rights, and I was even ready for that inevitable day when Peck would inform the class that the U.S. Supreme Court had ruled in favor of Kansas in *Kansas v. Colorado* (as a Colorado native who grew up in the Arkansas Valley, it is still a bitter pill to swallow). However, he had other topics he wanted to address as well. Most importantly, he wanted to make sure that all of us had an understanding of the math behind the practice of water law.

For example, we learned about the calculations used to determine if a new groundwater well is appropriate in Groundwater Management District #3 – Allowable Aquifer Yield = 0.40AMS/25 + AR/12. With equations like this being tossed around I thought, “Wait, I was told I didn’t need to worry about the math because that is what engineers are for.” However, Peck explained to us that it was important as an attorney to be able to explain these concepts to your client. This didn’t mean that engineers couldn’t assist you, but it did mean that as an attorney you should always strive to understand all your client’s issues because that is how you best serve your client. I am glad I learned this lesson and not what I expected out of Water Law. Any professor could have explained legal doctrines, but it took a practical professor – who is both an engineer and an attorney – to explain how an attorney actually practices law.

The other thing that sets KU apart is its numerous clinical opportunities. Presently, there are 11 different clinical programs at KU. These programs give students like me an excellent opportunity to get legal experience – especially during economic times like the one in which we are currently living.

I have completed one of these clinics, the Elder Law Clinic, and am currently participating in another, the Clinical Externship Program. I have “clerked” for Kansas Legal Services in the Kansas City, Kan., office for both clinics and can say without reservation that these experiences have been both rewarding and educational. In both, I have assisted clients with their legal issues and have felt the thrill of resolving issues successfully and have learned from other situations when our clients did not have the law and/or facts on their side.

No class in law school can prepare you for the first time you talk to a client who has a real legal issue. A clinic can and does. Nor can the first year assignment of writing a demand letter give you an understanding of the importance of your choice of words to express your client’s interests until you actually have a client. A clinic can and does. Therefore, the 11 clinics at KU are a testament to the law school’s devotion to giving students the building blocks to become good lawyers with practical skills by the time we leave.

(Continued on next page)
The Diversity Corner

Offensive T-Shirts Raise Client’s Eyes

By Kelly Lynn Anders

From the Editor: “The Diversity Corner” is a new column dedicated to answering questions KBA members may have about diversity in the work place.

Question:

Dear Kelly,

I was recently invited to an offensive T-Shirt party, which required everyone to wear a T-Shirt that is politically incorrect. I thought about declining the invitation, but I decided to go because it sounded fun and unique, it involved a large group of close friends, and was completely separate from my position as a lawyer. My wife and I looked for some of the most offensive shirts we could find. Although we found plenty that made us blush, we finally opted to take the low-key route. I wore a shirt with a confederate flag on the front, and my wife wore one with a four-letter expletive largely plastered across her chest. Our shirts were very tame compared with others at the party, and we had a great time. Unfortunately, we had to stop for gas on the way home. As I was standing there pumping gas, a client pulled into the station and saw me. He came over to say “hello,” and I could see the expression on his face change before my eyes. We exchanged pleasantries and I explained where my wife and I had been. Although he looked relieved and seemed to be satisfied with my explanation, he has not treated me the same since. I think he might be judging my choice of T-shirts and assume that I must share the beliefs associated with that flag. Have we become so hypersensitive about being politically correct that we can never deviate, even for fun?

T-Shirt Offender

Answer:

Dear Offender,

Perceptions are so important in the legal profession. Clients, colleagues, and the public-at-large are always watching what we do and say, and even how we dress. It’s sometimes challenging to know when we can relax and not worry about these things – or how far we can push the envelope without going too far. Unlike many professions, lawyers may not always be on the clock, but their actions are always scrutinized. We’re private citizens who can sometimes be treated as public figures. We can deviate from being politically correct, but we must always be aware of how our choices will be perceived. Unfortunately, your choice of T-Shirt sends a very clear and potentially damaging message about your thoughts about diversity, tolerance, and inclusion. The confederate flag is a very controversial symbol of a frightening time in our nation’s history. Wearing a T-Shirt with this flag on the front is not a “tame” choice – even for an offensive T-Shirt party. Ironically, a shirt with a four-letter expletive would have been a less incendiary choice. So, we need not be “hypersensitive” about such things, just alert and aware. Think about the historical implications of such choices, and remember that, for many people, the confederate flag and “fun” don’t mix.

Call for Questions

The Diversity Corner seeks questions about diversity issues for future columns. Names will be withheld by request. Please forward questions to: Lisa Montgomery, Member Services Director, Kansas Bar Association, 1200 SW Harrison St., Topeka, KS 66612, or send an e-mail to lmontgomery@ksbar.org.

About the Author

Kelly Lynn Anders, associate dean for Student Affairs at Washburn University School of Law, is the 2009-10 chair of the KBA Diversity Committee and author of “The Organized Lawyer” (Carolina Academic Press, 2009).

About the Author

Jason Brinkley is a 3L at the University of Kansas School of Law. He grew up in Lamar, Colo., where he attended Lamar High School. He graduated from the University of Northern Colorado with a Bachelor of Arts in political science. He also met his wife, Sara, at Northern Colorado, where she graduated with a Bachelor of Arts in journalism.

Renew Your KBA Membership Today

www.ksbar.org
Great Bend Opened Its Arms to Vietnam Refugees

By Matthew Keenan, Shook, Hardy & Bacon, Kansas City, Mo.

L ast month Tim O’Brien’s column wrote about the joy of seeing new citizens take the oath before the federal judiciary. That column prompted a conversation with my dad, and he reminded me of a story about my hometown’s role in welcoming immigrants in the summer of 1975. A story that has never been told. Until now.

Under the historical annals of the word “Vietnam” there are many significant milestones. Most are not uplifting testimonials of humanity. And whatever disagreement may exist about when Vietnam went from a “conflict” to a full-fledged “war,” there is no question about when it ended. That was 1975. Beginning in the early spring, and culminating by March, the South Vietnamese military began pulling out of the northern regions, with the hope of consolidating efforts further south, near Saigon. One news headline, published in the March 18, 1975, New York Times, reported: “South Vietnam Reported Yielding Most of Central Highlands Area; Main Evacuation Routes Cut Off.” The opening line read: “The Saigon government has decided to abandon most of the Central Highlands of South Vietnam because the area has become militarily indefensible, well-placed Western sources said today.”

Six weeks later, the entire country was indefensible. On April 29, Saigon had fallen to the Viet Cong. That same day, President Ford ordered a complete evacuation of all American personnel. The images of helicopters perched atop an elevated landing pad with a long stream of refugees trailing away is one of the most lasting images of the war’s end.

One United Press International reporter – Paul Vogel – described what that scene was like: “There were people, mostly families where the women and children did not get aboard the aircraft, who were lying in front of the fields of the airplane as it began taxiing. It’s the most frightening experience I’ve ever had. It’s the worst story I’ve ever had to cover, every viewpoint: humanity, men being cruel to other men, the fact of human beings turning into pure animals. I’ve seen mob scenes before; this was outright panic.” You can hear his account online: http://www.upi.com/Audio/Year_in_Review/Events-of-1975/Fall-of-Saigon/12305821478075-2/. Be advised – it’s chilling.

Within a week refugees began arriving on American soil. Initially, they were held at Guam, with 50,000 kept at its tent city. A May 1975 Time magazine article quoted one official at Guam with this sound bite: “I only hope it doesn’t sink.” The main problem noted one observer, “was still finding enough American sponsors to help feed, clothe, and house the refugees after they leave the camps.” All told, the immigrant numbers totaled 120,000, and were initially kept at four military bases – Camp Pendleton, Calif; Eglin Air Force Base, Fl.; Indiantown Gap, Pa., and Fort Chaffee, Ark.

Considering the unpopularity of the war, refugees were not uniformly well received. In a presidential press conference on May 6, 1975, a reporter asked President Ford if it was true that he was “damn mad” about the adverse reaction of the American people to the Vietnamese refugees. “I am primarily very upset, because the United States has had a long tradition of opening its doors to immigrants from all countries. We are a country built by immigrants from all areas of the world, and we have always been a humanitarian nation.”

Fort Chaffee kept 20,000 of the immigrants. Three hundred miles to the north, in Great Bend, Monsignor Joseph Stremel at St. Patrick’s Church met with the parish’s Social Action Commission about enlisting support for assisting the effort. At the end of the meeting, Stremel declared: “We will sponsor these people.”

On Aug. 15, the Nguyen and Mai families arrived. There were five families in total, 27 in number, and they arrived by plane at the Wichita airport. They spoke not a word of English. To that point, they had escaped from many towns that were overrun by communists. The Nguyen’s left the Central Highland hurriedly as the Second Military zone became indefensible, including their town, Di-Linh. The main evacuating highway to the capital in the south was cut off. Going through the remaining route along the seashore, the family did make it to a coastal town, Vung Tau. A few days later, the family was again on the run via a fishing boat to international waters, as Saigon fell. There, a commercial ship sailing along with the Navy’s 7th Fleet, picked them up and carried them to Guam. From there, they traveled to Ft. Chaffee.

The Great Bend community opened its arms. One of the newcomers was Hoang Mai. He was 17 at the time. “When Vietnam was divided in 1954, my grandparents were not able to come into South Vietnam, which meant they could not
practice their Catholic faith in communist North Vietnam. That was the first thing we learned growing up about why we relocated to Di-Linh in the south. And so when the south was falling to the communists, we fled.”

“In Kansas, everyone was so nice” Hoang told me recently. “We have heard stories about some Vietnamese that were not as lucky as we were. There was prejudice and other issues. But not with us. The community was very accommodating.”

One of the families instrumental in helping was Terry and Jerry Esfeld. “Helping them was exhausting, as we felt their needs were greater than they really were.” Terry told me recently. “Our ‘ears’ got tired when helping, as they could not speak English and we found ourselves shouting. They had the desire and work ethic to make money and you could imagine how hard it was for them to have the trust and understanding that ‘their money’ that they were giving to a total stranger was going to be theirs when they needed it.”

There are four anecdotes worth sharing.

Since you asked, some clothes would be nice. One resident, Donna Staab shared with me a couple of stories: “I remember asking Dien – a young twenty-something if there was anything he/she needed right now.” Dien answered quickly by modestly pulling his trousers out to show me his ‘underwear’ – which was a pair of swim trunks. Through the interpreter he told us it was the only underwear he’d had since he arrived in the United States. After learning sizes, my husband, Larry, and I went immediately to Sears to get underwear for everyone. It’s a very poignant memory for me – these 30 years later – as I recall telling my young children that night about the boat people who had left their war-ravaged country with only the clothes on their backs … that night my kids decided to give the family the bunk beds they were sleeping in. And we did.”

Learning the language. “My youngest son, Jeremy, was in the fourth grade when ‘our family’ came,” Donna told me. “One of the family’s little girls was in the same class. Her name was Voc. Jeremy taught her how to write her name in English. At the end of that same year Jeremy came running out of school with a look of great consternation … Voc had won the Spelling Bee (and Jeremy had lost his edge …).”

The C-section. On a couple of occasions Donna Staab took the women to the hospital to give birth. “They explained to me that in Vietnam men didn’t accompany their wives to the hospital to participate in the experience. Ve was in her late 30s as I recall when she called to tell me she was ready to go. She was in labor for several hours and her doctor made the wise decision to perform a Caesarean section and deliver the baby. The good doctor did his best to explain the procedure to the one person in the whole household who spoke less English than anyone else. Ve smiled and nodded her head as if she understood. My nursing career taught me that “informed consent” was really a very important concept, and I was painfully aware that whenever a member of our adopted family was really trying to understand what we were saying he or she would always smile and nod. They worked so diligently to communicate with us I decided to give Ve my best – clearest – description of what was happening. I made a “sawing” motion over her belly and I said “Baby cut – baby OK.” Meaning, in the simplest terms, we would make an incision and take the baby out, and the baby would be OK. Ve smiled … nodded. It just didn’t feel right. God’s grace was with us.

At the last minute, I phoned my husband and asked him to pick up Vang, Ve’s married daughter, and bring her to the hospital right away. When Vang walked in the room Ve said something in rapid Vietnamese and Vang turned to me with tears welling in her eyes “My Mother told me, ‘you take care of children now, I go to other room to die.’” In my earnest desire to let Ve know that her baby would be OK … I hadn’t told her that SHE would be OK too … and she thought she was going to die … all the time smiling and nodding. No matter how well we think we understand the message we’re sending … when we’re traveling the chasm of cultural boundaries … we must do everything we can to help each of us understand the other. No matter how much I think I know about the situation … there is more valuable information to come to light. With God’s grace, and Vang’s intercession, Ve went into the other room to ‘live’ and not to ‘die’. Both she and her new baby boy, named Hoa, were fine.”

The workers’ comp claim. The final story has a legal angle. One of the immigrants hurt his back at work. His attorney was Larry Keenan, who lived across the street from the convent and worked more baptisms, funerals, and first communions than the Pope. The only translator in town owned the Vietnamese restaurant; the testimony of what happened was obviously critical. Larry’s question was “when you lifted the pipe did you hurt your back?” From there, the translator spoke to the client; the exchange was intensive; voices were raised, like two people having a heated discussion on what seemed like a pretty simple proposition. And when the translator was finished with the exchange, she looked to Larry and gave a one word reply: “Yes.” Judgment entered.

Today, every one of the immigrants who arrived in Barton County in August 1975 became U.S. citizens. All of the children attended college and now work in various industries, including engineering, health care, and information technology. Tony Nguyen was not quite a year old in 1975. He told me “there are many people that dream of coming here to get their shot at a better life. I give my mother and father a lot of respect for coming here. They risked death on those little boats on the open sea. They left friends and family behind. They were willing to start with nothing and work their way up.” Mission accomplished.

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

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**Changing Positions**

Aimee M. Betzen has joined the Law Offices of Daniel A. Parmele, Wichita.
Matthew W. Bish, Jeremy L. Graber, Joshua T. Hill, Eric M. Pauly, Johnathan A. Rhodes, Bradley D. Serafine, and Justan Shinkle have become associates with Foulston Siefkin LLP in the Overland Park, Topeka, and Wichita offices.
John Bodel has joined Harper Law Office, Topeka.
Michael P. Cannady has joined Adams Jones Law Firm P.A., Wichita.
Richard B. Chambers, Hutchinson, has taken a position as regional coordinator for the Rob Wasinger for Congress Campaign.
Kenneth W. DeLaughder has joined Hines & Ahlquist P.A., Erie.
Darron C. Farha has joined Valparaiso University, Valparaiso, Ind., as vice president and university counsel.
Neil C. Gosch has joined Sanders, Warren & Russell LLP, Overland Park, as an associate.
Dustin L. Grant has joined Schmitt, Manz, Swanson & Mulhern, Overland Park.
John G. Hansen has joined Schlee Huber McMullen & Krause P.C., Kansas City, Mo., as a partner.
James Harty has joined Social Security Administration’s Office of Disability Adjudication and Review in Johnstown, Pa.
Ryan P. Hellmer has joined Goodell, Stratton, Edmonds, & Palmer LLP, Topeka.
Seth A. Jones has joined Arthur-Green LLP, Manhattan.
Gregory B. Kuhn has joined Lathrop & Gage LLP, Kansas City, Mo.
Christine M. Larson has joined Sharp McQueen, Liberal.
Angela R. Markley has joined Q-Comm Corp., Overland Park.
James S. Oswalt has joined the firm of Oswalt, Arnhold, Oswald & Henry, Hutchinson.
Justen P. Phelps has joined the Juvenile Division of the Sedgwick County District Attorney’s Office, Wichita.
Edward L. Robinson has joined Joseph & Hollander P.A., Wichita.
Danielle M. Saunders has joined Kansas Legal Services, Wichita.
Kenzie M. Singleton has joined the Kansas Coalition Against Sexual & Domestic Violence, Topeka, as a project attorney.
Pamela L. Smith has joined Medicalodges Inc., Coffeyville.

**Changing Locations**

Shawn P. Lautz and Benjamin J. Fisher have formed the Law Offices of Lautz and Fisher, 1 E. 9th, Ste. 204, Hutchinson, KS 67501.
Lawson Law Office LLC has moved to 6750 Antioch Rd., Ste. 301, Overland Park, KS 66204.
George D. Porter has moved to Two Pershing Square, 2300 Main, Ste. 900, Kansas City, MO 64108.
The new firm of Guin Martin & Mundorf LLC is located at 9237 Ward Parkway, Ste. 240, Kansas City, MO 64114.

**Miscellaneous**

Edward J. Healy, Wichita, has become a board member of the Wichita Community Foundation for 2009-10.
Robert S. Jones, Salina, has been granted fellowship in the American Academy of Matrimonial Lawyers.
Brooks G. Kancel, Wichita, has been selected to participate in the Wichita Metro Chamber of Commerce 2009 Leadership Wichita class.
Bruce Keplinger, Overland Park, has become a Fellow of the American College of Trial Lawyers.

**Correction:** Cory Barash has been with EIP Corp., Overland Park, for six years. It was erroneously reported in the October 2009 KBA Journal that he had recently joined EIP.

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.

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**“Dan’s Cartoon” by Dan Rosandich**

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**“Dan’s Cartoon” by Dan Rosandich**

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WWW.DANS CARTOONS.COM
William Alva Bonwell Jr.

William Alva Bonwell Jr., 81, of Wichita, died Sept. 1. He was born Nov. 16, 1927, in Newton, the son of William Alva and Beatrice (Colvin) Bonwell and was educated in the Wichita public school system. In 1949, he received a bachelor’s degree from the University of Wichita in political science and, in 1952, a law degree from the University of Kansas School of Law.

In 1952, Bonwell was commissioned as a first lieutenant in the U.S. Army Judge Advocate General’s Corps, 9th Infantry Division, where he was stationed in Goeppingen, Germany. He returned to Wichita in 1955, where he practiced law for more than 50 years, specializing in probate and real estate law. For many years, he served as a member and officer of the Wichita Bar Association Ethics Committee and he received the President’s Award for Outstanding Service in 2004.

He was active in the community, serving as a scoutmaster, a member of the Human Resource and Development Advisory Board, president of the Community Planning Council, and a member of the board of directors for both the Legal Aid Society and the United Way. He was awarded a Distinguished Service Award from the Quivera Council, Boy Scouts of America, and Distinguished Service Citations from the city of Wichita (1968 and 1975). As a member of the Alumni Association Board from 1962 to 1965, he participated in the transition from Wichita University to Wichita State University.

Bonwell was as passionate about law as he was about racing pigeons. Known for his long-distance racing pigeons that received national and international recognition, some were inducted into the national hall of fame of the sport. Bonwell served as legal counsel and president of the American Racing Pigeon Union and was honored for “Outstanding Service to the Sport of Pigeon Racing” in 1975. In 1973, he founded the American Pigeon Racing Museum and Library (World of Wings), located in Oklahoma City.

Survivors include wife, Gloria, of the home; and children, Lisa Marie Bonwell; Colorado Springs, Colo.; William A. Bonwell III, Henderson, Nev.; Amy Anne Bonwell, Bridgewater, N.J.; and Brent Lewis Bonwell, Santa Fe, N.M. He is also survived by nine grandchildren; two great-grandchildren; and his brother, Dr. Charles Bonwell.

Hon. Robert Haskins Miller

Hon. Robert Haskins Miller, 90, of Topeka, died Sept. 9. He was chief justice of the Kansas Supreme Court when he retired on Sept. 1, 1990. He was born March 3, 1919, in Columbus, Ohio, the son of George L. and Alice Haskins Miller. He attended public schools in Columbus and Pittsburgh, Penn. He received his bachelor’s degree from the University of Kansas in 1940 and his law degree from the University of Kansas School of Law in 1943.

Miller served in the security and intelligence division of the U.S. Army during World War II and was discharged in 1946. He practiced in Miami County, either as a sole practitioner or in partnership with Robert I. Nicholson, from 1946 until 1960; and served as county attorney, city attorney, and was attorney for the school boards. In 1960, he was elected as a judge of the 6th Judicial District and served until 1969 when he was appointed a U.S. magistrate by the judges of the U.S. District Court for the District of Kansas. He served in that capacity for more than six years. Miller was appointed to the Kansas Supreme Court by Gov. Robert F. Bennett in 1975 and became chief justice in 1988.

He was on the Kansas District Judges’ Pattern Jury Instructions Committee and later served on the Kansas Judicial Council. He also served on the Judicial Ethics Advisory Panel and the Kansas Governmental Ethics Commission for more than 10 years. He was a Rotarian for more than 40 years and was president of the Rotary Clubs of Topeka and Paola. Miller was a member of Phi Gamma Delta and Phi Delta Phi. He was also a member of the American Legion for more than 60 years; the Masonic Lodge for more than 50 years; and belonged to the Arab Shrine, the Shrine Greeters, and the Legion of Honor.

He is survived by his wife, Angie, of the home; sons, Stephen F. Miller, Paola, Thomas G. Miller, Shawnee, and David W. Miller, Peoria, Ill.; and eight grandchildren. He was preceded in death by a daughter, Stacey Miller Vale.

David Freet Patzman

David Freet Patzman, 70, a Kansas City attorney and mayor of Mission Woods, Kan., died June 1 in Mission Woods. He was born Sept. 17, 1938, to the late Dr. Dean Patzman and Elizabeth Freet Patzman. He grew up in Johnson County and earned a bachelor’s degree, magna cum laude, from Harvard University in 1960. For several years, he served in the U.S. Army Reserves, attaining the rank of captain.

He was a senior partner with Morrison, Hecker, Curtis, Kuder, and Parrish (now Stinson Morrison Hecker), from which he retired in 2003. He joined the firm in 1963, following his graduation from Harvard Law School and became a partner four years later.

Patzman returned to legal practice following his retirement from Morrison Hecker, becoming a staff attorney with the Federal Chapter 13 Bankruptcy Trustee’s Office in Johnson County, a position he held until earlier this year. Throughout his life, Patzman pursued a dedication to international exchange and outreach, beginning with his own experience as an American Field Service (AFS) high school exchange student in Germany in 1955. Over the years he held numerous leadership positions with AFS at the local, national, and international levels, including several years of service as a board member of both AFS USA and AFS International.

Patzman is survived by his wife, Sandra, of the home; two sons, Andrew Patzman, Washington, D.C., and John Patzman, Denver; sister, Janet Serrano, Hollister, Calif.; one grandson; and his international family. He was preceded in death by his parents and his sister, Ann.

Gerrit H. Wormhoudt

Gerrit H. Wormhoudt, 83, a retired attorney from Fleenor, Goosing, Coulson & Kitch in Wichita, died Sept 28. He was born July 27, 1926, in Mount Pleasant, Iowa, the son of Andrew and Rachel Wormhoudt. He enlisted in the U.S. Navy and after World War II, attended Northwestern University, receiving his bachelor’s degree in 1950 and his law degree in 1952.

He was a member of the Wichita and Kansas bar associations, a founding board member of the Wichita Collegiate School, and a board member of the Institute for Justice.

He is survived by his wife, Angie Wormhoudt; children, Dirk Wormhoudt, Julie Wormhoudt, Eric Wormhoudt, David Holding, Dianna Stang, Diette Basu, and Danielle Holding; brother, Edward Wormhoudt; and eight grandchildren. He was preceded in death by his parents.
Welcome Fall 2009 Admittees* to the Kansas Bar

| Philip David Albrecht               | Monika Lynsey Groom               | Daniel Laurus Magill               |
| Jennifer Ann Amyx                   | Jennifer Denise Hall               | Aaron Oliver Martin                |
| Rae Lynn Anderson                   | April Lynne Hall-Key               | Traci Elizabeth Martin             |
| Jonathan Bond Anderson              | Thomas J. Hamilton II              | Brant Adam McCoy                   |
| Brutrinia D. Arellano               | Burton M. Harding                  | Nora Cahill McCoy                  |
| Andrew James Argetsinger            | David A. Hardy                     | Justin Louis McFarland             |
| Michael Thomas Auer                 | Jeffrey Alan Harris Jr.            | Jennifer Jo McKenna                |
| Kasey Alanna Barton                 | Geri Lynne Hartley                | Christopher Bruce McKinney         |
| Emily Kathleen Baxter               | Sean Stephen Healy                 | Nicholas James Means               |
| David G.A. Becker                   | Ryan Patrick Hellmer               | Kevin William Mechtley             |
| Joseph Scott Behzadi                | Angela Dawn Herrington             | Casey Young Meek                   |
| Timothy Michael Belsan              | Elizabeth Jordan Hickert Fike      | Amanda Marie Meglemre              |
| Louis King Biegeleiseen             | Darcy Demetre Hill                 | Charles Daniel Miller Jr.          |
| Matthew William Bish                | Joshua Thomas Hill                 | Sarah Arlene Mills                 |
| Stacey Lynn Blakeman                | Marceda Michelle Hill-Starks       | Ellen Christine Montgomery         |
| Bridget Moria Boggess               | Kasey Joan Hollinrake              | Katie Ann Morgan                   |
| Jana Sue Bradfield                  | Joshua Charles Howard              | Shane Morrissey                    |
| Keith Alan Brock                    | Crystal Lynne Howard               | Amanda Marie Morrison              |
| Erin Michel Bruce                   | Paul Jerome Huffman                | Julia Ann Mowers                   |
| Matthew Ryan Burgardt               | Stephen James Huggins              | Catherine Frances Mulvaney         |
| Leigh Lauren Burke                  | Ronald Gene Huston Jr.             | Kyle Patrick Murray                |
| Kari Roxanna Burks                  | Beau Allen Jackson                 | Weaver Robert Nelson               |
| Adam Reid Burrus                    | Ellen Marie Jensby                 | Joshua Adam Ney                    |
| Matthew Dwight Buser                | Neal David Johnson                 | Brian Michael Nye                  |
| Emily C. Canedo                     | Andrew Michael Johnson             | Elizabeth Lee Oliver               |
| Jonathan Robert Clayton             | Seth Austin Jones                  | Kimberly Ann Overstreet            |
| Jonathan S. Cline                   | James Michael Jordan               | Katherine Alicia Paulman           |
| Travis John Coberly                 | Clayton James Kaiser               | James Pavisian                     |
| Matthew Hanten Conley               | Maria Grazyna Kaminska             | Joseph Michael Penney              |
| Paul William Cope                   | Ethan Seth Kaplan                  | Erica Nicole Perkin                |
| Shawnah Kae Corcoran                | Shannon T. Kempf                   | Demetrious Joachim-Jore Peterson   |
| Larry Don Crow Jr.                  | Alex Joseph Ketzner                | Corinne MichelePetrik              |
| Milfred Douglas Dale                | Jennifer Renee Kiper               | Sara Lynne Pfeiffer                |
| Danielle Nicole Davey               | Heather Rachelle Klaassen          | Callie Rae Pippin                  |
| Adam Steffen Davis                  | Paul Randolph Klepper              | Jessica Lin Vincik Piskorski       |
| Christopher M. DeBacker             | Carl Mathias Koupal III            | Jennifer Marie Priebe              |
| Kenneth Wayne DeLaughder            | Carol Ann Krstulic                 | Louis John Purvis                  |
| Tracey Theo Denton                  | Joanna Labastida                   | Jared Lee Reeves                   |
| Lauren Suzanne Douglass             | Anthony Edward LaCroix             | Valley A. Renshaw                  |
| Lisa Marie Drummond                 | Lori Louise Lalouette              | Nicolas Miller Restituto           |
| Kenneth Watford Estes               | Jesse Thomas Landes                | Johnathan Aaron Rhodes             |
| Adam Matthew Evans                  | Laura Elizabeth Lane               | Danielle Alyssa Rider              |
| Leila Shea Feldbauer                | Christine Marie Larson             | Bobbie Lee Riling                  |
| Eric Paul Fournier                  | Troy Alan Larson                    | Vincent James Rivera               |
| Meghan Sloan Fox                    | Justin Ross Leck                   | Jason Carl Robbins                 |
| Erica Marie Gage                    | Yoon Jae Lee                       | Rebecca Rose Rookstool             |
| Jessica Lynn Garner                 | Audrey Marie Lee                   | Daniel Day Royce                   |
| Blair T. Gisi                      | Mark Alan Lippelmann               | Daniel Theodore Porterfield Runge  |
| Neil Christian Gosch                | Douglas Lynn Longhofer            | Adam Garrett Sawatzke              |
| Jeremy Lynn Graber                  | Dakota Thompson Loomis             | Cassandra Marie Schach             |
| Dustin Lynn Grant                   | Heathen Ann Lottmann               | Timothy Martin Schapker            |
| Jessica Anne Gregory                | Seth Aaron Lowry                   | Jeremy Keith Schrag                |
| Valerie Jean Grey                   | Kimberly M.J. Lynch                | Danielle Kaleena Schulte           |
| *Eligible to be sworn in            | Angela Yvonne Madathil             | Samuel Bentson Sellers             |

*Eligible to be sworn in
Deadline to Submit 2010 IOLTA Grant Applications is Dec. 31

The Kansas Bar Foundation (KBF) is soliciting grant applications for the 2010 Interest on Lawyers’ Trust Accounts (IOLTA) that is abbreviated this year due to a change in the IOLTA grant cycle. In the past the IOLTA grant year has been April 1 – March 31. The KBF received permission from the Kansas Supreme Court to change the grant year to a calendar year cycle, beginning in 2011. Next year will be an abbreviated cycle, beginning April 1, 2010, and running through Dec. 31, 2010. For the 2010 IOLTA year, approved grants will be announced after the KBF Board of Trustees meeting in February 2010. The deadline for the 2010 grant application is Dec. 31, 2009.

The Kansas IOLTA program, approved by the Kansas Supreme Court in 1984, is supported by more than 3,500 lawyers across the state. The program collects interest from trust accounts in which funds are nominal in amount or are expected to be held for a short period of time. IOLTA grants are primarily aimed at funding programs that provide civil legal services for low-income people, law-related charitable public service projects, and improvements to the administration of justice, with the largest share going to provide direct legal services for victims of domestic violence.

Grant applications are reviewed by the KBF’s IOLTA Committee, which is comprised of appointees from the KBF, the Kansas Bar Association, the Kansas Supreme Court, the Kansas Association for Justice, and the Kansas Association of Defense Counsel. The committee forwards its recommendations to the KBF Board of Trustees for final approval.

In order to qualify for IOLTA funds, an organization must:

• Be a 501(c) (3) or 501(c) (6) if a local bar association,
• Use the funds for a specific charitable purpose, agree to an audit or a review of expenses;
• Provide quarterly and year-end reports as necessary; and
• Demonstrate fiscal responsibility and the ability to provide quality services.

For more information or to request an IOLTA grant application for 2010, contact Meg Wickham, manager of public services, at (785) 234-5696 or at mwickham@ksbar.org or visit www.ksbar.org/public/kbf/iolta.shtml.

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The federal advisory committees, after reviewing every rule to ensure that all time periods would be reasonable taking into account the effect of changing the time-computation method, concluded that virtually all time deadlines of less than 11 days should be extended to adjust for the effect of including intermediate weekends and holidays in calculating deadlines. To further simplify deadline computation, the advisory committees proposed changing most periods of less than 30 days to multiples of seven days. The advisory committee's adoption of seven-, 14-, 21-, and 28-day periods when possible, results in deadlines that will usually fall on weekdays because the final day falls on the same day of the week as the event that triggered the period. Thirty-day and longer periods were generally retained without change. The individual Judicial Council Advisory committees are currently conducting similar reviews of statutory time periods affecting their particular areas of expertise. The Judicial Council's proposed amendments to K.S.A. 60-206 will include amendments to statutes throughout the Kansas Statutes Annotated whenever the application of amended K.S.A. 60-206 will affect existing time periods and deadlines.

Other changes in amended Rule 6 and K.S.A. 60-206 clarify how to count forward when the period measured is after an event (e.g., 21 days after service of a motion) and the deadline falls on a weekend or holiday; and how to count backward when the period measured is before an event (e.g., 14 days before a scheduled hearing) and the deadline falls on a weekend or holiday. The proposed amendments also provide for computing hourly time periods, to address proceedings in which deadlines are expressed in hours (e.g., action must occur within 48 hours of the triggering event).

Amended K.S.A. 60-206 also provides that filing deadlines are extended if the clerk's office is "inaccessible." The proposed amendments provide flexibility for the court to define when a deadline should be adjusted or a failure to comply with a deadline should be excused because the clerk's office was "inaccessible." The proposed amendments, the federal Committee Notes, and the Judicial Council Civil Code Advisory Committee Comments do not attempt to define "inaccessibility," which can vary depending on whether a filing is electronic or paper, leaving the definition to supreme court or local rules and case law development.

This article has summarized the proposed amendments to time-computation under K.S.A. 60-206. To see the entire statute and the accompanying Comments drafted by the Judicial Council Civil Code Advisory Committee, look for a link on the Judicial Council Web site at www.kansajudicialcouncil.org.
Internet Expands Wars Over Content Ownership

By Larry N. Zimmerman, Valentine & Zimmerman P.A., Topeka

RECAP vs. PACER: Courthouse Content Wars

The Internet dramatically expanded ongoing wars over content ownership. Battles against file sharing music and movies continues in the courts and is broadening into fights between news outlets and online news aggregators. An interesting new twist has introduced those content wars technologies and philosophies into the public records of the federal courts.

Princeton University’s Center for Information Technology Policy (CITP) recently gained notoriety through the free advertising of a mass e-mails to attorneys from the U.S. federal courts. The e-mails warned about CITP’s newest technology project – RECAP. Fortunately, the empty warnings inspired more curiosity than concern.

RECAP Technology

Princeton's strategy is a two-part system for public record access. The first part is an archive of public domain documents filed in cases within the federal court system. Litigants, attorneys, and public advocates submit documents to the archive for cataloging and access without charge through a free software utility called RECAP.

RECAP operates as a plug-in extension for the Firefox browser available from Princeton at www.recapthelaw.org. RECAP springs to action when you log in to PACER from your viewer account. (RECAP does not activate when using PACER from your attorney filing login.) When you run a query for a court document, RECAP first checks the document in the Princeton archive.

If the document is available in the Princeton archive, RECAP provides it without a user fee. If the document is not already in the database, your search is passed to PACER. PACER serves you the document at the $0.08 per page user fee. The twist is that RECAP then submits the public domain document you just purchased to the Princeton archive. Any future search for that document by you or others will find it in the Princeton archive without a user fee.

RECAP Philosophy

The aims of RECAP’s creators are the political and social use of Internet collaboration to push for free and freely accessible access to the law. The RECAP Web site quotes the Supreme Court: “[I]t would be an odd result indeed were we to declare that our courtrooms must be open, but that transcripts of the proceedings occurring there may be closed, for what exists of the right of access if it extends only to those who can squeeze through the door?” (U.S. v. Antar, 38 F.3d 1348 (1995)).

Not all agree that making pleadings freely accessible equates to making them free of cost. Most acknowledge that providing access does incur some expense to create, maintain, and improve systems but there is frustration that using computerized systems requiring less real estate and management than paper systems are charged extra. Back in the beginning of electronic courts, Singapore successfully charged extra for paper filing and access to paper files to push users to computerization. PACER turned that logic on its head and charges users more (though modestly) for cost-saving tools.

Congress seems to have foreseen this paradox in the 2002 E-Government Act stating, “The Committee intends to encourage the Judicial Conference to move from a fee structure in which electronic docketing systems are supported primarily by user fees to a fee structure in which this information is freely available to the greatest extent possible.” RECAP arises out of frustration with the pace of implementing that free-of-charge access Congress envisioned.

RECAP and the Courts

Various federal courts have responded to RECAP mostly with warnings about potential security risks from open-source, free software. However, many attorneys already use the open-source, free Firefox browser required by RECAP and often do so because of documented security issues with the closed-source, proprietary Internet Explorer browser. RECAP can be enabled or disabled at the user’s discretion and control.

Another warning implied RECAP violates PACER terms of service. In fact, it has been carefully vetted by attorneys to carefully avoid such issues. RECAP simply allows you to access documents already in the public domain and to distribute public domain documents you have purchased. RECAP does not access or interfere with PACER servers.

The reaction of the courts has indicated that the greatest annoyance with RECAP is its potential disruption of the PACER’s user fee revenues. That would be a valid concern for the music, movie, and news industries but of questionable relevance to the courts as distributors of public law.

About the Author

Larry N. Zimmerman, Topeka, is a partner at Valentine & 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 Collection Attorneys Association and the American, Kansas, and Topeka bar associations. He is one of the founding members of the KBA Law Practice Management Section, where he serves as president-elect and legislative liaison.

To join the LPM Section or any other KBA section, you may register online at www.ksbar.org or call (785) 234-5696.
The KBA Title Standards Committee must acknowledge the invaluable contributions over many years, of stalwart member Harvey Snapp, who passed away in October 2007. His record includes a Bronze Star during World War II, 30 years representing Railroad Savings of Newton, 50 years of service to the Boy Scouts, St. Mary's Catholic Parish in Newton, the Knights of Columbus, the University of Kansas, and two KBA Distinguished Service Awards.

He was the franchise player for the committee and the driving force for the Kansas Title Standards Handbook, 7th ed. (2005), which would not exist but for his leadership. It was an honor to work with and against him, and his memory serves all who knew him as “how to practice law.” Members still recall when, in discussing an issue, the committee adopted Harvey’s Rule by acclamation: “No one ever lost a case by giving too much notice.” We were very fortunate for his manifest contributions, and privileged to be in his company. His professionalism and civility will always be with us.

David J. Wood
Title Standards Committee, chair, 2006-09
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E-mail: djwood@firstam.com

*6.2(b)
SHERIFF’S DEED – SERVICE OF NOTICE OF SALE

Problem: Seller took title by a Sheriff's Deed in a mortgage foreclosure action. Publication notice was given of the sale, however, a junior mortgagee who was a party and who had entered an appearance was not given notice of the sale pursuant to K.S.A. 60-205. Should you accept a deed from the Seller?

Standard 6.2(b): No. If any party who has entered an appearance was not given notice of the sale pursuant to K.S.A. 60-205, the sale is void. It must be set aside and a new sale held with appropriate notice given both under K.S.A. 60-205 to parties and K.S.A. 60-2410 to the public. Alliance Mortgage Co. v. Pastine, 281 Kan. 1266, 136 P.2d 457 (2006). But see K.S.A. 60-2416 and K.S.A. 60-504.

[K.S.A. 38-1710(a)(5) and K.S.A. 38-1714(a) 2/09]

6.12(b)
POWER OF ATTORNEY TO CONVEY HOMESTEAD

Problem (b): John and Jane Doe, husband and wife, wish to grant Sam Smith a Power of Attorney to sell, gift, transfer, mortgage or otherwise alienate their homestead. However, it is difficult or inconvenient for John Doe to join in the Power of Attorney with Jane Doe. May John Doe by separate document give his consent to Sam Smith to sell, gift, transfer mortgage or alienate the homestead?

Standard 6.12(b): Yes. K.S.A. 58-654 (as amended 2004) no longer requires that the husband and wife execute the same power of attorney instrument. The following Durable Power of Attorney is sufficient to accomplish this.

DURABLE POWER OF ATTORNEY ON HOMESTEAD

KNOW ALL PERSONS that I, John Doe, husband of Jane Doe, do hereby make, constitute and appoint, Sam Smith as my attorney in fact, to do any and every act and thing which I might do, and to enter into and perform on any and every contract, agreement, act, deed, instrument and thing as I might or could do, all on such terms and conditions as my said attorney shall determine in said attorney’s sole discretion, including regarding our personal residence and homestead, as described as:

Lot 1, Block 1, Subtraction Addition, Sedgwick County, Kansas (c/k/a 1234 Dark Alley, Wichita, Kansas 67000)

Sam Smith, as attorney-in-fact for my wife and myself, shall have full power and authority to contract, and to sell, transfer, convey, lease, assign, mortgage or in anywise to encumber or alienate our homestead property, and to execute any and all instruments in such transaction, for cash or credit, all as our
said attorney-in-fact shall determine, with full power vested in said attorney-in-fact to do all things necessary to effect the intended transaction.

This Durable Power of Attorney shall not terminate if I become disabled or in the event of later uncertainty as to whether either of us is dead or alive.

This Durable Power of Attorney is executed in conjunction with a separate Durable Power of Attorney executed by my wife Jane Doe to Sam Smith to exercise the above enumerated powers regarding the above described real estate which is our homestead.

I execute this Durable Power of Attorney in conjunction with my wife’s separate Durable Power of Attorney to reflect our joint consent as applicable or required by Article 15, Section 9 of the Kansas Constitution, and consent that the above appointed agent may alienate our interests in the above homestead, in whole or in part, and that the consent of such agent constitutes the consent of both principal and spouse, owners of the above described homestead property. This Power of Attorney is effective DATE [option to add expiration date].

IN WITNESS WHEREOF, I execute this Power of Attorney.

John Doe

[Add proper acknowledgement by “John Doe, husband of Jane Doe.”]

NOTE: As with 6.12(a), the drop dead provision is optional. The Grantor may wish to keep the Power of Attorney in force until revoked. The Title Standards Committee recommends the above form, noting the marginal difference in the 6.12(a) form text.

New 6.12(b) form, 8/08

16.5
MECHANICS’ LIEN – OIL AND GAS

(a) Problem: The record shows the filing of a lien against the oil and gas leasehold interest on real property pursuant to K.S.A. 55-180, K.S.A. 55-207 et seq. or K.S.A. 55-212 et seq. In examining the title for the owner of the surface and/or mineral owner (as opposed to the owner of the leasehold) or a mortgage holder of the surface and/or mineral owner, what requirements should be made?

Standard 16.5(a): These liens are filed against the oil and gas leasehold interest and therefore do not affect the merchantability of the landowner’s interest.

(b) Problem: Assume the same problem as (a) above except that you are examining for the leasehold interest holder or the crude purchaser.

Standard 16.5b: (a) The lien filed pursuant to K.S.A. 55-180 is filed by the Corporation Commission as a result of a claim of pollution under K.S.A. 55-178 and is against the person legally responsible for the proper care and control of an abandoned well [and] shall not include the landowner or surface owner unless he has operated or produced the well, has deliberately altered or tampered with such well thereby causing such pollution or has assumed by written contract such responsibility. This lien attaches to the oil and gas rights in the land and equipment located thereon.

Standard 16.5b: (b) The lien filed pursuant to K.S.A. 55-207 et seq. is a lien filed for labor and/or material supplied to a leasehold. A lien filed pursuant to K.S.A. 55-207 et seq. must be verified by affidavit and filed within six months of the last labor performed or material furnished. The lien must be filed with the Clerk of the District Court and indexed the same as liens against real estate; however, it is a lien against the leasehold interest only and does not attach to oil produced. Enforcement of the lien (K.S.A. 55-210) is in the same manner as enforcing mechanic liens against real estate (See Standard 13.3). The lien must be released.

Standard 16.5b: (c) The lien filed pursuant to K.S.A. 55-207 et seq. is a lien filed by the transporter of oil field equipment. The lien is perfected by filing within 120 days a verified statement in the office of the district court of such county where the equipment was delivered and the claimant must serve a copy of the statement on the owner of the leasehold by registered mail. The lien must be enforced by foreclosure within six months. The lien attaches to the equipment transported; therefore, it would not attach to oil delivered to a crude purchaser. The lien must be released.
Reflections on Lincoln's Kansas Campaign

By James P. Muehlberger

Acknowledgements: The author would like to acknowledge and thank Lin Fredrickson, reference archivist, Kansas Historical Society, for his assistance in obtaining some of the primary sources for this article; Professor Michael H. Hoeftch, for his comments and encouragement; Professor Peter J. Casagrande, who reviewed an early draft and made helpful suggestions; and Douglas L. Wilson, co-director of the Lincoln Studies Center at Knox College and whose book, "Lincoln's Sword: The Presidency and the Power of Words," was an inspiration for this article. Any errors contained herein are mine.
Introduction

I recently sat next to a Marine on his flight home from Iraq. He noticed that I was working on this article, pulled out his wallet and took out a yellowed copy of the Gettysburg Address. He told me that he carried Lincoln’s speech because he wanted it to be found among his personal effects if he fell in battle. How is it that Abraham Lincoln’s words, more than anyone else’s, continue to inspire and capture why a soldier gives his life so that the “nation might live”?

Obviously, Lincoln hasn’t done anything new lately, but we still feel his influence. What is it about the words and life of Lincoln that inspire so many today? Answers to these questions can be found by examining Lincoln’s December 1859 visit to Kansas, the furthest west he would travel in his life. The teachings of that campaign should particularly resonate with Kansas lawyers today who, as descendents in the profession that Lincoln did so much to ennoble, have a special connection with our greatest president.

It is not well-known that candidate Abraham Lincoln spent eight days touring and speaking in Kansas in 1859, just 11 months before his improbable election as the 16th president of the United States. The bypassing of this notable chapter in Kansas history and in Lincoln’s life by historians is perhaps understandable. Just a year earlier, Lincoln had waged a war of words with Stephen Douglas in their great Illinois debates during Lincoln’s failed run for the Illinois U.S. Senate seat. Two months later, the western politician delivered his historic speech and appeal to the eastern elite at the Cooper Union in New York City, which ignited his meteoric rise to the presidency. Lincoln’s Kansas tour, sandwiched between these historic events, has been largely overlooked. But as we celebrate the 150th anniversary of Lincoln’s only visit to Kansas, it is fitting that we consider the man who saved our republic, ended slavery, and put America back on its course as a beacon of freedom.

This article examines Lincoln’s Kansas campaign, with particular emphasis on his speeches. I will begin, in Part I, with a brief description of the troubled birth of “Bleeding Kansas” and attempt to paint a portrait, with broad strokes, of the charged Kansas political landscape into which Lincoln strode.

Part II examines Lincoln’s travels and speeches in Kansas. Part III describes the lessons taught by Lincoln to Kansans then and today, and Part IV concludes with some reflections on Lincoln’s Kansas crusade.

I. Terror in the Tallgrass

During the first 87 years of our nation’s existence, there was a serpent wrapped around the heart of the nation, and slavery’s bite benumbed and sickened its host with regularity. Slavery would cause Kansas to be “born in blood and passion.”

In order to understand the Kansas political climate during Lincoln’s visit, one must start with the 1820 Missouri Compromise, which was a temporary solution to the chronic curse of slavery. At that time, the United States consisted of 24 states, equally divided between free and slave states. In 1820 Missouri petitioned to become the 25th state, as a slave state, but there was no free state ready for admission. This meant that the balance between slave and free states would be disrupted, which was anathema to those members of Congress opposed to slavery. The Missouri Compromise temporarily solved the problem by establishing that, from 1820 onward, all states and territories north of Missouri’s southern border would prohibit slavery (except Missouri), and all states and territories south of Missouri’s southern border would allow slavery. The Union would be held together by the legislative bailing wire of the Missouri Compromise for 34 years.

The tenuous legislative balance was upset by the 1854 Kansas-Nebraska Act, proposed by Abraham Lincoln’s political antagonist of 20 years, U.S. Senator Stephen Douglas. As each new state was added to the Union, it threatened to upset the delicate balance of power in the House and Senate between the free and slave states. Douglas had conceived of the Kansas-Nebraska bill as a way to address continuing political turmoil over slavery, promote a transcontinental railroad from Chicago to California through the Nebraska territory, and perhaps lead to his nomination as president of the United States. The reasoning behind the bill was simple — open up the new territories of Kansas and Nebraska to settlers from both North and South, and let the people (i.e., white males) decide by voting whether to accept or reject slavery. These voters would create a new state from scratch. Douglas failed to see that his proposed doctrine of squatter sovereignty would spark civil war.

For the first time, the slaveholding status of an entire territory, a huge swath of open plains stretching west over present-day Colorado, which Andrew Jackson had set aside as permanent Indian frontier, would rest in the hands of a few thousand voters. Before 1854, hundreds of people had emigrated to the West annually, jumping off at places like St. Joseph and Westport, Mo. In the spring of 1854, however,

FOOTNOTES

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even as the Kansas-Nebraska bill was debated in Congress, the number swelled to the thousands. This new immigrant traffic, from which the budding little Town of Kansas (which would later become Kansas City) benefited, was going to Kansas, not California.5

The country had gone mad about Kansas. In April, the Massachusetts Legislature enacted the Emigrant Aid Society Bill, the purpose of which was to seed Kansas with free state settlers. Many of these New Englanders settled in tents on and around a hill overlooking the Kansas River, which they soon named Lawrence. Pro-slavery Missourians sensed an invasion. On May 22, the Kansas-Nebraska bill passed the House of Representatives, with wild excitement, by only 13 votes. On May 30, President Franklin Pierce signed the bill into law. Historians have described the act as “the most fateful single piece of legislation in American history.”6

Abraham Lincoln equated revoking the Missouri Compromise with repudiating the Declaration of Independence. “I was losing interest in politics,” he wrote in a letter in 1859, when “the repeal of the Missouri Compromise aroused me again.” Lincoln left his practice of law to go back into politics. Missourians did not wait for the bill to pass. They poured across the Missouri River in spring, staked claims on land owned by Indians, organized self-defense associations, and then went back home for the summer.7

The fate of Kansas would be decided by a race between North and South. Free state and pro-slavery forces rushed people into the Kansas Territory to influence the voting. The stakes being high and law enforcement low, vigilantism ruled. The new residents, with their extremist views, battled each other in violent elections, and Kansas soon received the nickname of “Bleeding Kansas” in eastern newspapers. President Pierce, a Democrat who favored the South, appointed Samuel LeCompte, a Marylander, as the chief justice of the Kansas Territorial Supreme Court, and other pro-slavery men to the territorial Legislature.

Col. James Henry Lane may have done more than any other man to bring freedom to Kansas. Called the “Liberator of Kansas,” Lane had a commanding presence, standing more than six feet tall, with a powerful voice and a mesmerizing speaking ability like that of “a prophet.” He had been a U.S. Congressman from Indiana, and had voted for the Kansas-Nebraska Act, but he called his vote one of the biggest mistakes of his life when he moved to the Kansas Territory in 1855. Lane was a politician and a field commander at the same time. A Mexican-American War veteran who had commanded two regiments, he organized Free State forces to protect Kansas ballot boxes from fraudulent voting and helped defend free state towns from pro-slavery forces. He led the Kansas constitutional conventions of Free-State representatives, which produced the anti-slavery “Topeka Constitution.”8

In May 1856, Justice LeCompte, sitting in his court in the tiny territorial capitol of Lecompton on the Kansas River west of Lawrence, convened a grand jury and brought an indictment for treason against several Free State leaders, including Lane, and ordered federal marshals to arrest Lane. Lane escaped from the territory and toured Chicago and other northern cities raising money and inflaming support for the Kansas cause. When pro-slavery forces began boarding steamboats heading for Kansas and disarming the Illinois settlers recruited by Lane and sending them back down the Missouri River, Lane established an overland trail west from Illinois through Iowa and then south through the Nebraska territory into the Kansas territory, which provided a lifeline of supplies and thousands of settlers to fortify the Free State cause. In fact, the settlement of the Kansas territory and its admission to the Union as a free state was largely due to the eloquence and efforts of Col. James Henry Lane.8

On May 21, 1856, an army of 1,200 Missourians, fortified with cannon, attacked Lawrence, burned the Free State Hotel to the ground and looted the town. A battle flag, with a crimson star and the motto “Southern Rights,” fluttered in the smoke-filled breeze. The dogs of war had been loosed. The next day, John Brown and his four sons, who arrived in Lawrence too late to defend the town, dragged five pro-slavery settlers from their cabins near Osawatomie, Kan., and hacked them to death “as declared by Almighty God,” said Brown.

Kansas “jayhawkers” began raiding Missouri, stealing and killing in the name of freeing slaves. Missouri “bushwhackers” responded in kind, fighting like “tigers.” Frederick Douglass summed up the mood of the radical abolitionists: Liberty “must either cut the throat of slavery or slavery would cut the throat of liberty.” Civil war had begun in Kansas.9

Like some horrible chapter out of the Middle Ages, gangs of private militia roamed the border settlements and farms, appearing out of nowhere, looting, burning, and killing, before vanishing into the tallgrass. In the primeval blackness of night on the prairie, terrified settlers were forced to sleep with rifles, revolvers, hatches, and knives within reach of their beds. Boston headlines screamed: “Murder Rules in Kansas. The bloody plot thickens. Blood flows. Freedom reels and stagers in a death grip with slavery.” During the next 10 years, the area

5. Id. at 5. “Kanze,” which became “Kansas,” was the Sioux name for the territory, which means “people of the south wind.” Hoeflich at 34.
7. Monaghan at 7-8. A great historical irony is that neither side appeared to have any difficulty in violating valid treaties and displacing the Native Americans who had lawfully settled on the land. Hoeflich at 37.
along the Kansas/Missouri border would be the scene of the longest-lived and most brutal guerrilla warfare ever seen on American soil.10

Sensational nationwide newspaper coverage reported on Kansas daily to an inflamed readership. Kansas was not only a national issue but, for a period of four years, the national issue. The Southern press described the New Englanders as fanatics, armed with Bibles and rifles, who were not amenable to reason. Northern papers described Missourians as “demons of the night” and a “depraved, brutish race of beings. . . .” In his May 19, 1856, Senate speech, which led to his near fatal beating, U.S. Senator Charles Sumner said “Slavery now stands erect, clanking its chains on the Territory of Kansas, surrounded by the code of death.” It was a ship with a pirate crew and “even now the black flag of the land pirates from Missouri waves at the mast head; in their laws you hear the pirate yell and see the flashes of the pirate knife.” Newspapers compared the Kansas struggles to that of the American Revolution: “The great spirits of History combat by the side of the people of Kansas, breathing a divine courage . . . [one] could see the ghostly figure of George Washington marching beside Lane’s militia.” Reverend Henry Ward Beecher warned that the battle between the free state and pro-slavery forces in Kansas would result in “blood to the horses’ bridles.”11

Although an overwhelming majority of settlers wanted to join the Union as a free state, a group of pro-slavery forces met in Lecompton in October 1857, drafted a pro-slavery constitution, and applied for statehood. President Buchanan, hoping to appease the Southern Democrats, endorsed the Lecompton Constitution, calling on Congress to admit Kansas as a slave state. Sen. Stephen Douglas, however, stunned the political world by breaking with his fellow Democrats in opposing ratification. Douglas took the principled approach that support for the Lecompton Constitution would betray his doctrine of popular sovereignty, because the elections on the constitution had been fraudulent and the constitution did not embody the will of the Kansas people.12

Kansas delegates then crafted the Leavenworth Constitution of 1858, which would have granted voting rights to African-American men, but the U.S. Congress, still dominated by pro-Southern Democrats, refused to endorse the document. The territorial Legislature of 1859, controlled by free state settlers, called yet another constitutional convention in Wyandotte on July 5. Among the delegates chosen to attend was John Ingalls, who had recently moved to Atchison County to practice law. Ingalls wrote his father that he was surprised by his election, considering every other county along the Missouri River had elected pro-slavery Democrats. “I spoke . . . to a crowd of yelling miscreants, who would have been glad to have pitched me into the Missouri, I suppose, as they have done with several Republicans in the last few years.” On June 29 a new free state document was adopted and signed by the 35 Republicans attending the convention. The Democrats refused to sign, leading to a bitter campaign for ratification.13

In 1859, Abraham Lincoln had yet to prove himself as a national leader, let alone show signs of true greatness. Before he became a monument, before his murder made him a sacred saint, he was a thoroughly human being, a frontier attorney who defended cases worthy and questionable. He was a stranger to those in the East and mostly thought of by those in the West as a self-educated frontier lawyer who had lost his bid to unseat Illinois Sen. Stephen Douglas, despite earning some notoriety as a debater on the slavery issue in the process.

Mark W. Delahay, a Leavenworth lawyer who knew Lincoln when they were lawyers in Illinois and whose wife was a Hanks and said to be related to Lincoln’s mother Nancy Hanks, invited Lincoln to attend the May 18, 1859, Osawatomie convention, which wrote the platform for the newly forming Kansas Republican Party (which replaced the Free State party). Lincoln declined, giving his reason his concern over losing time from his law practice and the extra distance involved in getting to Osawatomie. At Lincoln’s urging, however, the Kansas Republican Party adopted an anti-slavery platform.14

Delahay wrote Lincoln again on Nov. 15, encouraging him to come to Leavenworth and help save the election in Kansas for the Republicans and the Wyandotte Constitution. Delahay enclosed a letter signed by 53 merchants, bankers, and businessmen of Leavenworth, asking Lincoln to come and offering to pay his expenses for the trip. Lincoln’s reply showed not only his willingness to come, but also his appreciation to Kansas for their perseverance in a shared cause:

My Friends in Kansas: It has long been an eager desire of my heart to visit you and your noble land. Old acquaintances assure me that by coming to you at this time I may possibly render a slight service to your country and our common cause. When duty calls I ever strive to obey. Not without detriment to my interests,
I therefore waive all personal considerations and gladly place myself at the disposal of the friends of Freedom in Kansas, to whom I feel, in common with my countrymen, an eternal debt of gratitude.\footnote{Id.}

Lincoln was a gifted writer who worked tirelessly on his craft, which he considered to be one of the most important tools of his trade. In this letter he inspires with his emphasis on servant leadership, duty, and personal sacrifice for the cause of freedom. He persuades with his use of the rhetorical device of alliteration, the repetition of consonant sounds to bring out the beauty of rhythm and make words echo: “slight service,” “country and our common cause,” “friends of Freedom” and “common with my countrymen.” Lincoln attended less than one year of primitive schooling in an ABC “blab” school on the prairie, where the students read their lessons aloud, and he continued into maturity to read aloud most of his written work product, much to the annoyance of his law partner, William Herndon. Lincoln told one of his law clerks, “I write by ear. When I have my thoughts put on paper, I read it aloud, and if it sounds right, I let it pass.” If the reader reads the letter aloud he will hear what Lincoln heard.\footnote{Douglas L. Wilson, Lincoln’s Sword: The Presidency and the Power of Words, 30, 90 (NY, Alfred A. Knopf, 2006) [hereinafter Lincoln’s Sword].}

One month earlier, Lincoln had received and accepted his first major invitation to speak in the heart of the vote-rich East in New York City at the Cooper Union. He knew that he would be heard there by important people and that his speech would be covered extensively by the eastern press. Lincoln realized that his political life depended on his speech in New York, and so he decided to test and refine the speech in Kansas. Lincoln probably thought that the eastern press would little note, nor the world long remember, what he said in Kansas. And so, his Kansas audiences would be focus groups for the speech that would launch Lincoln into the presidency.

Lincoln also had a personal reason for visiting, as indicated in his acceptance letter. Bleeding Kansas had captured the attention of the nation, it was the issue he had debated with Douglas and the slavery issue was causing bloodshed and guerrilla war in the Kansas Territory. America had created Kansas and Kansas was, in many ways, recreating America.

Finally, Kansas had six delegates in the upcoming Republican national convention and those delegates were important to Lincoln. The Elwood Free Press had recently promoted a national ticket of William H. Seward for president and Abraham Lincoln for vice president. Lincoln knew that he had attracted attention in Kansas and decided it was finally time to visit its bloodstained soil.\footnote{The Kansas Tour of Lincoln the Candidate, The Kansas Historical Quarterly 294-307 (1945), reprinted in 31 Kansas History: A Journal of the Central Plains 275-93 (Winter 2008-2009). Lincoln may have also wanted to survey the Elwood, Kan., Missouri River crossing as a possible location for the initial point of the proposed transcontinental railroad. As a lawyer who had to ride the circuit on horseback or buggy, Lincoln knew how great was the demand for passenger trains. At the time, Lincoln was one of the foremost railroad lawyers in the West, representing the Illinois Central, which was then the largest rail system in the world.}

Lincoln Arrives in Kansas

On Nov. 29, Lincoln left Springfield, Ill., and traveled by train west to the Mississippi River, crossed the river to Hannibal, Mo., and boarded the Hannibal and St. Joseph Railroad for the four-hour ride to St. Joseph, Mo., the end of the line on the pioneering railway completed that year, which pushed the farthest west of any line in the country.\footnote{He was met at the depot by Delahay and Daniel “Web” Wilder, one of the publishers of the Elwood Free Press. To anyone seeing Lincoln for the first time, his appearance and mannerisms were startling. At 6-foot-4-inches, he dwarfed his peers and his coat hung like a gunny sack on his slender, elongated figure. His arms fell lower on his body than those of other men; his feet were huge beyond belief. His suit was probably disheveled from the trip, his sleeves too short, and his hair was probably disheveled and stuck out like a rooster’s feathers. The ungainly giant the Kansans met weighed about 160 pounds, and he was not yet the haggard, hollow-eyed figure of Civil War photographs. He was 50-years-old and clean-shaven, which accentuated his chiseled cheekbones, and kindly blue-grey eyes looking out from under his bushy eyebrows. He wore a curiously mingled expression of sadness and humor. Hand over hand, he gave the Kansans a hearty handshake, perhaps adding a “Howdy do.”} He arrived in St. Joseph on Thursday afternoon, Dec. 1. The St. Joseph Gazette reported Lincoln’s coming:

The Hon. Abe Lincoln of Ill. passed through this city yesterday, on his way to Kansas. The Republicans must be badly frightened when they send for big guns from other states to assist them. Old Abe will be lucky if he succeeds in doing for the Republicans of Kansas what he was unable to do for himself in Illinois – best the democracy.\footnote{He was met at the depot by Delahay and Daniel “Web” Wilder, one of the publishers of the Elwood Free Press. To anyone seeing Lincoln for the first time, his appearance and mannerisms were startling. At 6-foot-4-inches, he dwarfed his peers and his coat hung like a gunny sack on his slender, elongated figure. His arms fell lower on his body than those of other men; his feet were huge beyond belief. His suit was likely disheveled from the trip, his sleeves too short, and his hair was probably disheveled and stuck out like a rooster’s feathers. The ungainly giant the Kansans met weighed about 160 pounds, and he was not yet the haggard, hollow-eyed figure of Civil War photographs. He was 50-years-old and clean-shaven, which accentuated his chiseled cheekbones, and kindly blue-grey eyes looking out from under his bushy eyebrows. He wore a curiously mingled expression of sadness and humor. Hand over hand, he gave the Kansans a hearty handshake, perhaps adding a “Howdy do.”}

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Lincoln’s voice was rather high, with a strong Kentucky backwoods dialect. He said “wa-al” for “well,” “keerful” for “careful,” “that” for “there,” and “sot” for “sit.” His store-bought suits were typically too short in the sleeves and pant legs, leaving his trouser legs about an inch or two above his shoes. He had a peculiar, awkward gait, like he needed oiling. His legs were too long for his torso, and his hands and feet seemed too big. The Kansans drove Lincoln in a horse-drawn carriage from the depot to a barbershop, where he got a shave and the locomotive cinders washed off of his face, and then to the ferry to cross the Missouri River.\footnote{David Herbert Donald, Lincoln (NY Simon & Schuster 1995). It would be another 10 years before a bridge successfully spanned the mighty Missouri River.}

The three men sat in the dirt on the river bank waiting for the ferry boat on the unseasonably warm afternoon. “As we sat there I remember being impressed with the wonderful length of Mr. Lincoln’s legs. They were legs that could fold up; and the knees stood up like the hind joints of the Kansas grasshopper’s legs. He wore a hat of the stovepipe shape, made of felt, unglazed, not shiny, and needing no brush. The buttons were off his shirt …,” said Wilder. Lincoln’s stovepipe hat, which added eight inches to Lincoln’s height, caused him to appear to be over a foot higher than anyone else the Kansans had probably ever seen. The men crossed the Missouri River on Captain Blackiston’s ferry boat and arrived on Kansas soil at the river town of Elwood.\footnote{Lincoln in Kansas, Kansas Historical Collections, 1901-1902 7 (1902): 536-52 [hereinafter “Lincoln in Kansas”]; Patrick Leopold, Gray’s Doniphan County History: A Record of the Happenings of Half a Hundred Years 166 (Roycroft Press 1905).}

A. Lincoln’s Elwood Speech

Elwood had been established only three years earlier, but already boasted a population of more than 2,000 inhabitants. During these three years, thousands of immigrants had disembarked at its wharfs from St. Joseph ferries and St. Louis steamboats. The settlers outfitted in Elwood before beginning their 2,000 mile, four- to six-month trek by monstrous Conestoga wagons, each drawn by a dozen oxen, that rumbled to the distant lands of Oregon and California.

Lincoln stayed at the Great Western Hotel, a three-story frame building, which boasted 75 rooms and was said to be the finest hotel in the Kansas Territory. He had not scheduled a speech in Elwood, but its citizens begged him to address them. At the time, public speaking was one of the few forms of entertainment, equivalent to professional sports or popular music today. Although fatigued from the bruising train ride and “somewhat under the weather,” he kindly agreed. An Elwood man went through the town late in the afternoon and banged the hotel’s dinner gong as he called out that Mr. Abraham Lincoln would give a speech that evening in the hotel’s dining room.\footnote{Id. at 537.}

A large number of Elwood citizens assembled in the dining room to hear Lincoln. He expressed delight that he was no longer in the slave state of Missouri: “I am indeed delighted to be with you,” he told his hosts. “I can now breathe freely.”24 The Elwood Free Press reported that Lincoln:...

... stated that we had just adopted a state constitution, and it was probable that, under that constitution, we should soon cease our territorial existence, and come forward to take our place in the brotherhood of states ... Kansans would be free, but the same questions we had here in regard to freedom or slavery would arise in regard to other territories, and we should now take our part in deciding them ... Lincoln then not doubt surprised some in his audience by giving them a history lesson:

The general feeling in regard to slavery has changed entirely since the early days of the republic. You may examine the debates under the confederation in the convention that framed the Constitution and in the first session of Congress and you will not find a single man saying that slavery is a good thing. They all believed it was an evil. They made the Northwest Territory, the only territory then belonging to the government, forever free. They prohibited the African slave trade. Having thus prevented its extension and cut off the supply, our\footnote{The Elwood Free Press reported Lincoln’s words as “the fathers” but the author believes this to be an aural error by the reporter. Two months later, at Cooper Union, Lincoln used the phrase “our fathers” at least five times. Harold Holzer, Lincoln at Cooper Union: The Speech That Made Abraham Lincoln President 122-23 (NY Simon & Schuster 2004) [hereinafter Lincoln at Cooper Union].} fathers of the Republic believed slavery must soon disappear. ...

Finally, Lincoln turned his attention to the recent border violence:

Your territory has had a marked history – no other territory has ever had such a history. There have been strife and bloodshed here; both parties have been guilty of outrages; he had his opinions as to the relative guilt of the parties, but he would not say who was most to blame ... There is a peaceful way of settling these questions – the way adopted by government until a recent period. The bloody code has grown out of the new policy in regard to the government of territories. Mr. Lincoln referred briefly to the Harpers Ferry affair. He believed the attack of Brown wrong for two reasons. It was a violation of law; and it was, as all such attacks must be, futile as to any effect it might have on the extinction of a great evil.

We have the means provided for the expression of our belief in regard to slavery – it is through the ballot box – the peaceful method provided by the Constitution. John Brown has shown great courage, rare unselfishness, as even Governor Wise testifies. But no man, North or South, can approve of violence and crime.

21. David Herbert Donald, Lincoln (NY Simon & Schuster 1995). It would be another 10 years before a bridge successfully spanned the mighty Missouri River.


23. Id. at 537.


25. The Elwood Free Press reported Lincoln’s words as “the fathers” but the author believes this to be an aural error by the reporter. Two months later, at Cooper Union, Lincoln used the phrase “our fathers” at least five times. Harold Holzer, Lincoln at Cooper Union: The Speech That Made Abraham Lincoln President 122-23 (NY Simon & Schuster 2004) [hereinafter Lincoln at Cooper Union].
Lincoln’s speech “was received with great enthusiasm.” Afterwards, Lincoln and members of his audience ate dinner in the hotel dining room.26

Lincoln’s speech approached the extension of slavery issue from a fresh perspective, by citing the lessons and precedents of the American past. The speech was organized as a lecture by a “professor” who had mastered his history to buttress his position on founding principles. The phrase “our fathers” carried a special resonance for Bible-reading Americans of 1859. The Scriptures mention “our fathers” more than 50 times. Lincoln demonstrated that the secular fathers of America, when they brought forth our new nation, opposed slavery, expected it to end, and were dedicated to the proposition that all men are created equal.27

The reader will also note Lincoln’s criticism of John Brown’s October raid on Harper’s Ferry in his speech as a violation of the law and – “no man … can approve of violence or crime.” As much as Lincoln detested slavery, he refused to support violence or violation of the law in an effort to bring about change. In other words, the ends did not justify the means. Think how easy it would have been for Lincoln, making his first speech before Kansans, most of whom were fighting the introduction of slavery into their Territory, to have applauded Brown’s raid. After all, Brown was a Kansan and a hero to many (although certainly not all) in his audience. But Lincoln doesn’t take the easy road, he takes the harder, and more principled approach.

B. Lincoln Travels to Troy

The next morning fierce cold winds caused the temperature to plummet. Lincoln left Elwood for Troy in an open buggy, driven by Wilder. After traveling 10 to 12 miles west across the prairie, Lincoln was “blue with cold.” His buggy approached a wagon driven by what appeared to be a settler. The driver of the wagon was Henry Villard, a journalist who had met Lincoln during his 1858 unsuccessful senatorial campaign against Stephen Douglas. Villard said:

A buggy with two occupants was coming toward us over the open prairie. As it approached, I thought I recognized one of them, and sure enough, it turned out to be no less a person than Abraham Lincoln! I stopped the wagon, called him by name, and jumped off to shake hands. He did not recognize me with my full beard and pioneer’s costume. I said, ‘don’t you know me?’ I gave my name, he looked at me, most amazed, and then burst out laughing. ‘Why, good gracious! You look like a real Pike’s Peaker.’ His surprise at this unexpected meeting was as great as mine. He was on a lecturing tour through Kansas. It was a cold morning, and the wind blew cuttingly from the northwest. He was shivering in the open buggy, without even a roof over it, and a short overcoat, and without any covering for his legs. I offered him one of my buffalo robes, which he gratefully accepted. The next time I saw him he was the Republican candidate for the Presidency.28

Lincoln continued on his journey to Troy, an unimpressive hamlet and the county seat of Doniphan County. Upon his arrival, he saw a shabby frame courthouse, a tavern and a few shanties. The prairie wind shook the buildings and cut the faces of the travelers like a knife. Forty or less people assembled in the little, bare-walled courthouse to hear Lincoln’s speech. A member of the audience reported:

[T]here was none of the magnetism of the multitude to inspire the long, angular, ungrainy orator, who rose up behind a rough table. With little gesticulation – and that little ungraceful – he began, not to declaim, but to talk. In a conversational tone, he argued the question of slavery in the Territories, in the language of an average Ohio or New York farmer. I thought: ‘if the Illinoisians consider this a great man their ideas must be very peculiar.’ But, in ten or fifteen minutes, I was unconsciously and irresistibly drawn by the clearness and conciseness of his argument. Link after link it was forged and welded, like a blacksmith’s chain. He made few assertions, but merely asked questions: ‘Is this not true? If you admit that fact, is it not this inducement correct?’ Give him his premises, and his conclusions were as inevitable as death.

His anecdotes, of course, were felicitous and illustrative. He delineated the torturous windings of democracy upon the slavery question from Thomas Jefferson down to Franklin Pierce. Whenever he heard a man avow his determination to adhere unswervingly to the principles of the Democratic Party, it reminded him, he said, of a little incident in Illinois. A lad, plowing upon the prairie, asked his father in what direction he should strike a new furrow. ‘Steer for that yoke of oxen standing at the further end of the field.’ The father replied: ‘Steer for that yoke of oxen standing at the further end of the field.’ The father went away and the lad obeyed. But just as he started the oxen started also. He kept steering for them, and they continued to walk. He followed them entirely around the field, and came back to the starting point, having furrowed a circle instead of a line.

The address lasted an hour and three quarters. Neither rhetorical, graceful, nor eloquent, it was still very fascinating. The people of the frontier believed profoundly

26. Dec. 3, 1859, Elwood Free Press. John Brown had been tried, convicted, and sentenced to death for his raid on the federal armory at Harper’s Ferry. He was hung the next day.

27. Lincoln at Cooper Union at 122.

in fair play, and in hearing both sides; so they now called for an aged ex-Kentuckian, who was the wealthiest slaveholder in the territory. Responding he thus prefaced his marks: ‘I have heard, during my life all the ablest public speakers, all the eminent statesmen of the past and present generation, and while I dissent utterly from the doctrines of his address and shall endeavor to refute some of them, candor compels me to say that it is the most able – the most logical – speech I ever listened to.’

Lincoln’s speech demonstrates the power of logical structure and the slow, understated development of theme. Lincoln establishes credibility first by setting forth the historical facts, and does not get ahead of his listeners’ emotions. He builds slowly, preferring to under rather than overstate the facts, in the plain language of the plowmen in his audience.

C. Lincoln’s Visit to Doniphan

From Troy, Lincoln was driven approximately 18 miles southeast in a carriage by his friend, W.H. Nesbitt, a prominent Republican, to Doniphan, another Missouri River town and port. The weather had continued to be cold. Judge Nathan Price, a noted lawyer and judge, was a companion on the trip and provided a lantern that was placed under Lincoln’s buffalo robe to provide a little heat for the distinguished Illinoisan. Lincoln made his third Kansas speech in Doniphan’s hotel. Little has been discovered of the text of the speech, but the crowd was probably small and the speech short.

Ashel Lowe was the owner of the hotel in Doniphan, which was a station on the Underground Railroad for runaway slaves. Lowe’s 14-year-old son prepared the fire in Lincoln’s room. Lincoln asked the boy about the Underground Railroad, and the two spent nearly two hours together as the boy told Lincoln how slaves were brought there, how they looked, what they said, and how they were taken by wagon from Doniphan to Fall City, Neb., which was the next stop on the Underground Railroad.30

D. Lincoln’s Atchison Speech

The next morning Lincoln was driven in a carriage to Atchison, arriving at the Massasoit House hotel late in the afternoon. Many of Atchison’s citizens came into the hotel office to shake hands with Lincoln as he warmed himself by the wood-burning box stove. Eyewitnesses reported that Lincoln was sitting with his chair tipped up in active conversation. One of the first citizens to strike up a conversation was Col. P.T. Able, the head and brains of the pro-slavery movement in Atchison and the Kansas Territory. Both men were from Kentucky, and Able knew many citizens of Illinois who moved there from Kentucky. The two men found mutual acquaintances about whom they could converse, and Lincoln began to tell stories relating incidents in the lives of these Illinois Kentuckians.31

At 8 o’clock that evening, Lincoln gave a speech to a large crowd in the Methodist Church, which offered the most seating in the town for public addresses. There was not even standing room available inside for some members of the audience, however, who had to listen outside. As Lincoln walked up the aisle and took his place at the pulpit, a member of the audience described him as “awkward and forbidding, but it required a few words for him to dispel the unfavorable impression.” In the audience was a leading pro-slavery leader in Kansas, former Missouri Attorney General Benjamin F. Stringfellow, who had declared that Kansas could never be a free state because “no white man could break prairie.” Lincoln joked that, if that were true, he himself must be black, for he had broken prairie many times. When Lincoln told the audience that he intended to conclude his speech after about an hour-and-a-half, the crowd insisted that he continue. He ended up speaking nearly two-and-one-half hours.32

The next morning, after breakfast, the delegation from Leavenworth found Lincoln in the hotel barroom by a red-hot box stove, engaged in telling jokes and stories to a crowd of

29. “Lincoln in Kansas” at 538-39. Lincoln was a superb writer. He lived in an age of print. With no broadcasting, his words reached large audiences outside of the hall in which he spoke only by print. His speeches were reported in the newspapers and he composed them with that in mind. Accordingly, he generally spoke for the reader of the printed page. Theodore C. Sorensen, A Man of His Words, SMITHSONIAN (Winter 2009) at 60.

30. LINCOLN AND KANSAS at 87.


32. Speeches were a primary form of entertainment in 1859 America, particularly in frontier towns, such as Atchison. Moreover, speeches were typically much longer than they are today, and a speech of only an hour-and-a-half would have been considered short by 1859 standards. Finally, many of those in the audience may have traveled quite a distance, by rather uncomfortable and inconvenient means, to hear Lincoln’s address, and may have felt shortchanged by a speech of less than an hour-and-a-half in duration.
overland stage drivers and other rough characters of the frontier, who “received his narrations with the most boisterous and indistinguishable laughter.” Lincoln kept the Leavenworth delegation waiting for nearly a half-hour before leaving with them for that town, which was 20 miles south over rough, frozen wagon trails. A crowd with a band and many buggies met Lincoln and his party just outside of Leavenworth, and there was a parade into town past crowds of cheering people.33

**E. Lincoln’s Leavenworth Speech**

Leavenworth was a dusty, brawling river town and the largest city between St. Louis and San Francisco, boasting a population of approximately 10,000 citizens. The city’s growth was spurred by the freighting firm of Russell, Majors, and Wadell, which had a contract to haul supplies to the U.S. Army posts, including Fort Leavenworth, which was two miles east of town. The firm employed more than 6,000 teamsters, and owned more than 45,000 oxen, which it used to pull its wagons. In 1857, Leavenworth’s levee was paved with cobblestones, giving the city the first steamboat landing west of St. Louis. Although Leavenworth had been founded by pro-slavery Missourians, it was now also the home of a significant number of Free State men. The Leavenworth Republicans were a large enough group to give Abraham Lincoln a rousing welcome.34

Lincoln spoke that night at Stockton’s Hall to an enthusiastic crowd. One audience member described him as “an old man, tall, slim and awkward, and farmer looking.” For Lincoln gracefulness of movement was apparently difficult, if not impossible. With his hands clasped before him, Lincoln began to speak. He slowed his delivery to help his listeners in an era without loudspeakers:

Ladies and Gentlemen: You are, as yet, the people of a territory; but you probably soon will be the people of a state of the Union. Then you will be in possession of new privileges, and new ideas will be upon you. You will have to bear a part in all that pertains to the administration of the national government. That government from the beginning has had, now has and must continue to have a policy in relation to domestic slavery. It cannot, if it would, be without a policy upon that subject; and must, of necessity, take one of two directions. It must deal with the institution as being wrong, or as not being wrong.

1. The Fathers

Lincoln first provided an historical overview of the founding fathers’ actions barring the foreign slave trade and prohibiting slavery in the federal territories, demonstrating that the government’s early policy was based on the idea of slavery being wrong; and tolerating it only so far as required. He then addressed the Kansas-Nebraska Act, which he argued was based on opposite ideas — that is, the idea that slavery is not wrong. He said:

... you, the people of Kansas, furnish the example of the first application of this new policy. At the end of about five years, after having almost continual struggles, fire, and bloodshed, over this very question, and after having framed several state constitutions, you have, at last, secured a free-state constitution under which you will probably be admitted into the Union. You have at last, at the end of all this difficulty, attained what we, in the old Northwest Territory, attained without any difficulty at all. Compare, or rather contrast, the actual working of this new policy with that of the old, and say whether, after all, the old way — the way adopted by Washington and his peers — was not the better.

If I might advise my Republican friends here, I would say to them, leave your Missouri neighbors alone. Have nothing whatever to do with their slaves. Have nothing whatever to do with the white people, save in a friendly way. Drop past differences, and so conduct yourselves that, if you cannot be at peace with them, the fault shall be wholly theirs.

2. The Southerners

Lincoln began his equally extraordinary second section of his speech by purporting to address his remarks beyond his listening audience. He did so by employing the rhetorical device of *prosopopoeia*, an argument directed against an absent person or, in this case, an absent section of the country, the South. Lincoln pummeled his imaginary Southern listeners with a series of charges and dares:35

[My opponents] say that we have made the question [slavery] more prominent than heretofore. We deny it. It is more prominent; but we did not make it so. Despite us, you would have a change of policy; we resist the change, and, in the struggle, the greater prominence is given to the question. Who is responsible for that, you or we? If you would have the question reduced to its old proportions, go back to the old policy. That will effect it. But you are for the Union; and you greatly fear the success of the Republicans would destroy the Union. Why? Do the Republicans declare against the Union? Nothing like it. Your own statement of it is, that if the Republicans elect a president you won’t stand it. You will break up the Union. That will be your act, not ours. To justify it, you show that our policy gives you just cause for such desperate action. Can you do that? When you attempt it, you will find that our policy is exactly the policy of the men who made the Union. Nothing more and nothing less. Do you really think you are justified to break up the government rather than have it administered by Washington and other good and great men who made it, and first administered it? If you do, you are very unreasonable; and more reasonable men cannot and will not submit to you. While you elect the

33. Lincoln and Kansas at 95.
34. Id. at 99-101.
35. Lincoln at Cooper Union at 131-32. I have adopted Holzer’s subtitles for Lincoln’s Cooper Union speech here.
Lincoln concluded his performance with a plea for support from the Republicans in his audience. He closed by an appeal to all that the people are the rightful masters of the Congress and the government and must exercise their vote so that the principles of freedom shall not perish. He was cheered loud and long by the largest political crowd ever to gather in Kansas. The speech established Lincoln as both a credible witness to the past and an inspiring leader for the future. Henry Villard called it “the greatest address ever heard here.”

Lincoln’s speech evidences Lincoln’s mastery of the first three of the seven liberal arts – grammar, logic, and rhetoric. Grammar is the anatomy of the discourse. Logic is the science of reason. Rhetoric is the art of persuasion. Grammar gives command of language; logic command of thought; and rhetoric command of men. Rhetoric takes the flow of language and heightens it a bit by repeating and paralleling elements, by bringing out the beauty of natural rhythms, so as to emphasize the idea by calling our attention to the wonders of the language carrying it. It is the manipulation of words for persuasive ends.

The first section of Lincoln’s speech establishes credibility with a logical review of historical facts. He then uses the rhetorical devices of repetition (“new privileges and new ideas,” “nothing more and nothing less,” and “neither breaking nor attempting to break up”) and antithesis, the balance of opposite words and phrases (“as being wrong, or as not being wrong,” “compare, or rather contrast, the actual working of this new policy with that of the old,” “you are very unreasonable, and more reasonable men cannot and will not submit to you” and “we cannot object, even though he agreed with us”) to gem-like effect. Repetition and antithesis make his points “elegantly memorable.”

Lincoln also had a poetic literary sensibility and an ear for rhythm and cadence. Certain of his phrasing has a biblical cadence and quality to it: “If I might advise my Republican friends here, I would say to them, leave your Missouri neighbors alone. Drop past differences, and so conduct yourselves that, if you cannot be at peace with them, the fault shall be wholly theirs” (a precursor to his later “with malice towards none” phrasing), and “that cannot excuse violence, bloodshed, and treason. It could avail him nothing that he might think himself right.” His closing reminded the soon-to-be-voters in the audience that this was a government of the people, and for the people, and only by voting could they ensure that freedom shall not perish from the land. Lincoln’s speech also displays a commitment to the rule of law and a reverence for the fathers of American government, such as Washington – ideas that would form Lincoln’s political outlook and writings throughout his career.

After the speech, Lincoln visited with some of the men who had driven him from Atchison to Leavenworth, who were staying across the street from Lincoln’s hotel. Their room contained two beds, some chairs, and an old box stove, which “could eat wood enough to keep one man busy carrying fuel up the stairs and two or three men poor paying for it.” Lincoln and Marcus J. Parrott, the Kansas delegate in Congress, stayed long enough for all of the wood in the room to be devoured by the gluttonous stove.

It was a cold night and none of the men wanted to leave the room long enough to go for wood. Parrott had sent the men great sacks full of patent office reports from Washington to distribute. Times were not dull enough in the town to make government reports popular reading material, and many of the sacks of bound paper were unwrapped in the room. When the fire died down, two or three bulky books went into the stove. As the books were heaved into the stove one of the men asked, “Mr. Lincoln, when you become president will you sanction the burning of government reports by cold men in the Kansas territory?” Not only will I not sanction it, but I will cause legal action to be brought against the offenders,” Lincoln jested. He sat in the room for hours, “his feet against the stove, his chair tipped back. His reputation as a storyteller was deserved for he was the leader in swapping tales that night.”

On Sunday, Dec. 4, Lincoln took a break from politics in favor of spending the day relaxing and having dinner with the Delahay family and a few guests. Lincoln quickly made friends with the five Delahay children. After supper, when nobody but the Delahay family was present, he pulled off his tight-fitting shoes from his gargantuan feet as they sat about the fire in the back parlor. He then told the children story after story, much to their delight. Lincoln’s habit, at the close of one of his favorite stories about frontiersmen chased by Indians, was to end by saying “they got away.” Then he rose up to his full height and said, “Now I must get away.”

Lincoln stayed with the Delahay family for three days, and his visit was a great occasion for them. Mrs. Delahay honored their guest by using her best china at every meal. The children, dressed in their Sunday best, were allowed to dine with their company every night. Mrs. Delahay kept a Minton Jug on her parlor mantel. Lincoln, obviously having no idea as to the value of the china pitcher, took it outside to fetch some fresh

36. ABRAM LINCOLN: A Life at 576; LINCOLN IN KANSAS at 540-44.
38. LINCOLN’S SWORD at 32.
40. “Lincoln in Kansas” at 541. Lincoln had been granted a patent 10 years earlier on a device to raise the water level for barge traffic and so the men might have been burning a copy of Lincoln’s patent, a fact that may have crossed Lincoln’s mind as he saw the reports going up in smoke.

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water, and Mrs. Delahay saw him chip the lip of the pitcher as he clanked it against the iron mouth of the pump. Lincoln, unaware of the accident, came back into the house and offered the fresh water to Mrs. Delahay who, being the perfect hostess, did not so much as change for one minute her pleasant demeanor and expression.41

At two o’clock on Monday afternoon Lincoln gave his final Kansas speech at Stockton’s Hall to an immense audience, which generally followed that of his earlier Leavenworth speech. The next day, Tuesday, was election day in Kansas and Lincoln stayed to witness the voting. Lincoln believed that elections “were like ‘big boils’ – they caused a great deal of pain before they came to a head, but after the trouble was over, the body was in better health than before.” On Wednesday, Dec. 7, Lincoln left Leavenworth for home. He apparently traveled back to St. Joseph by horse and buggy, as the river was frozen, preventing steamboat travel.42

Lincoln returned to Illinois with fond memories of Kansas. He told his friends back in Illinois that he was “delighted with his visit and with the cordial reception he met with from the people of Kansas.” A few months later he advised a young lawyer, looking for a place to practice: “If I went West, I think people of Kansas.” A few months later he advised a young lawyer, looking for a place to practice: “If I went West, I think people of Kansas.”

**III. Lessons of Lincoln’s Kansas Campaign**

1. **Courage**
   
   What can be learned from Lincoln’s Kansas campaign? Perhaps the first lesson is moral courage. The three river counties in which Lincoln spoke were the most pro-slavery counties in the Kansas Territory. Atchison and Doniphan counties were named after pro-slavery leaders in Missouri, and had been settled by Missourians in an effort to influence the Kansas elections as to whether Kansas would enter the Union as a free or slave state after passage of the Kansas-Nebraska Act. Sporadic violence continued in Leavenworth County, also settled by Missourians in an effort to influence the Kansas elections.

   Lincoln was willing to suffer partisan criticism and personal risk to say what he believed was right. He spoke in the enemy’s camp and he had been more than equal to the challenge. In doing so, he hoped to persuade the Kansans and Missourians who disagreed with him or, at least, allow them to see that he was not the evil caricature portrayed in the pro-Southern Democratic newspapers, in an effort to open minds and hearts.44

2. **Doing the little things leads to big things**
   
   Lincoln wasn’t born on Mt. Rushmore; he climbed his way up that edifice through arduous effort. Lincoln’s Kansas campaign reflected hundreds of hours of hard work and research as to the Founding Fathers’ intentions as to slavery. Lincoln spent many hours in the Illinois State Library bent over a table, pen in hand, squinting in the gaslight as he studied piles of old volumes of congressional debates. His meticulous research allowed him to arm himself with American history and tell a clear, reasoned and compelling tale. He embellished his arguments in a narrative history, transporting his listeners back to their roots as a people, to the founding of the nation – a fairly recent story at the time to listeners who may have had fathers who had fought with General Washington. His thorough research gave Lincoln the confidence to take a principled position on the most important issue of the day.45

   By doing the little things, Lincoln accomplished the strategic objective of his campaign tour – he tested and refined his speech about slavery, transforming the rail-splitter into presidential timber. Without his Kansas campaign first, there may have been no Cooper Union, no Second Inaugural Address, no Gettysburg Address. Of course, Lincoln’s speech was also the result of hundreds of hours of hard work that he had spent early in his life taking himself in hand and mastering subjects such as English grammar. The schoolbooks he studied, such as Kirkham’s Grammar, had much to say about speaking and writing effectively. “Grammar instructs us how to express our thoughts correctly; rhetoric teaches us to express them with force and elegance.” Lincoln’s Kansas speeches demonstrate that he had learned his lessons well.46

41. *Lincoln and Kansas* at 127-129. It was at the Delahay home that Lincoln met Gen. James H. Lane, who would quickly become one of Lincoln’s closest friends and confidants. Lane had been president of the Kansas Topeka Constitutional Convention, and he would be elected in 1861 as Kansas’s first U.S. Senator. After Lincoln’s inauguration and the start of the Civil War, Lane traveled to Washington, where he resided in the White House and personally guarded President Lincoln. Craig Miner and Lincoln: A Mysterious Connection, 186 Kansas History: A Journal of the Central Plains Vol 24 No. 3; Erich Langsdorf, *Jim Lane and the Frontier Guard*, Kansas Historical Quarterly 13 Vol. 9 (1941).


43. *Id.* at 306; *Lincoln and Kansas* at 123; *Lincoln to James W. Somers*, Springfield, March 17, 1860.

44. *The Kansas Tour* at 304-5.

45. *Team of Rivals* at 164.

46. *Lincoln’s Sword* at 26.

pro-slavery men. He insisted on telling his listeners something that they would have resisted hearing: both sides had a role in the bloodshed. Because of his evolved sense of empathy and emotional intelligence, Lincoln was able to persuade.

4. Learning to be a better communicator

Lincoln was a self-taught master at grammar, logic, and rhetoric – our only “Poet-President” whose earliest literary interest was poetry. He was a writer first and a politician second in that he wrote essays not political speeches. He was a careful and conscientious draftsman, who knew the value of revision. His son, Robert Todd, provides this “word picture” of his father: “He was a very deliberate writer, anything but rapid. He seemed to think nothing of the labor of writing and was accustomed to make many scraps of notes and memoranda [which he would incorporate into his final work.] He first wrote, then corrected it, and rewrote the corrected version.”48

Neither did public speaking come easily to Lincoln. He practiced and practiced until he had mastered it, reading his speech aloud to catch the ideas by two senses, hearing and sight. Those in his Kansas audience were astonished at the logical, force of argument, and skillful manner in which Lincoln delivered his speeches, particularly coming from someone so awkward and odd in appearance. After each speech, he wrote down his thoughts on small strips of paper as to how he might better state a particular point, which he placed in his pockets or hat until he could past them over his written speech. He used humor to disarm his critics, and he spoke in the language of the plainest plowman in his audience so that he could be understood.49

5. A Lifelong Learner

Lincoln had less than a year of formal education but he learned how to learn on his own for the rest of his life. He studied the Founding Fathers’ intentions as to slavery when he was in his late forties and used that knowledge to launch his speeches, in which he rarely if ever argued legal points. Yet, until recently, Lincoln held the record for the most victories before the Illinois appellate courts, where legal arguments are almost all that mattered. In other words, Lincoln was a master of tailoring his arguments to his audience.

6. Humility

Recent literature has noted that humility often defines great leaders. Why? Because humility fosters an open mind and an ability to acknowledge errors, learn from mistakes, and leads to progress. Progress requires a sequential focus: “We” first, leaders. Why? Because humility fosters an open mind and an influential man each day of his life, ultimately developing the art to craft the Gettysburg Address.

7. Civility

Lincoln was kind and respectful to all, including his adversaries. Civility is the natural functioning of the legal profession, in which we are all servants of a higher, nobler master, the Constitution and the law. Lincoln saw the lawyer on the other side not as the enemy, “but a fellow traveler on the journey toward discovering the correct legal answer.”51 Lincoln did not demean or personally attack his opponents on the slavery issue; rather, he pointed out the lack of logic to their positions and, in doing so, persuaded many as to his point of view.

8. Understand your audience and play to it

Lincoln was a master of this concept, as evidenced by his Kansas speeches. Lincoln’s appearance and plain talk was crafted for his audience. He cultivated his plain approach to his speeches, in which he rarely if ever argued legal points. Yet, until recently, Lincoln held the record for the most victories before the Illinois appellate courts, where legal arguments are almost all that mattered. In other words, Lincoln was a master of tailoring his arguments to his audience.

9. Inspire

In Lincoln’s time, lawyers, particularly on the frontier, were on the firing line of civilization in molding and guiding public opinion and thought in politics, morals, and ultimately, the law. Lincoln influenced and motivated by bringing out the best – the “better angels” – of the natures of others, even when the darker angels of our nature beat their wings all around him. This may be the most difficult trait to cultivate but, if one adheres to the first eight principles, there’s a good chance that this aspect of leadership may follow.

10. It's never too late

At age 49, in the year before Lincoln came to Kansas, he was out of politics, having been defeated by Stephen Douglas, with little hope of returning to high office. A newspaper editor wrote, “The Hon. Abe Lincoln is undoubtedly the most unfortunate politician that has ever attempted to rise in Illinois. In everything he undertakes, politically, he seems doomed to failure.” When that was written Abraham Lincoln had seven years left to live. During those final seven years he did almost everything he is remembered for today. He was also not an easy decision for Lincoln to give up a lucrative law practice at the relatively advanced age (at the time) of 50 and take a leap of faith that he could be elected president. Lincoln teaches that one is never too old to start something new and everything that you’ve done thus far in your life may be preparing you for your ultimate work, a prelude to the most important contribution in your life.52

48. Lincoln’s Sword at 5, 23.
49. One audience member noted that Lincoln “got off several good hits – do all Kentucky orators try to say something funny?” Michael H. Hoeplich, Went at Night to Hear Hon. Abe Lincoln Make a Speech 29 Kansas History: a Journal of the Central Plains 100-115 (Summer 2006). Six months after his visit to Kansas, upon Lincoln’s nomination for president at the Republican National Convention, the New York Herald described Lincoln as a “fourth rate lecturer, who cannot speak good grammar.”
52. Gene Griessman and Pat Williams with Peggy Matthews Rose, Lincoln Speaks to Leaders 100 (Advantage Media Group 2009).
IV. Conclusion

Lawyers have been leaders in our society since its founding. Lawyers rely upon their mastery of history, in the form of precedent, as one of their stocks in trade. History also tells us where we've been and how we got where we are today. President Harry Truman said, “The only new thing in the world is the history you don't know.” This article has attempted to demonstrate how Lincoln used history to successfully argue against slavery and ultimately secure his election as the 16th president of the United States.

Some of our most effective presidents have been students of history. This article has focused on Lincoln, who would soon be forced to feel his way along a dark path trod by no other occupant of the White House, but Harry Truman and Dwight D. Eisenhower were also keen students of history. Yet another lawyer with roots in Kansas, who happens to go by the name “Mr. President,” is a graduate of Lincoln’s “School of Executive Management” and is said to be attempting to use Lincoln's playbook as you read this article. Why? Because historical patterns repeat. Human nature really hasn’t changed much over the years. What can change is our reaction to events. By looking back, sometimes we can see forward.

For instance, some of the ideas and phrases of the Gettysburg Address are in evidence in Lincoln's Kansas speeches in incipient and less polished form. The first sentence of Lincoln's famous Address reflects the history lesson Lincoln taught Kansans four years earlier: “Four score and seven years ago, our fathers brought forth upon this continent a new nation, conceived in liberty and dedicated to the proposition that all men are created equal.” Lincoln proceeds to demonstrate that equality is the premier self-evident truth, and human freedom a sacred right. Perhaps Lincoln's Address is able to kindle strong emotions even today because of its timeless message: Because human freedom is sacred, so too are sacrifices in freedom’s defense.

This article has also attempted to portray the truly human Lincoln beneath the hero he has become. Lincoln’s Kansas campaign demonstrated his courage, compassion, hard work, humility, empathy and dedication to the craft of writing, which would soon lead to Lincoln's greatest literary gem – the Gettysburg Address. While you probably won't end up on Mt. Rushmore by practicing these traits, with a leader like Lincoln as your guide, you're on the right road. That is why Lincoln's example and words resonate today, and provide guidance for tomorrow.

About the Author

Jim Muehlberger practices at Shook, Hardy & Bacon, Kansas City, Mo., where he specializes in defending class actions and complex litigation. He is a 1982 graduate of the University of Kansas School of Law and may be reached at jmuehlberger@shb.com.

AMENDMENT TO RULE 140 UNDER CONSIDERATION

An amendment adding a new section (h) to Supreme Court Rule 140, relating to Pretrial Conference, has been proposed to the Kansas Supreme Court. The Court has set Jan. 1, 2010, as the deadline for comment on the proposed amendment. Your review and comment are appreciated. You may comment at the following e-mail address: info@kscourts.org or by writing, Hon. Dan Biles, Justice, Kansas Supreme Court, 301 SW 10th Ave., Topeka, KS 66612. Following is Supreme Court Rule 140 with the proposed new section (h):

2010 SC ____

IN THE SUPREME COURT OF THE STATE OF KANSAS
RULES RELATING TO DISTRICT COURTS
Rule 140
FINAL PRETRIAL CONFERENCE

Supreme Court Rule 140 is hereby amended, effective the date of this order.
(a) The final pretrial conference contemplated by K.S.A. 60-216 shall be held before a judge with court participation throughout. The final pretrial conference shall be held at least two (2) weeks prior to trial.
(b) The final pretrial conference is predicated upon discovery being completed and the parties being prepared to complete the procedural steps recited herein. If additional witnesses or evidence is discovered after the final pretrial conference, the discovering party shall immediately make this known to all parties and the court in writing.
(c) Parties may be present at the final pretrial conference and shall be present when ordered by the court.
(d) The final pretrial conference will be conducted by an attorney who will participate in the trial of the case.
(e) The court shall prepare the pretrial order or designate counsel to do so.
(f) Should counsel object to the pretrial order, counsel shall state his or her objections in writing and forward the objections and the pretrial order to the court within ten (10) days.
(g) The final pretrial conference will be conducted substantially in conformity with the following procedural steps:

(1) Plaintiff will state concisely his factual contentions and the theory of his action.
(2) Defendant will state concisely his factual contentions and the theories of his defenses and claims for relief.
(3) The court will rule upon any proposed amendments.
(4) Court and counsel will confer as to matters not disputed and request will be made for admissions and stipulations.
(5) Names and addresses of witnesses who will be called will be submitted in writing and counsel will be prepared to state the essence of their testimony.
(6) All exhibits, which parties intend to use at the trial, shall be known to the court and opposing counsel and may be marked for identification and admitted into evidence.
(7) The court may rule on any motions for dismissal, judgment on the pleadings, or summary judgment.
(8) Counsel will state if a jury is requested, if a jury of less than twelve (12) will be accepted, and time required for trial.
(9) A guardian ad litem will be appointed if advisable.
(10) Limitations upon the number of expert and cumulative witnesses for each side will be considered and ruled upon.
(11) The issues of fact will be stated by the court.
(12) The questions of law will be stated and the court will rule thereon.
(13) Questions of evidence will be stated and the court will rule thereon.
(14) Problems relative to jury instructions will be stated and the court will rule thereon.
(15) The position of parties relative to settlement shall be considered and the possibility of settlement explored.
(16) If the court authorizes the filing of briefs the time of filing shall be specified.
(17) Any procedures that may aid in the disposition of the case will be determined, including submission on special verdict or general verdict and interrogatories, consolidated or split trials, reference to a master, less than twelve (12) jurors and less than unanimous verdict.

(Continued on next page)
Amendment to Rule 140 ... continued

(h) In a condemnation case, the following additional matters shall be considered and determined:
   (1) Date of the taking.
   (2) Any inconsistencies between the appraisers’ report and the description of the taking stated in the petition.
   (3) Legal description and size of the original tract before the taking.
   (4) Legal description and size of the tract taken.
   (5) Size of the tract or parcel remaining after the taking.
   (6) The nature of the taking, whether a fee simple interest or an easement, and any limitations on the taking established in the condemnation petition and/or appraisers’ reports.
   (7) Access rights taken.
   (8) Any other factors to be considered in ascertaining compensation, i.e., K.S.A. 26-513(d).
   (9) Positions of the parties regarding highest and best use.
   (10) Requests for other admissions and stipulations.
   (11) Exhibits, plats or demonstrative evidence to be introduced.
   (12) View of the premises.
   (13) Witness – appraisers. For each witness who will testify as to value or damage, each party shall state the witness’s valuation of the entire property or interest immediately before the taking and, where appropriate, the valuation of that portion of the tract or interest remaining immediately after the taking.
   (14) Any special instructions needed.
   (15) In the case of temporary takings, the duration of the taking.
   (16) Any motions in limine not previously ruled upon.

BY ORDER OF THE COURT, this ____ day of ____, 2010.

ROBERT E. DAVIS, Chief Justice

NOTICE OF AMENDMENT OF LOCAL RULES OF PRACTICE OF THE UNITED STATES DISTRICT COURT

The U.S. District Court for the District of Kansas gives notice of the amendments of local rules 5.1, 5.4.8, 5.4.12, 5.4.14, 6.1, 7.3, 9.1, 11.1, 15.1, 24.1, 26.2, 30.1, 38.1, 40.2, 51.1, 58.1, 72.1.1, 72.1.4, 72.1.5, 77.1, 77.2, 79.4, 81.2, 83.5.3, 83.5.4, 83.6.3, 83.6.5, 83.6.9, 83.7.2, CR 49.8, and CR 49.14. Copies of the amendments are available to the bar and the public at the offices of the clerk at Wichita, Topeka, and Kansas City. The offices are open from 9 a.m. to 4:30 p.m. on all days except Saturdays, Sundays, and federal legal holidays. The new rules and amendments are also available on the U.S. District Court Web site at www.ksd.uscourts.gov.

Interested persons, whether members of the bar, may submit comments on the new rules and amendments addressed to the clerk at any of the record offices. All comments must be in writing and, to receive consideration by the court, must be received by the clerk on or before 4:30 p.m., Dec. 10, 2009.

The addresses of the clerk’s offices are:

204 U.S. Courthouse  490 U.S. Courthouse  259 Robert J. Dole U.S. Courthouse
401 N. Market  444 SE Quincy  500 State Ave.
Wichita, KS 67202  Topeka, KS 66683  Kansas City, KS 66101

Signed:  Timothy M. O’Brien
         Clerk of Court
         U.S. District Court, District of Kansas
ATTORNEY DISCIPLINE

IN RE KENT O. DOCKING
ORIGINAL PROCEEDING IN DISCIPLINE
ONE-YEAR SUSPENSION
NO. 100,519 – DECEMBER 5, 2008

FACTS: Respondent, a private practitioner from Kansas City, was previously suspended from practicing law for three months in December 2006. However, he failed to advise his clients of the suspension and failed to represent a client in a guardianship/conservatorship matter competently despite collecting a fee of $1,000 for a termination petition. A hearing panel found clear and convincing evidence of violations of KRPCs 1.1, 1.4, 1.16, and 8.1 and SCRs 211 and 218. One mitigating factor and four aggravating factors were established.

The Disciplinary Administrator’s Office recommended one-year definite suspension, while the respondent requested published censure. The hearing panel recommended nine month’s definite suspension, and respondent did not file exceptions.

HELD: The undisputed findings of fact and conclusions of rules violations were adopted by the Supreme Court, and a one-year definite suspension was ordered. [Note: In May 2009, respondent voluntarily surrendered his license to practice law while five complaints alleging similar misconduct were pending, and he was disbarred.]

IN RE DOUGLAS W. DOWELL
ORIGINAL PROCEEDING IN DISCIPLINE
INDEFINITE SUSPENSION
NO. 100,863 – DECEMBER 5, 2008

FACTS: Respondent was a private practitioner in Kansas City and was admitted in 2002. He failed to provide competent representation to several bankruptcy clients, resulting in 12 show cause orders from the court. At the disciplinary hearing respondent stipulated to violations of KRPCs 1.1, 1.3, 1.4, 1.15, and 8.4(g) and SCR 211. In mitigation, he testified he suffered from depression, may have adult attention deficit disorder, and is an alcoholic. He obtained treatment for alcoholism and participates in Alcoholics Anonymous.

The hearing panel found clear and convincing evidence of the rules violations and found three aggravating factors and five mitigating factors, including inexperience in the practice of law, to be present. Both the Disciplinary Administrator’s Office and the hearing panel recommended indefinite suspension. Respondent did not file exceptions to the final hearing report.

HELD: The Supreme Court adopted the undisputed findings of fact and conclusions of rules violations and ordered indefinite suspension with a reinstatement hearing required to determine fitness to engage in the practice of law.

CIVIL

ABANDONMENT OF WATER RIGHTS
FRICK FARM PROPERTIES V.
KANSAS DEPARTMENT OF AGRICULTURE
PAWNEE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 98,750 – SEPTEMBER 25, 2009

FACTS: On Nov. 4, 1982, a certificate of appropriation was issued to Bernard J. Debes for Water Right, File No. 17,125 (water right), in Pawnee County. Frick Farm, owned by Kent and Karen Frick, purchased Debes’ real estate, including the water right, on Nov. 22, 2002. In January 2003, Debes received notice from the Kansas Department of Agriculture, Division of Water Resources (DWR or agency) that water had not been used under the water right for three years. Debes took the letter to Frick Farm and discussed it with the Fricks. Frick Farm then submitted a water use statement. On Jan. 9, 2004, Frick Farm was sent a letter notifying it that no beneficial use of water had been reported for three years and the water right would be terminated if the period of nonuse extended to five years. The Fricks were asked to report the reasons for their nonuse of the water right, and provided a list “as a guide in reporting in your own words the specific situation for your water right(s).” The DWR instituted proceedings to determine the abandonment of water rights. The chief engineer for DWR issued an order of abandonment and termination for nonuse of water for two periods exceeding five years. Through administrative proceedings and a district court review, the termination was upheld. The Court of Appeals affirmed.

ISSUE: Abandonment of water rights

HELD: First, Court found the agency’s verified report established a prima facie case that no beneficial use was made of this water right for at least five consecutive years and that due and sufficient cause did not exist to excuse this nonuse. Whether DWR could have taken a shorter route by presenting far less evidence – focused only on nonuse for five or more successive years – is a hypothetical argument because the agency did not place the initial burden on Frick Farm to establish any element required to terminate Frick Farm’s water right. Court clarified that the Court of Appeals’ decision should not be read as holding that DWR may satisfy its prima facie evidence requirement by submitting a verified report that simply shows five
or more successive years of nonuse – and nothing more. Court rejected Frick Farm’s challenge to the agency’s action under K.S.A. 77-621(c) on this question. Court also rejected Frick Farm’s challenges to the evidence. Court rejected Frick Farm’s argument that the chief engineer erred by considering county-wide statistical data on which crops are normally irrigated when determining whether any of the reasons for nonuse enumerated in K.A.R. 5-7-1 apply. Court held this evidence was relevant, and Frick Farm had the opportunity to rebut it with evidence of its planting rates. Court held that based on the record, there was substantial competent evidence to support the finding that no water was used in 1995 or 1990.

STATUTES: K.S.A. 77-601, -621; and K.S.A. 82a-701(f), (g), -706, -718(a), (c), -732(a), -1901(a)

EMINENT DOMAIN

ESTATE OF KIRKPATRICK V. CITY OF OLATHE
JOHNSON DISTRICT COURT – AFFIRMED
COURT OF APPEALS – REVERSED
NO. 96,229 – SEPTEMBER 4, 2009

FACTS: Landowner claimed home was substantially damaged by city’s construction of adjacent roundabout. District court awarded compensation to landowner under K.S.A. 26-513 and attorney fees. Court of Appeals reversed, finding mere damage to real property was not compensable under Kansas Eminent Domain Procedure Act (EDPA), K.S.A. 26-501 et seq., unless damage was necessary to complete a public improvement project. 39 Kan. App. 2d 162 (2008). Landowner’s petition for review granted to clarify apparent discrepancy between EDPA and Kansas case law.

ISSUES: (1) Inverse condemnation and compensable taking and (2) attorney fees

HELD: To give full effect to K.S.A. 26-513 and other provisions of EDPA, Court disapproves of Kansas case law that fails to take into account the statutory requirement that just compensation be provided for property damaged for public use, as required by plain language of the statute. For damage to real estate to be compensable under K.S.A. 26-513(a) and other provisions of EDPA, damage must be substantial and must be the planned or inevitable result of government action undertaken for public benefit. Damage that is tangential or consequential to a government action is more appropriately addressed in realm of tort law. Here, district court correctly determined the city was required to provide just compensation for damage to landowner’s property.

District court’s award of attorney fees and expenses is affirmed. When public improvement projects are funded at least in part by federal government, the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4601 et seq. (2006), requires the condemning state, state agency, or political subdivision to make satisfactory assurances to federal government that condemning authority will reimburse property owners their attorney and litigation expenses associated with successful inverse condemnation claims. This agreement, evidenced by the subsequent acceptance of federal funding, gives Kansas courts authority to award attorney fees and litigation costs in such actions.

STATUTES: 42 U.S.C. §§ 4601 et seq., 4653, 4654(c), and 4655(a)(2) (2006); K.S.A. 26-501 et seq., -513, -513(a), -513(d), -513(d) subsections (7), (8), (10), (12), (14); K.S.A. 58-3501 et seq., -3502, -3502(4), -3506, K.S.A. 60-513(a)(4); and K.S.A. 75-6101 et seq.

HABEAS CORPUS

BOLDRIDGE V. STATE
ATCHISON DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
COURT OF APPEALS – AFFIRMED IN PART, AND REVERSED IN PART
NO. 97,652 – SEPTEMBER 11, 2009

FACTS: Boldridge’s conviction for murder of her husband, and her hard 50 sentence, were affirmed on direct appeal. Boldridge filed 60-1507 motion claiming ineffective assistance by counsel during trial and sentencing. In hearing held after trial counsel had died, district court ruled Boldridge’s testimony regarding advice given her by trial counsel was inadmissible hearsay, and denied the 60-1507 motion. District court found trial counsel’s prior service as part time pro tempe judge issuing warrants for records directly related to Boldridge’s criminal prosecution did not warrant automatic disqualification, and Boldridge waived any objection to the alleged conflict. District court also found Boldridge failed to establish trial counsel gave her inaccurate legal advice regarding aiding and abetting. In unpublished opinion, Court of Appeals affirmed in part, finding trial counsel was not ineffective during trial but was during sentencing. Dissent said multiple egregious error undermined confidence in outcome of Boldridge’s trial. Boldridge’s petition for review granted on claim of ineffective assistance during trial. Court of Appeals’ decision to vacate sentence and remand for resentencing remains final.

ISSUES: (1) Ineffective assistance of counsel – conflict of interest, (2) ineffective assistance of counsel – inaccurate legal advice, and (3) ineffective assistance of counsel – remaining claims

HELD: Trial counsel acted under conflict of interest when he accepted appointment as Boldridge’s defense counsel, but error was not structural. Under circumstances, Boldridge did not show that counsel’s prior service as a pro tempe judge affected the adequacy of his attorney’s representation at trial. Judicial and attorney professional conduct provisions are discussed. Another attorney in trial counsel’s firm having represented murder victim in terminating Boldridge’s parental rights presented a potential conflict of interest, but no showing it affected trial counsel’s representation of Boldridge at trial.

District court erred in excluding evidence of trial attorney’s statements to Boldridge, which significantly hindered Boldridge’s ability to present her claim of ineffective assistance of counsel. Case is reversed in part and remanded for new evidentiary hearing on this issue.
Trial attorney's failure to introduce evidence of prior domestic abuse involving Boldridge and her husband, and cross examination of star prosecution witness, were not constitutionally deficient under the circumstances. No merit to cumulative error claim.

STATUTE: K.S.A. 60-460, -1507

HABEAS CORPUS
IN RE CARE & TREATMENT OF SPORN
SEDGwick DISTRICT COURT – AFFIRMED
NO. 99,757 – SEPTEMBER 18, 2009

FACTS: When Sporn reached prison release date in 2005, state commenced proceeding to commit him under Sexually Violent Predator Act (SVPA). Jury returned verdict for Sporn, and he was released on postrelease supervision. When Sporn violated conditions of his supervised release by viewing pornography and sexually explicit Web sites, he was returned to prison and state initiated SVPA proceeding. District court applied res judicata and dismissed the petition, finding the prior SVPA case was an adjudication on the merits. State's appeal transferred to Supreme Court.

ISSUES: (1) Prerequisite for cause of act under SVPA and (2) res judicata

HELD: The principal prerequisite for filing a petition to commit a person under SVPA is that the proposed respondent meet the criteria of a sexually violent predator under the definitions in K.S.A. 59-29a02. Here, state erroneously relies on notice provision in K.S.A. 59-29a03(a)(1), which simply governs when the commitment procedure may be commenced. In re Case & Treatment of Johnson, 32 Kan. App. 2d 525, rev. denied 278 Kan. 845 (2004), is distinguished.

District court correctly dismissed the petition. Even if state's contention is accepted, that a second SVPA petition is permitted where there has been a material change in respondent's mental status and recidivism risk, state failed to carry its burden of making an initial showing of such a material change.

STATUTES: K.S.A. 20-3018(c); and K.S.A. 59-29a01 et seq., -29a02, -29a02(a), -29a03(a), -29a03(a)(1), -29a03(f), -29a04(a)

HEALTH – TORTS – STATUTES
ADAMS V. BOARD OF SEDGWICK COUNTY COM’RS
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 99,195 – SEPTEMBER 4, 2009

FACTS: Adams was repeatedly hospitalized for mental health treatment. On release from last involuntary hospitalization, mental health center and staff failed to accurately report Adams' noncompliance with medication, as required by court's outpatient treatment order. Adams attacked mother with a hammer, and was shot and killed by his daughter. Adams' mother and daughter sued Sedgwick Board of County Commissioners and several mental health professionals, alleging breach of duty to control Adams and protect them from harm. District court granted summary judgment to defendants, finding any duties to plaintiffs that existed were subject to discretionary function exception in Kansas Tort Claims Act (KTCA). Plaintiffs appealed, arguing defendants breached a special duty and breached Kansas Care and Treatment Act for Mentally Ill Persons (Act), K.S.A. 59-2945 et seq. Defendants cross appealed, claiming plaintiff's appeal was not timely filed. Appeal transferred to Supreme Court.

ISSUES: (1) Negligence and (2) Care and Treatment Act

HELD: Cases in Kansas and other jurisdictions discussing Restatement §§ 315 and 319 and outpatient treatment are examined. Here, defendants owed no duty to plaintiffs under those Restatement sections, and no statutory duty under the Act. K.S.A. 59-2967(c), which imposes a duty on an outpatient mental health treatment facility to report material noncompliance with an outpatient order, creates a duty owed to the public in general but does not create a statutory duty owed to individuals injured by an outpatient. No need to address question of whether KTCA discretionary function applies, district court's reasoning, or county's cross-appeal.

STATUTES: K.S.A. 2008 Supp. 59-2966(a); K.S.A. 75-6102(b), -6102(c), -6102(d), -6103(a); K.S.A. 20-3018(c); K.S.A. 59-2945 et seq., -2946(e), -2946(f), -2946(f)(1)-(3), -2967(a), -2967(c), -2967(f)(1), -2967(g), -2969(a), -2969(b), -2969(e), -2969(f); and K.S.A. 75-6101 et seq.

OIL AND GAS
NORTHERN NATURAL GAS COMPANY V. MARTIN,
PRINGLE, OLIVER, WALLACE & BAUER LLP
CERTIFIED QUESTION FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF NEBRASKA
NO. 100,282 – OCTOBER 9, 2009

CERTIFIED QUESTION: Does an injector of natural gas into underground storage, who demonstrates such gas was originally injected into underground storage but migrated to adjoining property or to a stratum or portion thereof, which has not been condemned as allowed by law or otherwise purchased, lose title to, or possession of the migrated gas when the gas migrated before July 1, 1993, the effective date of the controlling statute, K.S.A. 55-1210, and was not captured or reduced to possession by another prior to July 1, 1993?

ISSUE: Oil and gas

HELD: Court answered the question, yes. Court stated that prior to July 1, 1993, the landowners adjoining Northern's underground gas storage area possessed the legal right to produce and keep the injected gas, which had migrated onto their property, unless and until Northern obtained a certificate to expand its storage area onto their land and paid them for that privilege through a condemnation action. K.S.A. 55-1210 abolished that right, as well as permitting migrating gas to trespass upon adjoining land. Such a substantive change to vested rights cannot apply retroactively.

STATUTES: K.S.A. 60-3201; and K.S.A. 55-1202, -1210

SLIGHT-DEFECT RULE
ELSTUN V. SPANGLES INC.
RENO DISTRICT COURT – REVERSED AND REMANDED
COURT OF APPEALS – AFFIRMED
NO. 98,179 – OCTOBER 9, 2009

FACTS: On Feb. 24, 2004, Elstun stepped into a 2-inch deep hole in the parking lot of Spangles and suffered a broken hip. She testified the hole was hidden from view because the pavement was dark and wet and the hole was filled with water. The district court granted summary judgment to Spangles finding the slight-defect rule barred her claim. Court of Appeals held the district court erred in applying the slight-defect rule to a retail business parking lot. Court stated the long-standing Kansas rule that slight defects in sidewalks do not present an actionable negligence claim against cities, individuals, or private corporations required by law to maintain them because of the financial burden of maintenance in Kansas weather. However, Court stated that in contrast to sidewalks, parking lots are not always open to the public and sometimes they are only open to customers or those approved by business managers. Court held parking lots are controlled by the same rules of liability as the rest of the business premises.

ISSUE: Slight-defect rule

HELD: Court held that the slight-defect rule is a narrow, judicially created exemption to this general principle that has until now been applied only to sidewalks. Court stated that it declined the invitation to extend that exception to parking lots. Instead, injuries that are alleged to have been suffered in parking lots must be assessed under this state's premises liability principles.

STATUTES: No statutes cited.
TAX REFUND, AMENDED RETURNS, AND TOllING OF STATute OF LIMITATIONS
IN RE TAX APPEAL OF LEMONS
BOARD OF TAX APPEALS – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 98,468 – OCTOBER 9, 2009

FACTS: Court granted review to address what was then an issue of first impression whether K.S.A. 2008 Supp. 79-3230(g) tolled K.S.A. 2008 Supp. 79-3230(f)’s 180-day statute of limitations for seeking a refund as a result of an income adjustment. The Department of Revenue (KDOR) contended that the tolling provision applied only when new income information would prompt an assessment, not when it would prompt a refund. Since the Court granted review, the Legislature amended subsections (f) and (g) of K.S.A. 2008 Supp. 79-3230 to conform the statute to the KDOR’s reading of it.

ISSUES: (1) Tax refund, (2) amended returns, and (3) tolling of statute of limitations

HELD: Court held the Board of Tax Appeals and the Court of Appeals were correct in allowing the taxpayers to obtain a refund, even though they did not seek it until well after 180 days had passed after their 1994 income adjustment. Until subsections (f) and (g) of K.S.A. 2008 Supp. 79-3230 were amended, the tolling provision was not limited in application to those situations in which an income adjustment would enable the department to assess tax. It also applied to situations in which an income adjustment would prompt a taxpayer to seek a refund. Court held the tolling provision in K.S.A. 2008 Supp. 79-3230(g) applies to toll the time for a taxpayer to seek a refund, as well as the time allowed for the KDOR to seek an assessment.

STATUTE: K.S.A. 2008 Supp. 79-3230(f), (g)

WORKERS’ COMPENSATION
BERGSTROM V. SPEARS MANUFACTURING Co.
WORKERS’ COMPENSATION BOARD
REVERSED AND REMANDED
NO. 99,369 – SEPTEMBER 4, 2009

FACTS: Finding Bergstrom had not exercised good faith in failing to perform alternate job duties employer offered after Bergstrom’s workplace injury, Workers’ Compensation Board (Board) reduced Administrative Law Judge’s award to Bergstrom. Bergstrom appealed, contending the Board erroneously applied a good-faith effort requirement not contained in K.S.A. 44-510e. Appeal transferred to Supreme Court.

ISSUE: Good-faith requirement and K.S.A. 44-510e(a)

HELD: History of incorrectly decided cases has disregarded plain statutory language and perpetuated an incorrect analysis of workers’ compensation statutes. K.S.A. 44-510e(a) contains no requirement that an injured worker make a good-faith effort to seek postinjury employment to mitigate employer’s liability. Foulk v. Colonial Terrace, 20 Kan. App. 2d 277 (1994), Copeland v. Johnson Group Inc., 24 Kan. App. 2d 306 (1997), and all subsequent cases that have imposed a good-faith requirement on injured workers are disapproved.

Dissent: (McFarland, C.J.): Majority disregards principles of stare decisis without justification, and fails to consider Legislature’s failure to modify statute since Foulk was decided.

STATUTES: K.S.A. 2008 Supp. 44-510h(b); K.S.A. 44-510e, -510e(a), -515(a), -515(e); and K.S.A. 1988 Supp. 44-510e(a)

CRIMINAL
STATE V. ANDELT
MARSHALL DISTRICT COURT
REVERSED AND REMANDED WITH DIRECTIONS
COURT OF APPEALS – REVERSED
NOS. 98,665/98,699 – OCTOBER 9, 2009

FACTS: Andelt, on parole for a Nebraska felony, convicted in Kansas on plea to possession of methamphetamine. Criminal history put Andelt in category for drug abuse treatment, but district court imposed prison term, citing K.S.A. 21-4603d(f). Andelt appealed, arguing district court erred in not sentencing him to nonprison sanction of drug abuse treatment under Senate Bill 123 as provided by K.S.A. 21-4729. Court of Appeals held it was reasonable to conclude the Legislature intended exceptions to K.S.A. 21-4603d(n)’s mandatory imposition of drug abuse treatment program. A sentencing court is not required to impose a nonprison sentence, even if such a sentence is presumed, in certain circumstances, such as when a new felony is committed while the offender is incarcerated and serving a sentence for a felony or while the offender is on probation, assignment to a community correctional services program, parole, conditional release, or postrelease supervision for a felony. Court of Appeals found no reversible error in district court’s sentencing, and no appellate jurisdiction to further review Andelt’s nondeparture sentence.

ISSUES: (1) Sentencing and (2) drug abuse treatment

HELD: Court concluded the plain language of K.S.A. 21-4729 and K.S.A. 21-4603d makes certified drug abuse treatment programs mandatory for individuals who qualify for such programs under K.S.A. 21-4729. A district court does not have discretion to sentence an offender otherwise qualifying for a drug abuse treatment program to imprisonment. Court held the district court erred when the court sentenced Andelt to 20 months’ imprisonment instead of appropriate terms of drug abuse treatment under K.S.A. 21-4729. Court reversed the judgments of the Court of Appeals and district court with regard to Andelt’s sentences, vacated those sentences, and remanded to the district court with directions to resentence Andelt to appropriate terms in a certified drug abuse treatment program under K.S.A. 21-4729.

STATUTES: K.S.A. 21-4603d, -4603d(b)(1), -4603d(c), -4603d(d), -4603d(f)(1), -4603d(f), -4603d(f), (n), -4703(q), -4705(a), (f), -4721(c)(1), -4722, -4729, -4729(a)(1), -4729(c); K.S.A. 22-3717(d)(1)(C); and K.S.A. 65-4142, -4159, -4160, -4160(a), -4161, -4162, -4163, -4164

STATE V. HENDRIX
JOHNSON DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 97,323 – OCTOBER 23, 2009

FACTS: On charges arising from heated conversation between Hendrix and sister in which there was no physical force by either, Hendrix was convicted of criminal threat and aggravated assault. He appealed, claiming district court erred in denying request for self-defense jury instruction. Court of Appeals affirmed in unpublished opinion, holding Hendrix was not entitled to self-defense instruction as a matter of law because no physical force was actually used. Supreme Court granted Hendrix’s petition for review.

ISSUES: (1) “Use of force” in K.S.A. 21-3211 (Furse 1995) and (2) self-defense jury instruction

HELD: Under plain language of K.S.A. 21-3211 (Furse 1995), a jury instruction on self-defense is not warranted unless the defendant has used actual force. “Use of force” does not mean “threat of force” or “display of force” or “presentation of force” or any interpretations that similarly dilute the actual use of force. Court of Appeals

DISSENT (Davis, C.J., joined by Luckert, J.): Cannot join majority because he finds “use” and “force” in K.S.A. 21-3211 (Furse 1995) are ambiguous and believes Legislature reasonably intended to incorporate both physical and constructive force within the self-defense statute. Language in Model Penal Code, adopted by several states, is cited as helpful.

STATUTES: K.S.A. 21-3213, -3408, -3419(a), -3420, -3426; K.S.A. 22-3602(e); and K.S.A. 21-3211, -3211(a) (Furse 1995)

STATE V. LATURNER
CHEROKEE DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
COURT OF APPEALS – AFFIRMED IN PART AND REVERSED IN PART
NO. 96,086 – OCTOBER 9, 2009

FACTS: Laturner was convicted of possession of methamphetamine and drug paraphernalia for possession of four ziplock baggies, where three of the four baggies contained methamphetamine. At trial, Laturner objected to a lab report on the four baggies, arguing admission of the testimony of the forensic scientist who wrote it was erroneous because the report was not clear as to which baggies tested positive for methamphetamine and the certificate of analysis did not explain what test equipment was used. The district court overruled Laturner’s objection. The Court of Appeals found admission of a forensic laboratory certificate of analysis without the testimony of the analyst violated Laturner’s rights under the Confrontation Clause.

ISSUE: Right of confrontation

HELD: Court held that K.S.A. 22-3437(3) is unconstitutional when applied in a case where the Confrontation Clause of the Sixth Amendment applies because it places too heavy a burden on a defendant’s Confrontation Clause rights. The burden is imposed by the requirement that a defendant state grounds for an objection to the use of a certificate prepared pursuant to K.S.A. 22-3437 and by further providing that a proffered certificate shall be admitted in evidence unless it appears from the notice of objection and grounds for that objection that the conclusions of the certificate — including the composition, quality, or quantity of the substance submitted to the laboratory for analysis or the alcohol content of a blood or breath sample — will be contested at trial. The court overruled State v. Crow, 266 Kan. 690, 706, 974 P.2d 100 (1999). Court stated that in any case where the right of confrontation arises under the Sixth Amendment to the U.S. Constitution, the third and fourth sentences of K.S.A. 22-3437(3) are severed.

STATUTES: K.S.A. 22-3437 and K.S.A. 53-601

STATE V. MARX
LYON DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 98,059 – SEPTEMBER 18, 2009

FACTS: District court suppressed evidence obtained in search of motor home after officer followed motor home to return hubcap and stopped it after observing it cross the fog line and then the dotted line on the other side of the lane. District court granted motion to suppress the evidence discovered in subsequent search of motor home because stop was not lawful. District court found it was not motivated by officer’s desire to return hubcap and initial detention was not justified as a public safety stop. District court also found the officer did not have reasonable suspicion that driver had violated K.S.A. 8-1522, by failing to maintain a single lane. State appealed. Court of Appeals rejected the state’s public safety argument, but agreed the stop was lawfully supported by reasonable suspicion of criminal activity. 38 Kan. App. 2d 598 (2007). Petitions for review by both parties granted.

ISSUES: (1) Public safety/community caretaking stop and (2) reasonable suspicion of traffic infraction

HELD: State failed to carry burden of justifying the initial detention of the motor home as a public safety stop for community caretaking purposes. Court of Appeals and district court are affirmed on this issue.

K.S.A. 8-1522(a) is examined and interpreted as establishing two separate rules of the road applicable to travel upon a roadway with two or more clearly marked lanes. First, a driver must, as nearly as practicable, keep vehicle entirely within a single lane. Second, a driver may change lanes or move from current lane of travel to another location only after ascertaining the movement can be safely made. A traffic infraction occurs under K.S.A. 8-1522(a) when either rule of the road is violated. State v. Ross, 37 Kan. App. 2d 126, rev. denied 284 Kan. 950 (2007), and United States v. Jones, 501 F. Supp. 2d 1284 (D. Kan. 2007), are discussed. On record of this case, state failed to carry its burden of establishing the officer had a reasonable suspicion the driver of the motor home violated K.S.A. 8-1522(a). District court’s suppression of the evidence is affirmed.

CONCURRENCE: (Davis, J., joined by McFarland, C.J.): Concurs with majority’s conclusion that district court correctly suppressed the evidence in question. Majority’s analysis of K.S.A. 8-122(a), however, results in an unreasonable and unworkable standard for an officer to apply when determining if there is reasonable suspicion to initiate a traffic stop for failing to maintain a single lane.

STATUTES: K.S.A. 2008 Supp. 8-2118(c); K.S.A. 8-1522, -1522(a), -1548, -2203; K.S.A. 21-3105(2); and K.S.A. 22-2402(1)

STATE V. PEIRANO
SALINE DISTRICT COURT – AFFIRMED
NO. 100,587 – OCTOBER 9, 2009

FACTS: Peirano entered guilty plea in 1994 to first-degree murder of daughters and attempted second-degree murder of wife. Finding two aggravating circumstances on the record, the district court imposed concurrent hard 40 terms with a consecutive 49-month sentence. District court modified sentence two days later to find no showing of mitigating circumstances that outweighed the two aggravating factors. Peirano filed motion in 2007 to correct an illegal sentence, which the district court denied. Peirano appealed, claiming district court erred in failing to make balancing finding at sentencing hearing, and in concluding, the murders were committed in an especially heinous, atrocious, or cruel manner.

ISSUE: Correction of illegal sentence

HELD: K.S.A. 22-3504(1) does not provide a basis for attacking a sentence due to sentencing court’s alleged failure to make balancing finding before imposing a hard 40 sentence under K.S.A. 21-4635. No reversible error in this case because Peirano’s sentence was not illegal under limited terms of K.S.A. 22-3504. The sentence was authorized by a valid statute, both as to its character and its term, and was not ambiguous with respect to time and manner to be served.

STATUTES: K.S.A. 21-4635, -4635(d), -4636(b), -4636(f); and K.S.A. 22-3504, -3504(1)

STATE V. SEWARD
SALINE DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 100,263 – OCTOBER 2, 2009

FACTS: Seward pled guilty to charges of rape and aggravated criminal sodomy and clearly stated his intention during plea negotiations to challenge the constitutionality of off grid sentencing under Jessica’s Law, K.S.A. 21-4643. District judge did not address – and Seward did not ask for specific findings of fact and conclusions of
law on the record – on Seward’s constitutional challenges. Seward appealed, initially claiming the concurrent hard 25 sentences imposed under Jessica’s Law were cruel and unusual in violation of federal and state constitutions. Following State v. Ortega-Cadelan, 287 Kan. 157 (2008), and State v. Thomas, 288 Kan. 157 (2009), Seward sought remand to district court for factual findings and conclusions of law under rubric in State v. Freeman, 223 Kan. 362 (1978). Seward also challenged district court’s decision to deny motion for downward durational departure.

ISSUES: (1) Constitutional challenges to Jessica’s Law and (2) downward durational departure

HELD: Under facts in this case, district judge, Seward, and Seward’s counsel share responsibility for absence of adequate Free man findings and conclusions of law in the record. In view of (1) tension in authorities regarding whether a district court or a party has obligation to assure there are adequate findings on the record, (2) newness of constitutional issues raised by Jessica’s Law, and (3) efforts by Seward and counsel to keep issues alive beyond sentencing, Supreme Court is willing to remand case to district court for entry of sufficient factual findings and conclusions of law. Emphasis that this case is exceptional. In the future, a defendant who wishes to appeal on the basis of a constitutional challenge to a sentencing statute must ensure the findings and conclusions by the district judge are sufficient to support appellate argument, by filing a motion invoking the judge’s duty under Rule 165 if necessary.

No abuse of district court’s discretion to deny motion for downward durational departure sentence.

CONCURRENCE AND DISSENT (Luckert, J.): Concurs with majority’s holding that denial of Seward’s departure motion was not an abuse of discretion. Dissents from majority’s decision to remand case for additional findings and conclusions of law regarding Seward’s argument that sentence is cruel and unusual punishment. Does not find case to be exceptional and believes giving district court the discretion to reopen the record only excuses Seward from having failed to meet his burden to establish cruel and unusual nature of his sentence.

STATUTE: K.S.A. 21-4643, -4643(d)

STATE V. TRAUTLOFF
FRANKLIN DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 100,425 – OCTOBER 9, 2009

FACTS: Trautloff convicted of single counts of rape, aggravated criminal sodomy, aggravated indecent liberties with a child, and sexual exploitation of a child. District court imposed concurrent life without parole sentences on all convictions. On appeal, Trautloff claimed he did not meet the statutory prior convictions prerequisite for life without parole sentences because his two prior convictions for multiple felonies in the same information involving sexually violent crimes on the same day constituted a single conviction event. Trautloff also claimed the jury was improperly instructed on a theory of sexual exploitation that was broader than the narrow charging language in the information, and claimed his sentence was based on prior criminal history not proven to a jury beyond a reasonable doubt.

ISSUES: (1) Prior conviction event in K.S.A. 21-4642, (2) jury instruction broader than charging document, and (3) sentencing

HELD: K.S.A. 21-4642 is examined. Language of K.S.A. 21-4642(c)(2) requiring that a prior conviction event include more...
Appellate Decisions

than one conviction “on the same day and within a single count” is meaningless as written and is a typographical error. That statute is to be read to define a prior conviction event as “one or more felony convictions of a sexually violent crime occurring on the same day and within a single court. These convictions may result from multiple counts within an information or from more than one information.” Here, Trautloff had only one prior conviction event for sexually violent crimes. District court erred in imposing life without parole sentences. Sentences are vacated and case is remanded for resentencing.

Under facts in case, district court’s instruction to convict on alternative versions of the offense created a real possibility the jury would have rendered a different verdict if district court had instructed only as to the single alternative charged in the information. Trautloff’s conviction for sexual exploitation of a child is reversed. Case is remanded for a new trial on that count.

To the extent Trautloff argues K.S.A. 21-4642 is unconstitutional under Apprendi, Kansas has rejected such arguments.

STATUTES: K.S.A. 21-3502(a)(2), -3504(a)(3), -3506(a)(1), -3516(a), -3516(a)(6), -3516(b)(2), -4642, -4642(a), -4642(c)(1), -4642(c)(2), -4643(b)(1), -4704(e)(1); K.S.A. 22-3414(3), -3504(1); and K.S.A. 1993 Supp. 21-4703, -4703(c), -4720(b)(4)

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Appellate Practice Reminders . . .

From the Appellate Court Clerk’s Office

Docketing an Appeal

Alison Schneider has been the docketing clerk in the appellate courts for the past seven years and has a mastery of the rules, which is the practitioner’s best resource, after review of the appellate rules. Schneider may be reached at (785) 296-2768.

The docketing fee is currently $135. See Rule 2.04, supplemented by 2009 SC 31, effective July 1, 2009, until June 30, 2010, unless rescinded or amended by the Kansas Supreme Court. A $125 docket fee is set by rule, and a surcharge is authorized from time to time by the Legislature. The current surcharge is $10. Consult www.kscourts.org for further updates, particularly in June 2010.

Before you attempt to docket an appeal, read Rules 2.04 and 2.041 [2009 Kan. Ct. R. Annot. 12 – 20] in their entirety. Attorneys stop reading too soon and miss important steps. For example, if you are filing an appeal that originated in a municipal court, before a magistrate judge, or in an administrative agency, you will need to include certified copies of all orders and notices at each level. The appellate courts review a proceeding from its initiation to determine whether jurisdictional requirements have been met at each level. Appellate jurisdiction depends on those jurisdictional requirements having been met.

For appeals from the Court of Tax Appeals or the Workers’ Compensation Board, see Rules 9.03 and 9.04 [2009 Kan. Ct. R. Annot. 76 – 77], respectively, in addition to the general docketing rules. There are record certification requirements unique to those types of appeals.

Transcripts often present problems at docketing. If no transcript is requested or if transcripts have been requested and completed, submit a statement to that effect with the docketing materials and show service on opposing counsel. If transcripts have been requested but not yet completed, a copy of the request for transcript must be included in the docketing materials. Transcript requests must comply with Rule 3.03 [2009 Kan. Ct. R. Annot. 24 – 26] in the following particulars: Note the transcript is “for appeal purposes,” file the original transcript request with the district court clerk’s office, and show service on the court reporter and opposing counsel.

Remember that all documents, except those relating to transcript requests and the docketing statement, must be certified, file-stamped copies. Include an original and one copy of the docketing statement and one set of the accompanying documents.

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

CIVIL

CHILD SUPPORT, SOCIAL SECURITY DISABILITY INSURANCE BENEFITS, AND ADDITIONAL AUTHORITY ON APPEAL

SOCIAL REHABILITATION SERVICES V. WHITE

BROWN DISTRICT COURT – AFFIRMED

NO. 101,330 – SEPTEMBER 25, 2009

FACTS: In 1989, Social and Rehabilitation Services commenced proceedings against White regarding the paternity of a child born in 1988. White was personally served with process, but failed to respond. The district court entered a default judgment against him declaring him to be the father of the child and ordering him to pay child support of $200 per month plus $1,614 for state assistance provided for the child. In 2003, White, who was now disabled, began receiving Social Security Disability Insurance (SSDI) benefits. In December 2005, the court issued a monthly income withholding order for $200 per month child support and for $50 per month to be applied to the accumulated arrearage. The order applied to White’s SSDI payments. In May 2006, the withholding order was reduced to $200 per month child support and $25 per month for the arrearage. In June 2007, White’s obligation for ongoing support ended when his child, who had already reached age 18, completed high school. Accordingly, in July 2007 the withholding order was modified to $225 per month to be applied to the child support arrearage, which by this time amounted to approximately $39,000. In 2008, White was in prison serving a 24-month sentence for burglary and theft. He is scheduled for release in December 2009. White moved to terminate the income withholding order. In September 2008, the district court denied White’s motion.

ISSUES: (1) Child support, (2) SSDI benefit, and (3) additional authority on appeal

HELD: Court held that SSDI is subject to execution for recovery of court-ordered child support. Supplemental Security Income benefits, which are not treated as income in the calculation of child support in Kansas, are distinct from benefits received from SSDI, which are subject to execution for child support. Court held that under both state and federal law it is clear that SSDI benefits are subject to garnishment for past-due child support. Court also noted that a letter of additional authority pursuant to Supreme Court Rule 6.09(b) is reserved for citing significant relevant authorities not previously cited, which come to a party’s attention after briefing, not for raising new issues. An appellate court will not consider new issues raised for the first time in a party’s Rule 6.09(b) letter. 

STATUTE: K.S.A. 60-2120

DEFAULT JUDGEMENT

FORER V. PEREZ-LAMBKINS

LABETTE DISTRICT COURT

REVERSED AND REMANDED

NO. 101,167 – SEPTEMBER 25, 2009

FACTS: Forer sued Perez-Lambkins for conversion and breach of contract in October 2003. Perez-Lambkins answered Forer’s petition and counterclaimed for damages of $954.50. On Nov. 9, 2004, Perez-Lambkins moved for summary judgment. Then from December 2004 until March 2005, the district court granted Forer three extensions of time to respond to this motion. Finally, in March 2005, Perez-Lambkins filed a pretrial questionnaire addressing Forer’s claims and reiterating her claim for damages. Finally, on the day of the pretrial conference on the case, May 10, 2005, Forer filed a pretrial questionnaire and a response to the motion for summary judgment. That same day, the district court heard Perez-Lambkins’ motion for summary judgment. The court stated that the recently filed response was “several months beyond the time for doing so.” Because Forer’s response failed to controvert any of Perez-Lambkins’ proposed statements of uncontested fact, the court deemed Forer to have admitted those statements and granted summary judgment on the fraud and conversion claims to Perez-Lambkins. The court denied Forer’s request to file another response out of time, finding no “excusable neglect or just cause,” but granted Forer additional time to deal with his contract claim and set a trial date. Then, the court noted Forer had not filed an answer to Perez-Lambkins’ counterclaim. It was served on Forer more than 15 months earlier. Perez-Lambkins told the court she would file a written motion for default judgment on the counterclaim, noting she “just noticed” she had not received an answer. Despite this, the district court granted default judgment at that time. The court denied Forer’s moved for reconsideration.

ISSUE: Default judgment

HELD: Court stated that if the party against whom judgment by default is sought has appeared in the action, K.S.A. 60-255(a) requires that he or she shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. Court also stated that district courts must comply with the procedure set forth in the statute. Court held that because K.S.A. 60-255(a) specifically states the district judge shall render default judgment upon request, this court will not uphold a grant of judgment that does not occur under circumstances that do not comply with the statute. Court concluded that when parties to a lawsuit have sought default judgment Kansas courts have routinely held that failure to comply with the three-day notice requirement constitutes reversible error.

STATUTE: K.S.A. 60-2120(a), -255(a)
FACTS: In 1999, Edith Dia, a resident of Germany, obtained a default paternity judgment and child support award against Marvin Oakley Jr., a resident of Kansas. Oakley contends that he had no knowledge of the German lawsuit. In 2005, German authorities, acting on Dia’s behalf, sent the German judgment to Kansas for registration under the Uniform Interstate Family Support Act (UIFSA). Oakley was properly served with notice that the German judgment had been registered in Kansas and that its registration would be confirmed unless he contested it. He requested a hearing but failed to attend it, resulting in the confirmation of the order’s registration here and thus Oakley lost the ability to challenge jurisdiction in Kansas, but he possibly could do so in Germany.

ISSUES: (1) Jurisdiction and (2) registration of foreign judgment

HELD: Court held the district court correctly ruled that Oakley failed to raise the issue in Kansas before the German judgment was registered and confirmed here. Court also held the district court correctly ruled that German support orders may be registered and enforced in Kansas under UIFSA.

STATUTES: K.S.A. 23-451, -4,101(a); K.S.A. 23-9,101, -9,102, -9,607, -9,608; and K.S.A. 60-260(b)

MEDICAL MALPRACTICE AND JURY INSTRUCTIONS

FOSTER V. KLAUMANN

SEDGWICK DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS

NO. 100,286 – SEPTEMBER 11, 2009

FACTS: Foster suffered from a hereditary condition called multiple hereditary exostosis, aka multiple hereditary osteochondromas. With this condition, bumps made of bone and cartilage grow around the ends of the long bones of the body. Dr. Klaumann began seeing Foster when she was 5 years old in April 1999 about osteochondromas on her legs and shoulder, and he ultimately performed surgery on Foster. In May 2006, the Fosters sued Dr. Klaumann on claims of medical malpractice. The following claims ultimately went to the jury were that Dr. Klaumann: (1) failed to give and document an appropriate informed consent for osteochondroma removal surgery, (2) surgically removed osteochondromas without proper indication, (3) failed to appropriately identify and protect neurovascular structures during the operation, (4) caused a functionally complete and permanent injury to Keely’s deep peroneal nerve and partially injured her superficial and common peroneal nerve, and (5) failed to properly and timely treat Keely’s nerve injury and to refer Keely to a doctor who specialized in nerve injury. A jury rendered a verdict in favor of Dr. Klaumann. The Fosters’ appeal from the trial court’s judgment denying their motion for a new trial and multiple jury instruction errors.

ISSUES: (1) Medical malpractice and (2) jury instructions

HELD: Court held the giving of both the specialist and the general physician standard of care jury instructions likely confused the jury and affected its verdict in the case. Court also stated that based on the factual issues that needed to be resolved, the giving of the best judgment jury instruction could have served to confuse the jury by injecting subjectivity into a standard of care that is supposed to be objective. The giving of those two jury instructions constituted reversible error under the particular facts of this case. Court reversed for a new trial. Court found no reversible error on Fosters’ other arguments, including that the trial court erred in admitting expert witness testimony, that they were substantially prejudiced by a violation of the trial court’s order in limine, that the trial court erred in refusing to give a modified informed consent instruction to the jury, and that the jury’s verdict was contrary to the law and evidence.

DISSENT: Judge Pierron dissented finding, that the standard jury instructions given by the trial court were not erroneous and did not constitute reversible error.

STATUTE: K.S.A. 60-205, -226, -227, -237, -401(b), -404, -456

MINORS, NEGLIGENT SUPERVISION, SUMMARY JUDGMENT, AND MOTION FOR RECONSIDERATION

RUSSELL ET AL. V. BRADEN ET AL.

DOUGLAS DISTRICT COURT – REVERSED AND REMANDED

NO. 101,100 – OCTOBER 9, 2009

FACTS: Chris Braden and Brian’s mother, Shara Farnan-Flaherty, are divorced and have joint legal custody and shared physical custody of Brian Braden, who was 14 years old on the date of the acts giving rise to this litigation. In May 2006, Chris purchased for Brian a paintball gun. On May 10, 2006, while Brian was in the physical custody of his mother, Brian shot Daniel Russell in the eye at close range with the paintball gun, and Daniel suffered permanent partial loss of sight and permanent disfigurement of his left eye. Daniel’s parents filed suit alleging a host of claims for relief against a variety of defendants, including claims of negligent entrustment and negligent supervision against Farnan-Flaherty. Before discovery was closed, Braden filed his motion for summary judgment, asserting that uncontested facts established that Brian was not in his custody at the time of the shooting, thus entitling him to judgment as a matter of law. The district court initially granted Braden’s motion on the negligent entrustment claim but denied his motion on the negligent supervision claim. However, after a motion for reconsideration basically on the element of foreseeability, the district court awarded summary judgment to Braden. The Russells only appealed the summary judgment on their claim for negligent supervision.

ISSUES: (1) Minors, (2) negligent supervision, (3) summary judgment, and (4) motion for reconsideration

HELD: Court stated that Braden filed his original motion for summary judgment on the mistaken belief that his mere lack of physical custody at the time of the incident meant that he could not be held liable under either claim for relief. Consequently, the only facts set forth in the motion pursuant to Rule 141 were related solely to custody and did not suggest in any manner that the requisite foreseeability was challenged. The Russells compiled with Rule 141 in responding to these facts. Court declined to endorse a summary termination of the Russells’ remaining claim when there was never a clear challenge that the Russells could not factually support foreseeability for purposes of their negligent supervision claim. Court held that the Code of Civil Procedure is to be construed to assure a just determination of the issues. The Russells did not object to the giving of the specialist instruction, and were not surprised, and therefore, are precluded from attacking it on appeal.

STATUTES: No statutes cited.

SUGGESTION OF DEATH, FRIVOLOUS LAWSUIT, AND ATTORNEY FEES

MCCABE V. HOCH

SEDGWICK DISTRICT COURT – AFFIRMED


FACTS: In 2003, McCabe hired Schoenwald P.E. to prepare drawings for a roof over the building where McCabe operated his Appliance Workshop. McCabe sued Schoenwald in 2005 after rain leaked into the building during a four-month period when McCabe was constructing the roof. The roof leaked in through holes that McCabe had cut in the existing roof during construction resulting in damages to McCabe’s building and its contents. The trial court
granting summary judgment in favor of Schoenwald finding McCabe had failed to provide expert testimony to establish that Schoenwald deviated from the appropriate standard of care. McCabe appealed the trial court’s decision to the Kansas Court of Appeals. On Sept. 7, 2007, the Court of Appeals affirmed the trial court’s holding on lack of expert testimony and proximate cause. On Oct. 5, 2007, McCabe filed a petition for review in the Kansas Supreme Court. Schoenwald died on Feb. 16, 2008. On April 22, 2008, Hoch filed a suggestion of death and on April 23, 2008, the Kansas Supreme Court denied McCabe’s petition for review, stating: “Petition for review by William C. McCabe DBA Appliance Workshop. Considered by the Court and denied. Suggestion of Death of A. Kenneth Schoenwald P.E. noted.” On Sept. 10, 2008, McCabe filed the current pro se lawsuit against Hoch and Foulston Sieffkin alleging negligence in Hoch’s filing of the suggestion of death prior to a decision by the Supreme Court. The court granted Hoch’s motion to dismiss and ordered $2,100 in sanctions against McCabe.

ISSUES: (1) Suggestion of death, (2) frivolous lawsuits, and (3) attorney fees

HELD: Court held the death of a party is a material fact in every lawsuit and that K.S.A. 60-225(a) provides a legitimate means to apprise all parties of certain facts, which may have a substantial impact upon the further prosecution of a lawsuit. Court held there was nothing improper in Hoch’s filing of the suggestion of death. Court stated the Kansas Supreme Court had complete discretion in deciding whether to consider McCabe’s case, and the denial of his petition for review was no opinion on the merits. The Kansas Supreme Court’s notation of the suggestion of death was just that — nothing more than a notification that the suggestion of death had been filed in the case. Court also held that circumstantial evidence based on the timing of the denial, without more, was simply not sufficient proximate cause. Last, court held the district court’s findings that McCabe’s lawsuit was frivolous and his allegations were groundless was supported by substantial competent evidence. Sanctions were appropriate along with attorney fees for the appeal in the amount of $11,685.

STATUTE: K.S.A. 60-205, -211, -225(a), -454

TERMINATION OF PARENTAL RIGHTS AND INFORMED OF APPEAL RIGHTS IN RE L.B.

JOHNSON DISTRICT COURT – AFFIRMED IN PART AND DISMISSED IN PART
NO. 102,202 – OCTOBER 16, 2009

FACTS: On July 10, 2007, Social and Rehabilitation Services took L.B. into custody because the state was concerned mother had left L.B. in day care for extended periods of time. On Jan. 9, 2008, the district court found L.B. was a child in need of care (CINC) and ordered a reintegration plan. Eventually the state filed a petition to terminate mother’s parental right and the court found clear and convincing evidence that mother was unfit and the condition was unlikely to change. The journal entry of termination was filed on Dec. 22, 2008. Mother filed a notice of appeal on Jan. 20, 2009, challenging the decisions of “Dec. 4, 2008” and the CINC decision of Jan. 28, 2008. On March 4, 2009, mother filed a motion alleging her attorney had not told her that she had a right to appeal the CINC determination. The district court agreed, but the order of termination was not modified.

ISSUES: (1) Termination of parental rights and (2) informed of appeal rights

HELD: Court agreed that mother’s notice of appeal as to the CINC orders was untimely, but addressed the application of State v. Ortiz, 230 Kan. 733, regarding knowledge of appeal rights, in the context of a civil CINC/termination of parental rights proceeding. Court applied a balance test of Mathews v. Eldridge, 424 U.S. 319, concerning the state’s interest as parens patriae along with the parents’ rights to preserve the family relationship and the child’s best interests. Court held that given the procedural posture of the case and the fact that an appeal of the temporary custody determination and the CINC findings would at this late date have little value and would only serve to delay the resolution of the case, the balance tipped in the state’s favor and the mother was not entitled to take an untimely appeal of the temporary custody and CINC findings. Court found it lacked jurisdiction to consider those issues. The court also found that weighing the evidence in the light most favorable to the state, a reasonable factfinder could determine it was highly probable that mother’s parental rights should be terminated and such termination was in L.B.’s best interests.

STATUTE: K.S.A. 2008 Supp. 38-2201, -2202(d), -2205(b), -2269(b)(4), (7), (8), (c)(2), (3), (4), -2273(a), (c)

WORKERS’ COMPENSATION AND EXEMPTION FROM ACT

WONDERFUL HOUSE CHINESE RESTAURANT ET AL.

WORKERS’ COMPENSATION BOARD – AFFIRMED
NO. 101,614 – OCTOBER 9, 2009

FACTS: Wonderful House Chinese Restaurant Inc. was incorporated in June 2007 and opened for business in Goodland on Dec.
6, 2007. The restaurant had no employees before December. Alfred Slusher began working at Wonderful House in December. Then on Dec. 26, 2007, while working, Slusher fell and shattered his elbow. Unfortunately, Wonderful House did not have workers’ compensation insurance coverage on that date. Slusher filed a workers’ compensation claim. In due course, an administrative law judge (ALJ) ordered Wonderful House to pay Slusher’s outstanding medical bills, medical treatment, and temporary total disability compensation. Later, after deciding the restaurant was unable to pay, the ALJ ordered the Workers’ Compensation Fund to pay Slusher the benefits. The judge ruled Wonderful House was not exempt from workers’ compensation under K.S.A. 44-505(a)(2) because it was reasonable to assume it would exceed $20,000 in gross annual payroll for nonfamily members in 2008, the next calendar year. (In fact, total payroll for nonfamily members for the first six months of 2008 was $11,690.30.) However, the board ruled Wonderful House was exempt from workers’ compensation under K.S.A. 44-505(a)(3) and the ALJ should not have considered the 2008 expected payroll. The board reversed the ALJ’s decision and denied benefits to Slusher.

ISSUES: (1) Workers’ compensation and (2) exemption from act
HELD: Court held that workers’ compensation coverage is not universal in Kansas. The Workers’ Compensation Act exempts any employment where the employer has not had a payroll for a calendar year and where the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than $20,000 for all employees excluding family members. Court held the law clearly states the act applies only to employers with a gross annual payroll greater than $20,000 for the current calendar year. Because the restaurant in this case did not have such a payroll for the calendar year, court agreed with the board and held the Worker’s Compensation Act did not apply.

STATUTE: K.S.A. 44-505(a)(2), (3)

CRIMINAL

STATE V. AGUILAR
SEDGwick DISTRICT COURT
REVERSED AND REMANDED WITH INSTRUCTIONS
NO. 100,992 – OCTOBER 2, 2009

FACTS: Aguilar was detained and arrested for DUI and driving while suspended (DWS). During the course of the detention, officers discovered a green botanical substance. The Sedgwick County Regional Forensic Center (Lab) tested the substance and identified it as marijuana. Aguilar pled guilty to DUI and DWS, but was not charged with any drug crimes. The district court ordered Aguilar to pay a $400 lab fee.

ISSUE: Laboratory drug testing fee
HELD: Court held the plain language of K.S.A. 2008 Supp. 28-176(a) permits imposition of a $400 laboratory analysis fee only if the forensic science or laboratory services are rendered or administered by the lab in connection with the case. When a defendant is charged with nondrug-related offenses but the laboratory testing is conducted on drugs found on the defendant’s person at time of arrest, the fee of such testing may not be imposed upon the defendant because the testing was not rendered or administered in connection with the defendant’s case pursuant to K.S.A. 2008 Supp. 28-176(a).

STATUTE: K.S.A. 2008 Supp. 28-176(a), -1567

STATE V. ARROCHA
JOHNson DISTRICT COURT – SENTENCE VACATED AND REMANDED
NO. 100,588 – OCTOBER 9, 2009

FACTS: Arrocha convicted in 2002 of aggravated robbery and kidnapping. In 2007, he filed motion to correct journal entry of sentencing, stating the district court failed to announce any postrelease supervision at the sentencing hearing and improperly included postrelease supervision in written journal entry. District court denied the motion. Arrocha appealed.

ISSUE: Pronouncement of sentence
HELD: Sentencing court failed to pronounce the complete sentence at the sentencing hearing by failing to include the term of postrelease supervision as required by law. Sentence is vacated and case is remanded for imposition of a complete sentence in open court.

STATUTES: K.S.A. 22-3405(1); K.S.A. 1999 Supp. 21-4704, -4704(e)(2); and K.S.A. 21-3421, -3427 (Furse 1995)

STATE V. BOWERS
MIAMI DISTRICT COURT
REVERSED AND REMANDED
NO. 100,805 – SEPTEMBER 2, 2009

FACTS: Bowers convicted in bench trial of felony driving under influence of alcohol or drugs and other traffic-related offenses. He appealed, claiming district court erred in conducting the trial without first advising him of his right to jury trial.

ISSUE: Waiver of right to jury trial
HELD: Attorney’s request for a bench trial cannot serve as a valid waiver of Bower’s right to a jury trial. District court failed to advise Bowers of his right to jury trial or to even raise the option, and there was no discussion between Bowers and the court regarding jury trial right he was waiving by proceeding to a bench trial. Bowers’ convictions are reversed and case is remanded for a new trial.

STATUTE: K.S.A. 22-3403(1)

STATE V. FIELDEN
JOHNson DISTRICT COURT – AFFIRMED
NO. 95,798 – FEBRUARY 23, 2007

PUBLISHED OPINION FILED OCTOBER 8, 2009

FACTS: Fielden charged with six counts of violating protection of abuse order obtained by wife. Some charges arose during Fielden’s incarceration and jail confinement. Trial court granted state’s motion to consolidate the six cases, and then dismissed charges leaving one charge in each of three consolidated cases. Jury acquitted Fielden in one case and convicted him in the remaining two cases. Fielden appealed, claiming his right to due process was violated when trial court joined the three cases for a single jury trial and claiming he was denied a fair trial by prosecutor’s improper statements during opening and closing arguments.

ISSUES: (1) Joinder of charges for single trial and (2) prosecutorial misconduct
HELD: Under facts in case, no violation of Fielden’s constitutional right to a fair trial in joining the three cases into a single trial. Fielden’s claims of prejudice from trial court and witnesses reminding jury of Fielden’s incarceration are discussed and rejected. Viewed in light of whole record, prosecutor’s comments were not so gross and flagrant as to prejudice the jury against Fielden and deny him a fair trial. Instances were not misconduct as alleged, but permissible argument or admissible evidence based on facts of case. No evidence of ill will by the prosecutor or any concerted effort to deny Fielden a fair trial.

STATUTES: K.S.A. 22-3202, -3202(1), -3203; and K.S.A. 60-455
STATE V. JOHNSON  
SEDGWICK DISTRICT COURT  
REVERSED AND REMANDED  
NO. 100,728 – OCTOBER 9, 2009

FACTS: Officers responded to call of burglary in progress and discovered girlfriend of tenant was packing tenant’s belongings because landlord had asked tenant to leave. When Johnson reached for cigarette package from her purse after the officer had told her not to, the officer grabbed the package for safety concern. Upon discovery of drug evidence in cigarette package, officer searched Johnson’s purse finding cocaine. Johnson was convicted of possession of cocaine. On appeal, she challenged the district court’s denial of her motion to suppress, and argues the officer lacked reasonable suspicion to detain her and search the cigarette package because the seizure and search exceeded the scope of the officer’s safety detention.

ISSUES: (1) Reasonable suspicion for investigatory detention, (2) reasonable suspicion justifying officer safety search, and (3) scope of search

HELD: Johnson did not argue in district court that reasonable suspicion justifying an investigatory detention had dissipated once landlord verified Johnson was tenant’s girlfriend and verified the tenant had been asked to leave. Any such argument would likely fail because officers were arguably justified in detaining nontenant who appeared to be removing items from the apartment.

Close call, but under totality of circumstances, officer had sufficient reasonable suspicion to believe officer safety might be at risk, and to take some action.

Under facts and Arizona v. Gant, 556 U.S. ___ (2009), officer’s search of the cigarette package was an impermissible warrantless search. Conviction is reversed and case is remanded for further proceedings.

DISSENT (Hill, J.): Agrees that officer had legitimate reasons to seize the cigarette package from Johnson, but disagrees that officer could not legally examine its contents. Believes majority’s comparison to automobile search is strained.

STATUTES: K.S.A. 22-2402, -2402(1), -2402(2), -2501(c); and K.S.A. 65-4160(a)

STATE V. KELLEY  
SEDGWICK DISTRICT COURT  
REVERSED AND REMANDED  
NO. 100,255 – OCTOBER 9, 2009

FACTS: Kelley was convicted by a jury of two counts of rape, one count of attempted rape, and one count of aggravated incest of his 16-year-old daughter, K.C.R. Upon being confronted by his wife about K.C.R.’s allegations, Kelley went to the police station and confessed to sexual advances against K.C.R. During the initial interview, K.C.R. told the police that her father had sexually assaulted her three times and attempted a fourth, giving details concerning each encounter. Kelley’s wife, Naomi, K.C.R.’s steppmother, told police that Kelley admitted that he touched K.C.R. but did not provide any details. Naomi also told police that she was aware of a prior false sexual allegation by K.C.R. against Kelley that K.C.R. had a general reputation for lying. K.C.R.’s testimony was consistent with her statements to the police. However, K.C.R. later recanted her statements and told Kelley’s defense attorney that nothing ever happened. At trial, K.C.R. testified that the whole story about the sexual assaults was a lie and that the first three incidents never happened and that the fourth incident resulted after a morning struggle when Kelley tried to wake her up. All the police officers testified to the statements made by K.C.R. implicating Kelley. The trial court entertained separate motions for new trial from Kelley’s defense counsel and also from Kelley appearing pro se. The trial court denied both motions and sentenced Kelley to 267 months’ imprisonment.

ISSUES: (1) Hearsay evidence and (2) right of confrontation

HELD: The court reversed for a new trial based on the admission of the hearsay statements made by Naomi to police officers because Naomi did not testify at trial. Court found the statements violated Kelley’s rights under the Sixth Amendment right of confrontation. Court stated that Naomi’s statements were made to a Wichita Exploited and Missing Child Unit detective conducting an investigation of the rape allegations K.C.R. had made against Kelley and were testimonial and implicated the Confrontation Clause. Consequently, Naomi needed to testify as a witness, either before or after the police officer testified, in order to render her statements admissible. Because Naomi did not actually testify as a witness at trial, her hearsay statements should not have been admitted into evidence. Court found that Kelley objected to the testimony at trial.

Court held that considering K.C.R.’s recantation of her allegations against Kelley, the lack of substantial physical evidence supporting the allegations, and the significance of Naomi’s hearsay statements to the police, court was unable to conclude beyond a reasonable doubt that the inadmissible hearsay testimony had little, if any, likelihood of having changed the result of the trial.

STATUTES: K.S.A. 2008 Supp. 60-460(a); and K.S.A. 60-404

STATE V. NAMBO  
SEDGWICK DISTRICT COURT – AFFIRMED  
NO. 100,464 – SEPTEMBER 25, 2009

FACTS: Nambo pled guilty to aggravated robbery in which the gun was possessed by another person throughout the entire incident. District court’s sentencing included order that Nambo register under K.S.A. 22-2902(a)(7) of the Kansas Offender Registration Act (KORA). Nambo appealed, claiming registration cannot be required of an unarmed accomplice.

ISSUE: Registration of accomplices under Kansas Offender Registration Act

HELD: Issue of first impression. K.S.A. 22-4902(a)(7) is analyzed and applied. Under that statute, a person may be required to register as an offender under KORA if convicted of any person felony and the district court makes a finding on the record that a deadly weapon was used in the commission of such person felony. Such a person need not have had actual possession of the deadly weapon for the statute to apply. Cases applying sentencing statutes to accomplices are distinguished.

STATUTES: K.S.A. 21-3205(1), -4618, -4618(a), -4618(d), -4704(h), -22-4902(a)(7); K.S.A. 2003 Supp. 21-4704(h); and K.S.A. 1976 Supp. 21-4618

STATE V. PETERMAN  
RICE DISTRICT COURT – REVERSED AND REMANDED  
NO. 101,852 – SEPTEMBER 25, 2009

FACTS: Officer was dispatched to standby Peterman’s residence where Nelson was removing her property. When officer followed Nelson into house, Peterman pointed assault-type rifle at him and ordered him out of the house. Peterman charged with aggravated assault of officer. District court granted Peterman’s pretrial motion to suppress evidence of the assault, finding officer’s entry into the residence was illegal. State appealed, arguing the officer was performing community caretaking function motivated by public safety concerns because he had reasonable grounds to believe Nelson had immediate need for assistance to protect her life or property.

ISSUES: (1) Emergency doctrine and (2) evidence of independent crime

HELD: Under facts of case, emergency doctrine was not applicable to actions taken by the police officer, but evidence of a separate independent crime initiated against police officers after an illegal entry or arrest will not be suppressed under the Fourth Amendment of U.S. Constitution. Tenth Circuit case discussed and followed.
Appellate Decisions

District court's suppression order is reversed. Case is remanded for reinstatement of charge of aggravated assault of an officer.

STATUTE: K.S.A. 21-3411

STATE V. WEBBER
SMITH DISTRICT COURT
REVERSED AND REMANDED
NO. 101,132 – OCTOBER 9, 2009

FACTS: Webber convicted of rape. He filed post-trial motions on allegations including counsel was ineffective in not filing a notice of appeal as Webber had requested. District court appointed counsel but did not order Webber's presence at a preliminary hearing on the motions in which there was testimony from Webber's trial counsel. Webber appealed from district court's denial of the motions.

ISSUE: Statutory right to be present at K.S.A. 60-1507 evidentiary hearing

HELD: Webber's post-trial motions were in nature of a K.S.A. 60-1507 motion, thus Webber had a statutory right to be present at an evidentiary hearing. Here, the so-called preliminary hearing became an evidentiary hearing when district court heard testimony and determined facts from that testimony. Bellamy v. State, 285 Kan. 346 (2007), is distinguished. A full evidentiary hearing in a K.S.A. 60-1507 proceeding is required when the claims presented raise substantial fact issues, and the fact issues concern events about which the movant has personal knowledge from participating in the events. District court erred in taking testimony when Webber was not present. Error was not invited or harmless.

STATUTES: K.S.A. 21-3502(a)(2), -3511; and K.S.A. 60-1507, -1507(f)

STATE V. WILLIAMS
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 100,129 – SEPTEMBER 25, 2009

FACTS: Jury convicted Williams of aggravated assault, aggravated robbery, and criminal possession of firearm. While on probation, Williams was denied permission to report late to the residential facility in order to help his aunt fix a flat tire, and when faced with being returned to county jail, he fled to Texas. Williams was then charged, tried, and convicted of aggravated escape from custody. On appeal, he claimed the trial court erred in allowing a no-sympathy instruction, which nullified his testimony and undermined his theory of the defense. He also claimed sentencing error in criminal history not being proven to a jury.

ISSUES: (1) Sympathy jury instruction and (2) sentencing

HELD: Appropriateness of a sympathy instruction is examined and two cases finding reversible error are distinguished. Under facts of this case, when Williams admitted all elements of the alleged crime in his trial testimony, and when sole trial strategy was to appeal to sympathy of the jury and thereby encourage jurors to ignore the facts, ignore the law, and ignore their oaths as jurors, district court did not err in instructing jurors pursuant to PIK Criminal 3d 51.07 that they must consider the case without favoritism or sympathy for or against either party and that neither sympathy nor prejudice should influence them in their deliberations.

Controlling Kansas Supreme Court cases defeat Williams' sentencing claim.

STATUTES: K.S.A. 22-3412(b), -3412(c); and K.S.A. 60-247(d)
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**Tuesday, December 8, Noon – 1 p.m.**
Immigration Consequences of Criminal Conviction
Michael Sharma-Crawford, Sharma-Crawford Attorneys at Law LLC, Overland Park
Telephone CLE

**Wednesday, December 9, Noon – 1 p.m.**
How HITECH Are You? HIPAA HITECH—Understanding the New HIPAA Laws and Regulations Relating to Privacy and Security of Protected Health Information
Catherine Moir Walberg, KaMMCO, Topeka
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Featuring selections of the Kansas Real Estate Practice & Procedure handbook as materials
Kansas City Marriott Country Club Plaza, Kansas City, Mo.

**Tuesday, December 15, Noon – 1 p.m.**
Recent Court Decisions and Legislation Relating to Land Use Law
James M. Kaup and Michael M. Shultz, Kaup & Shultz L.C., Lawrence
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**Wednesday, December 16, Noon – 1 p.m.**
FDIC Insurance: Preparing for Client Inquiries
Terri D. Thomas, Kansas Bankers Association, Topeka
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