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www.ksbar.org  |  June 2016  |  5
Thank you for the invitations and hospitality during my year as President. Although I would have loved to accept all the invitations and visited every bar association in Kansas, as a legal department of one person it wasn’t always possible to get away from work. For those of you I missed, I hope to see you at the annual meeting.

**ABA President Paulette Brown**

The Wichita Bar Association (WBA) worked hard to bring ABA President Paulette Brown to Wichita for a visit. I appreciate the invitation to participate in this visit. Paulette is a dynamic leader with a focus on the ABA project to eliminate bias in the legal profession. She is also encouraging young persons of diverse cultures to pursue a legal career. In addition to speaking to WBA members, President Brown visited the Boys and Girls Club in Wichita, which is something she does in every state. President Brown explained that it is important for young people to see persons of color in leadership positions in the legal profession because it is easier to visualize yourself as a lawyer if you know someone you have something in common with is doing it already.

Other highlights of this visit included a preview of the Bar Show talent which reminded everyone to sign up for the KBA Annual Meeting to ensure you get tickets to the WBA Bar Show. The WBA leadership also arranged for a visit to the “Visual Justice: Gordon Parks' Photography Collection at WSU.” Add this to your things-to-do list for the upcoming vacation season.

As with most bar events, the head table was reserved for the guest of honor and bar leadership. However, unlike many bar events, everyone at the head table was a woman—including the ABA President, KBA President, both KBA representatives to the ABA, and the entire officer team for the WBA. What a wonderful statement about lack of gender bias in the WBA!

**Like-A-Lawyer—WBA style**

The WBA also allowed me the opportunity to attend another luncheon and share my thoughts about the KBA and some challenges facing our legal community. This was a great opportunity to recognize a few of the many WBA lawyers committed to supporting the Wichita community, such as Kelly Rundell and Amy Fellows Cline, the co-chairs of the KBA Annual Meeting Planning Committee, who are also both active in other not-for-profit organizations in Wichita. Thanks Kelly and Amy for participating in this presentation by “liking” other lawyers in the WBA. A prime example of how lawyers give back to their community is the WBA-sponsored “Clean Slate” day where, in March of 2016, volunteers expunged or approved for expungement 150 individual cases in one day. The WBA estimated that around 1000 citizens attended this event. Once again showing why it is easy to “Like-A-Lawyer!”

**TBA Annual Meeting**

Attending the Topeka Bar Association (TBA) Annual Meeting is a yearly event for me, but it was fun to make it one of my official KBA visits. As you may recall, the TBA helped kick off the Like-A-Lawyer discussion by encouraging members to donate “briefs” (underwear) to Let’s Help. Thanks to the joint effort of TBA and KBA members and staff, the “brief bin” (underwear bin) at Let’s Help was full of new undergarments for the first time in many years. During the TBA Annual Meeting, members discussed other service activities that again reinforce the legal profession’s commitment to the community. The TBA also announced its annual award recipients. Congratulations to TBA award winners: Judge Karen Arnold-Burger, Sarah Morse, Judge Evelyn Wilson and Patrick Salsbury. As with many of the bar associations in Kansas, the TBA young lawyer leaders, such as Sarah Morse, are engaged and excited about the bar as an organization as well as the lawyering profession. This is great news for the future of all professional legal associations.

**Brown vs. Board of Education Visit**

The KBA president is offered the opportunity to select the location of the April Board of Governors (BOG) meeting. Most Presidents highlight a fun activity or interesting hometown business. Thanks to the suggestion of BOG member Cheryl Whelan and the work of the KBA staff, my hometown visit for the BOG included the opportunity to meet at the Brown vs. Board of Education National Historical Site. The facility was open for tours with many historical exhibits. Many of us, especially me, don’t take the time to visit the sites in our own communities. This was a wonderful opportunity, and I hope you stop for a visit when you are in Topeka.

**About the KBA President**

Natalie G. Haag currently serves as executive vice president/general counsel for Capitol Federal Savings Bank. She has been a member of the Kansas Bar since 1985, and received her bachelor’s degree from Kansas State University in 1982 and her law degree from Washburn University School of Law in 1985.

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Natalie poses with Laura Graham, the new Topeka Bar Association President.

Marcia Wood, Christine Campbell, Kellie Hogan, and Holly Dyer at the Wichita Bar Association luncheon.

Award recipients Hon. Evelyn Z. Wilson, Hon. Karen M. Arnold-Burger and Sarah A. Morse at the Topeka Bar Association annual meeting.

ABA President Paulette Brown speaks at the Wichita Bar Association luncheon.
Closing Time

As I sit here writing my last article for the Young Lawyers and close out my tenure as president—passing the gavel to Nathan Eberline the president-elect—I can’t help but think about the important things I learned during my time in this position. From the immense challenges the ABA Young Lawyers face in an ever-changing legal and technological landscape, to keeping the interest in membership in the Kansas Bar Association, I learned just how critical our bar associations really are to the legal world in which we work in.

The American Bar Association has numerous projects such as the Grit Project which educates female lawyers about the science behind the grit and growth mindset—two important traits that many successful female lawyers have in common—and works on retention of female lawyers as well. There is the Permanency Project which helps children move through foster care to permanent placements, while helping states identify barriers to permanency for children and strategies to address them, and saving states money in foster care dollars. These are just two in a laundry list of projects the ABA conducts to enhance the practice of law, and improve the lives of those who need our assistance.

The Kansas Bar Association is just as important here on the state level. From the tireless work of Joe Molina, our Legislative Services Director, who keeps us in the loop regarding all legislative matters in a time were the practice of law and our legislature are an interesting crossroads in our history, to Jordan Yochim our executive director, to our president Natalie Haag, and journal editor Jennifer Salva who tirelessly waits for me to submit my articles after the deadline has passed. These are just some of the individuals who contribute to the success of the KBA.

The KBA conducts projects in various forms as well: the High School Mock Trial tournament brings in some of the brightest student litigators around, and the Pro Bono work that the KBA encourages, along with Kansas Legal Services, continues to bring legal services to those who would otherwise not have access to legal counsel or assistance.

The KBA and ABA have many sections you can join that specialize in many areas of law and demographics, such as the Family Law Section, Young Lawyers, Insurance Law, and LGBT lawyers groups. Bar associations offer so much more than you realize; they are a way to socialize, network, and become involved with not only with the legal community, but with your community overall. Our bar associations strengthen our legal community in ways that we never realized. Encourage colleagues to join today, get involved, and enjoy all the benefits bar association membership has to offer. It’s been an honor to serve as the YLS president. Thank you to all those on the YLS executive committee, and to everyone at the KBA.

About the YLS President

Justin Ferrell serves as in-house counsel/risk manager for the Kansas County Association Multiline Pool in Topeka. He currently serves on both the TBA Young Lawyers and KBA Young Lawyers in many capacities. jferrell@ksbar.org

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A couple weeks before Christmas 2015, I entered a phase of my legal career that was the most stressful, traumatic, and panic-inducing of my life. Oddly, the catalyst was a telephone call from Governor Sam Brownback. He offered me an appointment to the 12th Division of the 18th Judicial District Court, and I accepted. After almost 17 years of legal practice, I was about to become a judge.

So why the stress, trauma, and panic from such wonderful news? Unlike most new judges, I wasn’t corporate counsel or partner of a law firm. I was a solo practitioner for 14 years. I didn’t even have the benefit of an office share arrangement with other lawyers practicing the same areas of law. I also didn’t have the benefit of a victorious primary election with an uncontested general, which gives newly-elected judges in Sedgwick County almost five months to wrap things up. I had to close down a law practice I’d built up over fourteen years in two months.

In hindsight, the plan I implemented to shut down my law practice is something I wish I would have incorporated into the practice of law years before, and is an experience I believe all solos and even small-firm lawyers can learn from.

Lesson 1: There are two ways to transition to a new career, the right way and the wrong way. Pick the right way.

The first thing I did after getting the good news was talk to judges who’d been through the same transition, albeit under different circumstances (the corporate counsel/partner transition). Most didn’t get why I was so stressed. Indeed, most didn’t understand why I needed so much time to wrap things up. My objective at first was to be sworn in March 1, 2016, which gave me almost three months. They suggested handing over the keys to the practice to someone immediately.

One wise lawyer made an observation as he overheard a conversation in traffic court on this subject: “That’s a good way to get a disciplinary complaint filed against you.” Yet, the stress of private practice tempted me to do what these judges suggested. Fortunately, the voice of reason stayed my hand. Instead, I took a day or so to enjoy the good news, then shut myself up in my office and plowed through my files. I needed a reasonable transition plan that ensured my clients were taken care of.

The first thing I noticed when reviewing my files was that my schedule of pending cases wasn’t as stretched out as I thought it was. Jan. 21, 2016, 9 a.m. was the last appearance on my calendar. Instead of waiting until March 1, I would be sworn in at 11 a.m. Jan. 21. My stress diminished drastically after this revelation.

Next, I had a few dozen ongoing criminal and traffic cases, a few business law and estate planning matters, as well as a dozen or so family law files. After reviewing the files I determined that I could close most of them by Jan. 21—more stress relief.

At this point in my law practice most of the new business came from referrals and repeat clients, and these people called my phone lines or looked up the practice on the internet. Thus, to be fully responsible in my transition, I had to find someone who’d take over my phone lines, website, and open cases.

Lesson 2: Accept the truth that your practice isn’t as valuable as you think it is, so the primary goal should be making sure your clients are protected and not how much money you make from the transition.

I read somewhere that the average law firm or partnership is valued at around $350,000. A little knowledge is a dangerous thing. The fact is that the average value of some firms or partnerships is valued at $350,000. If the firm handles business law, employment law, contract law, probate, intellectual property, or any other area or practice where the clients stay with the firm even when the lawyer who handled the clients leaves, sure, there’s value to the book of clients. However, this is not the case with practice areas where the lawyer represents the client on a random and unpredictable basis, such as the one time criminal charge, traffic, divorce, or child support matter. For these, the attorney-client relationship is either limited to legal issues with rare reoccurrences, or is so personal that the client will shop around when the old lawyer retires or moves on to greener pastures. Here, the goal of the transitioning lawyer should be to give the clients a friendly place to initiate the next contact so they don’t feel completely abandoned.

In my case, most of my practice consisted of the intermittent legal issues so cashing out wouldn’t yield a huge bounty. Continued representation of the remaining clients was the most pressing goal. Rule 1.17 of the Kansas Rules of Professional Conduct states:
A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, in the state in which the practice has been conducted;

(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;

(c) The seller gives written notice to each of the seller’s clients regarding:

(1) the proposed sale;

(2) the client’s right to retain other counsel or to take possession of the file;

(3) the fact that the client’s consent to the transfer of the client’s files will be presumed if the client does not take any action or does not otherwise object within 90 days of receipt of the notice;

(d) The fees charged clients shall not be increased by reason of the sale.

Thus, I needed someone who could take over the practice with its cases, telephone lines, and advertising contracts, and I needed to identify an attorney who would agree to the Rule 1.17 practice transition mandates. Fortunately, the first person I called agreed to take over my practice with all responsibilities that entailed.

Hard work is done and I’m ready to get sworn in, right? Wrong! Actually, this is where the real hard work began, and where the lessons for all lawyers to learn begin.

Lesson 3: With “vacation” quickly approaching, buckle down and work the heck out of the cases so you don’t leave a mess for your replacement or former clients to clean up.

It takes months to work most cases to closure. The fact is that many get continued a few times merely because the lawyers on both sides don’t see the need to hurry or prioritize. Only the clients seem to be in any real rush to close their cases. I’ve made it a habit to not postpone indefinitely like some lawyers seem to do in every case, and have tried to let all lawyers appearing before me in court know that this is my second biggest pet peeve (lack of preparation is the first). However, continuances are inevitable…that is until you run out of time to postpone your cases.

Imagine not being able to continue your cases any more. Imagine how many clients you’d appear for every day. You wouldn’t have the luxury of continuing this case or that simply because you wanted to golf on the afternoon of your sentencing or PV docket day. Clients wouldn’t be told at the last minute that their cases were continued yet again due to scheduling conflicts. This is what my final weeks of law practice were like. There were lots of conflicts, but I had to appear nonetheless. I ran late for a few dockets, but I worked like crazy to close out every case I could leading up to Jan. 21.

I worked like it was the day before vacation every day.

By the time I reached my deadline, I had a total of 18 case files remaining out of dozens, and all but a few were set for sentencings or diversion hearings, thus, they were mostly closed. A couple had interesting issues that the new attorney had to file motions on or argue at trial, but this is why I chose an experienced lawyer with years of practice in the relevant legal specialties. Suffice to say he was grateful I thinned out the files and handed him a box and a half of files and not an entire filing cabinet. The clients were happy, his practice enhanced by additional business, and I minimized the stress of walking away from my law practice to become a judge.

Lesson 4: Pick a period of time and work like it is the day before vacation every day.

The legal business is stressful. There’s a good reason we carry one of the highest alcoholism rates of any profession. Why? My experience is that we often take on too many clients and don’t deal with the ones we already have in a timely fashion. We don’t have enough time to tend to the clients’ needs or our own. The result is we stretch the cases out so long that we frazzle the nerves and patience of everyone. No one is happy.

Attorneys resort to alcohol or drug abuse to deal with the stress; angry clients file ethics complaints with the disciplinary administrator’s office. Flushing out the active file pipeline every few years leaves your desk clear and frees you to pursue new clients without the risk that you won’t have time to work the cases. It also gives you the luxury of taking extended vacations every few years without worrying about the cases that need immediate attention back home.

Now that I’m a judge I can’t “flush the pipeline” and clear my desk the way I wish I had as a practicing attorney. I can only tell you that I now have a different perspective on the practice of law. I know what other judges have been saying about the overworked, overstretched lawyers who are chronically late to court or who sometimes don’t even bother showing up because they never flushed the pending case pipeline and instead keep postponing the inevitable. Such attorneys don’t close out cases that are long in the tooth yet keep taking on more clients they don’t have time to work with properly. This is not a good way to practice law. It’s unprofessional and even unethical. Take it from a judge who shared your pain; pick a block of time—one month, three months, whatever—and appear in court on every scheduled case, close all cases where closing is possible, and don’t continue unless the other side insists and the court overrules your objection. You’ll be surprised at how much easier it will be to breathe afterwards regardless how hard you worked the day(s) before vacation.

About the Author

Hon. Kevin M. Smith graduated Regent University School of Law, cum laude, in 1999, and practiced law in Kansas for almost 17 years before being sworn in as judge for the 12th Division, 18th Judicial District, Sedgwick County, Kansas, on Jan. 21, 2016. His first assignment is Juvenile Court where he presides over Juvenile Offender and CINC matters.

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Borrowing an idea from the LGBT Movement

A few years ago I saw the movie "Milk". Maybe you remember it. It was a film biography about the man who became the first openly gay elected official in San Francisco, and was shot and killed, along with Mayor George Moscone, in November 1978. Two of his public speeches were re-enacted in the movie, and they came to mind recently. I’ll explain why in a minute.

The first speech was at the Gay Freedom Day Parade in San Francisco in late June 1978:

"My name is Harvey Milk and I'm here to recruit you. I want to recruit you for the fight to preserve your democracy. Brothers and sisters, you must come out! Come out to your parents, come out to your friends, if indeed they are your friends. Come out to your neighbors, come out to your fellow workers. Once and for all, let's break down the myths and destroy the lies and distortions. For your sake, for their sake. For the sake of all the youngsters who have been scared by the votes from Dade to Eugene." (Emphasis mine).

This speech immediately came to my mind as I wrote a previous column about the new data on substance abuse, depression and barriers to treatment for lawyers. The recent survey showed that one of the major obstacles for lawyers (to the tune of about 67 percent) was the fear of others finding out one has an illness. And not just any illness, but alcoholism or a mental illness. And yet, in KALAP, we get the opportunity to know and work with so many wonderful Kansas lawyers who have successfully managed those illnesses, so I know that stigma is wrong and unfair. And I know too, that so often as I get into conversation with someone, eventually they mention they have a family member or friend with one of those conditions. So we all know there are lots of lawyers—lots of people—who are dealing with the illness and the stigma.

I think the idea inherent in Harvey Milk’s exhortation to come out is that once family and friends who already know and like someone and think of them as “regular” people find out that the person is lesbian, gay, bisexual or transgender, they will realize they are not that different after all. And this is the kernel—the key to the message of this column. The comic strip character Pogo is famous for his line that “we have met the enemy and he is us.” We’ve met the problem drinker, the depressed, the anxious—and she is us. If not me personally, then a neighbor, a colleague, or someone I know.

Now, KALAP is totally confidential of course, so we don’t talk about individuals. And I’m not actually advocating for those who have successfully managed alcoholism or mental illness to necessarily publicize that fact. What I am trying to advocate is a shift in our attitudes, even a paradigm shift in our perceptions. Alcoholics are among us everywhere. Lawyers contending with depression and anxiety are among us everywhere. We know them. They are not alien, not other. They are our family members, our friends, and our associates in the legal profession.

Once upon a not-so-very long time ago, there was a stigma toward tuberculosis, and cancer. When I searched cancer stigma on the web, here’s one statement that came up on www.cancerworld.org: "Stigma breeds silence, which fuels the fear and ignorance that feeds the stigma. Breaking this vicious circle not only makes life easier for people with cancer, but can also change public attitudes towards prevention and early detection."

Early detection, and thus treatment, can often be fatally delayed just by the stigma.

Patrick Krill, one of the study’s authors, also a lawyer and director of the legal professionals program at Hazelden, had this to say about stigma according to the State Bar of Wisconsin website:

When drinking becomes problematic, or lawyers develop mental health conditions, the pervasive stigma associated with those issues creates a barrier for lawyers to seek help, Krill says. “There’s a lot of stigma attached to substance use disorders and mental illness. Because a lawyer’s reputation is so important, there’s a fear in admitting vulnerability or weakness, or admitting that we are struggling,” he said. “And those fears can be justified, because this can be a harshly judgmental and highly competitive environment. But when this data comes out and people realize how many lawyers are struggling, it will be difficult to view these issues through such a judgmental lens. That’s my hope anyway.”

The second speech in the biopic was Harvey Milk’s victory speech after the defeat of Proposition 6 in California in 1978, on the eve of his own assassination: ”Tonight, it’s become clear to everyone out there that they do know one of us . . ." And I’m betting that you know someone with a substance abuse disorder or a mental health condition, just like you probably know people with diabetes, or heart disease, or asthma—all chronic health conditions that can be successfully managed. The sooner we get rid of the stigma, the better.

About the Author

Anne McDonald was appointed to the Lawyers Assistance Program Commission at its inception in 2001 and has served as the Executive Director of KALAP since 2009. She graduated from the University of Kansas School of Law in 1982.
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IOLTA Snapshot: Kansas CASA
Court Appointed Special Advocate program volunteers advocating for the best interests of children in courtrooms

The Kansas Court Appointed Special Advocate (CASA) program will use funding from a $12,500 Interest on Lawyers Trust Account (IOLTA) grant to hire additional staff to recruit and train volunteers. According to national trends, the number of children in foster care is going down. However in Kansas, the number of children in state custody has risen to record levels, correlating with a rising number of child abuse and neglect complaints. Last year, CASA programs were only able to serve about 17 percent of Kansas’ abused and neglected children. The state’s ability to advocate for more children is dependent on its ability to increase the number of trained volunteers. National CASA standards allow a full-time staff person to supervise only 30 volunteers. Some of the CASA programs are at capacity, and can only serve more children if they have additional staff to recruit, train and supervise CASA volunteers.

"CASA programs in Kansas provide children in the court system with a much-needed voice, advocating to ensure their best interests are sought. CASA volunteers are this voice for abused and neglected children. Funding through IOLTA helps to support the vital services of CASA volunteers across the state, and helps to ensure the needs of abused and neglected children are met."

– Mickey Edwards, State Director
Kansas CASA Association
www.kansascasa.org
Not too long ago, I was speaking on the telephone with a law professor from back east. She was listed as a reference by an applicant for a clerkship in my office. As is the habit of most law professors, she chose this opportunity to instruct me on the finer points of law and life. Her specialty is the subject of ambiguities. She pointed out, "Judge, did you know there is an ambiguity in the Kansas state song, *Home on the Range?"
"Well, professor, I did, actually. When our legislature is in session, we can't really say, 'Where never is heard a discouraging word . . .'
"No, Judge, that's not what I was referring to. Actually, I was referring to the next phrase."
"What do you mean, where the skies are not cloudy all day?"
"Yes, precisely."
"Really! Oh I'm sorry, professor, that is as plain as a pikestaff to me. It simply means there's not a cloud in the sky all day, so come to Kansas and see all of our 'Sunflowers in our Sunflower State.'"
"That's fine, Judge, and I appreciate your view on this, but perhaps we should take a look at it in a different way. How is that?"
"All right."
"Well, consider this. You are from Seattle, a town that receives rain 361 1/2 days a year. Hearing that verse from your song, someone from Seattle could consider, 'Aha! All day the skies are not cloudy.' Indeed, for some period during the day, the skies have no clouds."

I was stunned. She was right. There is an ambiguity in that verse.

With that, I started examining all sorts of statements, looking for ambiguities. The classic, of course, is "Did you see the girl on the hill with the telescope?" Who has the telescope? The girl? The hill? Or you?

Or consider this from a brief I recently read: "The defendant turned on the police officer with a gun." Who had the gun? The defendant? Or the police officer?

Consider this example from a recent workers compensation case:

"I really started hurting around the first of April."
Interestingly, both sides used that statement for support. One side claimed the worker's pain did not start until April 1. The other side argued the worker's pain intensified significantly on the first of April.

Now that you are aware of these little landmines that get planted in the rush of your initial composition, you must remedy them. Ambiguities such as these mentioned lead to imprecision. When you draft any legal document, imprecision is the last thing you want.

As you start your edits, you must look for ambiguous statements in your writing. Once you start looking for them, they jump out, as if they are highlighted. Answer these questions honestly when editing your work: Is this statement ambiguous? Can it be taken another way? Is it precise?

If it is ambiguous, redraft it to render the meaning you wish to convey.

For example:

The defendant who had a gun turned on the police officer.

or

The defendant turned on the police officer who followed him with a gun drawn.

or

The worker only began to feel pain around the first of April.

or

The injured worker's pain intensified around the first of April.

**Ambiguity: Just How Blue is that Sky?**

Hill speaks at many continuing legal and judicial education presentations in Kansas and on occasion at the Judicial College in Reno, Nev. His topics include such subjects as ethics for lawyers and judges, the law and procedure of contempt proceedings, decision-making, appellate brief writing and oral argument. Judge Hill also speaks often to civic groups and organizations about Kansas courts and the law.

Hill also served as Chair of the PIK Committee, a subcommittee of the Judicial Council, from June 2003 to June 2012.

hills@kscourts.org

About the Author

With such redrafting, the modifier is moved so it more clearly modifies the subject that you want to modify.

With my telescope, I saw the girl on the hill.
I saw the girl on the hill had a telescope.
I saw the girl near the telescope on the hill.

To rid your writing of unintended ambiguities, look for them when you are editing. After all, good writing is the end product of many decisions. Is this word right? Should this phrase be moved over here? Should this word, sentence, or paragraph be eliminated?

The best way to take care of ambiguous statements is to redraft the sentence. If you do not have an editing checklist, I recommend that you make one. Use of such a checklist provides a methodical review of your composition.

Assuming you know your audience (subject of a later article) here is an example:

Answer the following questions honestly:

1. Are the parties clearly identified?
2. Are their claims spelled out?
3. Does my theme spring up with vigor and clarity?
4. Are the sentences unambiguous?
5. Can there be any misinterpretation of my meaning?
6. Are there transitions between paragraphs?
7. Is the piece too long? Too short?
8. Have I created road signs to guide my reader?
9. Is my reasoning clear and unassailable?
10. Is the conclusion tight, bright, and persuasive?

We all love Home on the Range, but from now on I bet you will think of those cloudy skies. Did you hear the one about the hunter who went after the bear with a knife?
That’s either a story about one tough (if not foolish) hunter or one tough bear.

I wonder which?
Mandatory Succession Planning

Abraham Lincoln is credited with saying, “The best way to predict your future is to create it,” and multiple jurisdictions are demanding that lawyers do just that through mandatory succession planning.

Nebraska and Iowa Rules

The Nebraska Supreme Court has proposed an amendment to its rules which would require sole practitioners to have a backup attorney should the practitioner leave the practice unexpectedly. The proposed amendment to Nebraska Supreme Court rule § 3-803(C) mandates that:

“(1) Each attorney who is a sole practitioner shall name an attorney (“Designated Attorney”) to protect the interests of the designating attorney’s clients in the event the designating attorney dies, becomes disabled, disappears, or abandons or otherwise temporarily or permanently ceases the practice of law. The Designated Attorney may take whatever actions may be required or deemed appropriate under any such circumstance, including but not limited to, reviewing client files of the designating attorney, notifying the designating attorney’s clients of the situation, maintaining the designating attorney’s practice to the extent feasible or practicable, and/or proceeding with resolution or other disposition of the designating attorney’s client matters.

(2) A form to name a Designated Attorney shall be included with the annual dues statement: At the time of naming a Designated Attorney, the designating attorney shall certify on the form that the Designated Attorney has agreed to serve as such.”

This Nebraska amendment was released for public comment in April 2016, and some version is expected to be finalized later this year. On the other side of I-29, the Iowa Supreme Court adopted Court Rule 39.18 in November 2015 aimed at the same goal of requiring solo practitioners to plan for their ultimate exit from practice—even if that exit is unexpected. The Iowa rule is more burdensome than Nebraska’s proposal, however, requiring solos to have a written plan that:

• Designates both a primary and an alternate active Iowa attorney
• Authorizes Designated Attorneys to make trust account disbursements, dispose of inactive files, and arrange for storage of files and records
• Identifies location of electronic records and provides Designated Attorneys access to passwords and other security protocols required to access such records
• Is available for review upon request to Iowa’s disciplinary administrator equivalent

Some Concerns

The noble purpose of such succession planning rules is to protect clients when their lawyers die, are disabled, disappear, or are disbarred. Whether these two states’ rules accomplish that purpose without stirring up a host of thorny new issues is still open for debate. The most obvious complaints are that the rules seem to sidle up close to rent-seeking by non-solos unaffected by the rules because of an unfounded assumption that multi-lawyer firms always plan for the sudden exit of a partner. If clients’ interests are the concern, then a more effective (and fair) approach might look to ensuring that every lawyer has a succession plan in place—even those who are not sole practitioners. Having been observer to dissolution of some solo practices and partnerships both, my anecdotal experience is that neither has cornered the market on preparation.

Other concerns raised in Iowa and Nebraska relate more to the mechanics of making such a plan work. For example, what is the anticipated impact on insurance for lawyers signing up as Designated Attorneys? There does not seem to have been much research into that issue but it is hard to believe an agreement to assume responsibility for another firm would not be of interest to malpractice carriers. Along this same vein, what protections exist for a Designated Attorney when a triggering event occurs and his practice suddenly is consumed with closing down a colleague? There are some unwritten protections for a disciplinary administrator approved team closing down a firm that may not be afforded to Designated Attorneys.

This issue will come to Kansas and soon. The best way for Kansas lawyers to predict our future succession planning rules is to step up and create them.

About the Author

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

kslpm@larryzimmerman.com
To all attorneys and others who have referred criminal trial and appellate cases to us, we truly appreciate your confidence in our firm and your commitment to preserving the rights and liberties of those accused.

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Members in the News

Changing Positions

Jonathan E. Benevides has been elected to member at Baker Sterchi Et Al, Kansas City, Mo.

Christopher T. Borniger has been promoted to partner at the Law Offices of Morris, Laing, Evans, Brock & Kennedy, Chtd., Wichita.

Anne E. Burke, Jason C. McClasky and Shea E. Stevens have formed Burke McClasky Stevens—concentrating in family law and mediation, Overland Park.

Hon. Daniel D. Creitz has been reappointed chief judge of the 31st Judicial District, Iola.

Megan L. Hoffman has been promoted as partner and shareholder at the Law Offices of Morris Laing Et Al, Wichita.

John Matthew Leavitt has been promoted partner at Hulnick Stang & Gering & Leavitt, Wichita.

Kevin D. Mason has been promoted to shareholder at White Goss P.C. and Bryant E. Parker has joined as an associate, Kansas City, Mo.

Christopher B. Nelson has joined Fisher Patterson Sayler & Smith LLP as an associate.

Hon. Michael F. Powers has been reappointed as chief judge of the 8th Judicial District, Marion.

Douglas T. Shima has been appointed as Clerk of the Appellate Court, Topeka.

Matthew W. Bish, Eric M. Pauly, Bradley D. Serafine and Justan Shinkle have been promoted partner at Foulston Siefkin LLP, Wichita.

Jessica L. Skladzien has been promoted partner at Lewis Brisbois Bisgaard & Smith LLP, Wichita.

Clifford A. Cohen has moved to 7015 College Blvd. #375, Overland Park, KS 66211, (913) 345-2555, (913) 345-2557 (fax), cac@ksmolaw.com.

Changing Locations

Anne E. Burke, Shea E. Stevens and Jason C. McClasky have moved to Burke McClasky Stevens, 9401 Indian Creek Pkwy., Ste. 220, Overland Park, KS 66210, (913) 242-7522, (913) 242-7517 (fax), aburkejd@aol.com, shea@bmsfamilylaw.com, jace@bmsfamilylaw.com.

Members in the News

Miscellaneous

The Douglas County Bar Association has announced the new elected officers and board of directors: Branden L. Smith, President; Anne B. Hall, Vice President; Terence E. Leibold, Secretary; Dakota T. Loomis, Treasurer. Board of Directors: Curtis G. Barnhill, Cheryl L. Denton, Richard W. Hird, Jody M. Meyer and Sarah E. Warner.

Holly A. Dyer, Wichita, has been elected to the American Law Institute.

Jay F. Fowler, Wichita, has been inducted as a fellow of the International Academy of Trial Lawyers.

Larry E. Keenan, John Peck and Hon. Kathryn H. Vratil were recognized by University of Kansas School of Law to receive the 2016 Distinguished Alumni Award.

Paul Shipp, Manhattan, spoke to Abilene seniors at the senior center about healthcare decisions including creating durable powers of attorney and living wills.

Diane H. Sorensen, Wichita, has become a panel member of the American Arbitration Association.
The First "Secret Service"

The Kansas Frontier Attorneys who Protected Abraham Lincoln

By James P. Muehlberger

Seven members of the Frontier Guard also served as Treasury Guards, who remained on duty throughout the war. The unfinished Washington Monument stands behind them.
I. Introduction
On April 27, 1861, a grateful President Abraham Lincoln thanked 116 men—among them 49 Kansans—saying that “language was incapable of expressing how great an obligation he and the people all over this country are under to this little band of patriotic men for their services in preventing, as they undoubtedly did prevent, this capital from falling into the hands of the enemy.” Who were the men in this “little band,” and what had they done? Most were battlefield veterans who had fought in General James H. Lane’s army against pro-slavery soldiers in “Bleeding Kansas” during the six years leading up to the outbreak of the Civil War. After the fall of Fort Sumter, Lincoln asked these men to bivouac in the White House and serve as his armed bodyguard—the first “Secret Service”—and they likely saved Lincoln’s life. As a result of the recent discovery of documents identifying these men, 18 of whom were Kansas frontier lawyers, their story can now be told for the first time.1

II. "On to Washington!"
At the outbreak of the Civil War, Confederate leaders realized the South was vastly outnumbered. The Confederates’ best chance for success depended on a quick strike leading to victory. Many believed their best chance for victory would be to eliminate the one person with the courage and determination to “put the foot down firmly” if necessary—Abraham Lincoln. New York Tribune editor Horace Greeley said, “There were forty times the reason for shooting [Lincoln] in 1860 than there was in ‘65, and at least forty times as many intent on killing him.” There were rumors that an army of Confederates, flush with victory after the capture of Fort Sumter, was marching toward the capital to drag Lincoln from bed and hang him from the nearest tree.2

Washington was located in the red heart of Confederate country. Located 40 miles south of the Mason-Dixon Line, the nation’s capital was a slave-owning city carved out of Maryland. Most of its residents and government employees either owned slaves or were pro-slavery, and the city was completely surrounded by the slave states of Virginia and Maryland. Washington had no fortifications, only a handful of loyal soldiers, and was infested with Confederate spies and saboteurs. The South rang with cries of “On to Washington!” Jefferson Davis’s wife sent out cards inviting her friends to a May 1 reception at the White House. President Lincoln startled his cabinet by stating, “If I were [Confederate General G.T.] Beauregard, I would take Washington.”3

In April 1861, there was not yet a U. S. Secret Service. No Federal Bureau of Investigation. No Central Intelligence Agency. No well-trained federal agents who could be dispatched to gather intelligence relating to a threatened presidential assassination or overthrow of the government. Most of the 16,000 men in the U. S. Army were out West fighting Indians. The military force that remained in defense of Washington consisted mainly of loyal government clerks and the military band. The clerks had been armed, but they knew little about war. Lincoln desperately needed fighting men who could handle a gun, stand under fire, and not hesitate to fire into the face of the enemy. Fortunately for Lincoln, scores of experienced soldiers from Bleeding Kansas had just arrived in Washington to enroll in the army. Jim Lane, who had just been elected as Kansas’s first U.S. Senator, was their leader. Lincoln summoned Lane, who he had met 16 months earlier during his visit to the Kansas Territory, to the White House to discuss the crisis.4

When Lane arrived at the White House, he gripped Lincoln’s huge, hard hand. At 52, Lincoln was a strapping 200 pounds of muscle on a 6-foot 4-inch frame, his black suit draped over sinewy shoulders and a narrow waist. His shoulders and forearms were so strong that he could hold a heavy, double-bladed ax horizontally in one outstretched arm and hand without a quiver. His gray eyes peered out beneath bushy eyebrows, set in a leathery face. He was the virile figure of his presidential campaign: the strong, independent, Western rail-splitter, and not yet the haggard, hollow-eyed figure of Civil War photographs.

The men met for several hours in Lincoln’s second-floor office, where a fire crackled and blazed in the marble fire-
place behind a brass fender. Lincoln's worktable stood between two tall windows that faced the South Lawn, looking out across the marshes to the jumbled blocks that surrounded the unfinished shaft of Washington's monument. Lincoln explained the situation and told Lane: I don't know who I can depend on. Lane replied, "I'll organize a body of men who will fire when called upon."

The rebels were well known to Lane and the Kansans—they had fought pro-slavery soldiers in successful military campaigns for six years in the Kansas Territory. Lane believed the rumored attack on the White House was a certainty. He knew the mood of his men, some of whom had fought South Carolina men in the Kansas Territory. Knowing them to be rough men ready to do violence on Lincoln's behalf, Lane warned Lincoln: "The only trouble is they may fire whether called upon or not. Their blood is up!" Pro-slavery men had left blood from the friends and family members of the Kansans on the prairie grass. Now it was time to even the score.

Lincoln had met most of these rough-hewn Kansans during his visit to the Kansas Territory 16 months earlier, and he quickly agreed to Lane's proposal.

III. Bloody Kansas

The Kansas Territory Lincoln had visited in December 1859 was a rugged, deadly place. The vast territory, a huge swath of open plains stretching west to the Continental Divide and including much of present-day Colorado, had first been opened to white settlers by the May 1854 Kansas-Nebraska Act. The question of whether Kansas would be a free or slave state was to be decided by the voters (i.e., white males). Free State and pro-slavery men flooded into the territory in an effort to determine the outcome of slavery in Kansas, and violence quickly ensued. Weapons began flooding into the territory, and partisans on both sides soon became walking arsenals. Newspapers began calling the territory "Bleeding Kansas."

Lawyers were also attracted to the territory. Land sales and claim disputes led to much legal business. Towns that were county seats (and therefore the sites of courts), such as Leavenworth and Lawrence, were favorites of frontier lawyers. The vast majority of these men were not graduates of law school, but had trained for the bar by apprenticing themselves to another lawyer. They tended to focus on common sense, rather than highly technical legal analysis. Many soon became leaders of the Free State men.

IV. "The White House is Turned to Barracks"

As the sun set on April 18, 1861, the Kansans, bristling with revolvers and rifles, marched down Pennsylvania Avenue to the White House. Newspapers reported that these Westerners had "seen hard service on the frontiers," were "among the most skillful marksmen" in the country, and "were impatient to avenge the wrongs they had suffered in Kansas." The Kansans brushed by "Old Edward," the wizened Irish doorman who had served seven U.S. presidents, and set up camp in the East Room, to the left of the front entryway into the White House. The men forted-up for trouble. They dumped crates of Enfield rifles and ammunition in the middle of the floor of the East Room. The men expected they might have to withstand a siege, so they wanted plenty of ammunition on hand. If the Confederates attacked, they expected to fight to the death. Lincoln's secretary, John Hay, recognized the desperate and historic nature of what he was witnessing and noted in his diary, which he started that very night: "The White House is turned into barracks. Jim Lane marshaled his Kansas Warriors today ... into the East Room ... It is a splendid company ... of Western Jayhawkers." For the next ten days the men operated as the country's first "Secret Service."

For ten days, the city's fate hung by a thread. One question now transfixed the nation: Whose soldiers would reach Washington first? Federal troops to save it? Or the Confederate Army to seize it?

V. The "Men Who Stood Off an Entire Rebel Army"

On Thursday, April 18, 1861, many longtime residents of Washington began fleeing the city, terrified of being caught in a battle when the Confederates attacked. Trains were filled to overflowing. The roads were clogged with horseback riders, and carriages and wagons heaped with household goods. The poor walked, pulling their personal possessions in handcarts.

Both for Lincoln's protection and the benefit of Confederate spies, Lane conspicuously positioned sharpshooters on the roof of the White House, armed with deadly Sharps buffalo rifles, which could blow a hole through a man "big enough to allow a stagecoach to drive through." War stared at them from just 800 feet away. Only the width of the Potomac River separated the United States from the newly formed Confederate States of America. In the wooded Virginia hills overlooking the river, Confederate campsfires blinked like evil red eyes at the city.

It was rumored that the Confederate Army intended to attack Washington that night, kill or imprison Lincoln, and move the Confederate capital north of the Potomac. But the presence of the fierce Kansas fighters, whom the Confederate newspapers called "Kansas cutthroats," caused the Confederates to hesitate, as they knew these Westerners could and would shoot. Rather than attack, the Confederates attempted to first learn their opponent's troop strength and intentions.
Based upon the letters the Kansans wrote to their loved ones, they expected they may not live to see the morning light. But they vowed, in typical Western understatement, to give the rebels “a good fight.” Northern newspapers called the Kansans “Lincoln’s Guard” or the “Frontier Guard.”

The Kansans began a misinformation campaign, spreading rumors that their numbers the first night were several hundred, and that their force grew quickly over the next few days to several thousand. Lane refused the suggestion that his men wear uniforms—the last thing Lane wanted was for the Confederates to know their identity, location, and number. At night, the men marched noisily back and forth across the wooden Long Bridge spanning the Potomac, making the rebel spies believe they were being reinforced with hundreds of fighters, who it was rumored were hidden at Willard’s Hotel, the Treasury Building, and in the unfinished Capitol.9

By Saturday morning, April 20, Washington was nearly a ghost town. The city was isolated. Confederates had torn up the railroad tracks leading North, burned railroad bridges, and destroyed telegraph lines. Union spies reported that the Confederates believed Lincoln’s Guard were now “400 or 500 strong.” In reality, as other loyal men joined the group, the number of men camped in the East Room had grown to only 116.10

When Lincoln recalled the events of April 1861 one year later, he described the city’s isolation: “Mails in every direction were stopped,” while telegraph lines were “cut off by the insurgents” and “all the roads and avenues to the city were obstructed.” At the same time, the “military and naval forces called out by the government for the defense of Washington were prevented from reaching the city by organized and combined reasonable resistance. The capital was put into the condition of a siege.” Despite his entreaties, his wife Mary refused to leave his side. She sat up all night fully dressed, waiting to be captured.11

Union spies reported that the Confederates in Virginia were in “dread of James Lane and his John Brown horde.” To Confederates, Brown was a crazed religious zealot who had been willing to die for his cause of freeing slaves—much like a martyr fighting a holy war. Calling Lincoln’s Guard a “John Brown horde” reflected slave-owners’ fear that the men in Lincoln’s Guard were also martyrs who would fight to the death—and these men had already defeated larger pro-slavery armies in the Kansas Territory. Pro-Slavers hesitated to fight them again.12

On Monday, April 22, the city was as dark and deserted as the sunset. Theaters and stores had closed. Lincoln’s Guard marched conspicuously up and down in front of the White House, armed with rifles and revolvers. A glimmer of good news finally appeared on the horizon. It was reported that the Eighth Massachusetts Volunteers and the Seventh New York Regiment had commandeered a ferry boat and had finally sailed into Annapolis Harbor. Their commanders, however, refused to allow them to sail up the Potomac River to Washington because they feared that enemy guns might shell them from the Virginia shore.13

On Tuesday, April 23, the city was braced for an attack. General Scott came to dinner at the White House and spoke with Lincoln about the possibility of famine in the city. The impending attack by Confederates seemed more real than the hope of rescue from the North. A haggard-looking, worried Lincoln scanned the Potomac River with field glasses through the window of the Executive Office, looking for ships bringing troops and exclaimed, “Why don’t they come! Why don’t they come!”

Lane received word from his spies that the Confederates were gathering at the crossroads of Falls Church, Va., about nine miles from Washington, for a strike at the White House. The Kansans marched to Falls Church, where they saw a company of Confederates drilling in the town square. They attacked, scattering the Confederates, who did not even have time to take down their flag, which was flapping on top of a flagstaff. The Kansans brought the flag back to Washington—the first Confederate flag taken by federal forces on Confederate soil during the Civil War.

On Wednesday, April 24, Lincoln met at the White House with federal troops who had been wounded in Baltimore as they attempted to get to Washington. Lincoln’s “impatience, gloom and depression were hourly increasing.” He thanked the men for their patriotism and then confided his doubts openly: “I don’t believe there is any North. You are the only northern reality.” Unknown to Lincoln, however, the Confederate general in Alexandria, Va., wrote General Robert E. Lee that he believed there was “an army now numbering ten to twelve thousand men” there. The propaganda efforts of Lincoln’s Guard had paid off.

On Thursday, April 25, a train carrying 1,000 soldiers of the Seventh New York regiment finally pulled into Washington. The next day, additional troops from Massachusetts and Rhode Island arrived. The emergency had passed. The Kansans had succeeded in causing the Confederates to delay their attack, buying Lincoln the time he needed to march federal troops into the city.

On April 27, Lincoln formally thanked the Kansans, and presented each soldier with a signed “Honorable Discharge” (even though they were never officially enrolled in the Union army), and took a photograph with them on the South Lawn of the White House. Lincoln concluded, “I cannot speak so confidently about the fighting qualities of the Eastern men… but this I know—if the Southerners think that man for man they are better than… our Western men… they will discover themselves in a grievous mistake.” Lincoln added, “Nothing is too good for 110 [sic] men who stood off an entire rebel
VI. The Kansas Lawyers in Lincoln’s “Secret Service”

The identity and actions of Lincoln’s “Secret Service” had been in question until the author discovered the dusty muster roll and after-action report of the men in the Library of Congress, during a sabbatical from his law firm. Finally, we now know the identity of these brave Kansans. Because of space limitations, this article will discuss only a few of the Kansas lawyers in this brave band. But describing these men as lawyers is like describing Doc Holliday as a dentist. These tough frontier lawyers were as good with a pistol as with a pen.13

On April 18, 1861, the first day of their service guarding Lincoln, the Kansans had elected seven men to serve as officers of their company, four of whom were lawyers. They elected Mark M. Delahay as First Lieutenant, John T. Burris as Sergeant, John W. Jenkins as Corporal, and Jim Lane as their Captain. Delahay had first met Lincoln in Illinois, where Delahay was a lawyer and ran a newspaper. In 1855, Delahay moved his family to Leavenworth, where he continued his legal practice and started an antislavery newspaper. Publishing an anti-slavery newspaper in the Kansas Territory was a risky—and even deadly—occupation. Under the laws adopted by the so-called “Bogus Legislature,” a pro-slavery legislature fraudulently elected by Missouri pro-slavery voters, opposing slavery in print was punishable by imprisonment and/or death. Accordingly, the “Colt pistol was as much the necessary equipment of an editor as his pencil and paper.” In December 1855, while Delahay was attending the Free State convention in Lawrence, a pro-slavery mob destroyed Delahay’s newspaper office and threw his printing press into the Missouri River. Delahay and his young family were forced to flee for their lives to Illinois, but the dogged Delahay returned to Leavenworth in 1857 and started another antislavery newspaper. Abe Lincoln stayed with Delahay and his family for three days during Lincoln’s December 1859 visit to Leavenworth. After Delahay’s service in Lincoln’s Guard, Lincoln first appointed him Surveyor General of Kansas, then the Kansas U.S. District Court Judge.16

Sergeant John Burris was a rough-hewn Ohioan. His grandfather had fought in the Revolution at the battle of Yorktown. His maternal grandfather held the office of Sergeant-Major under General Anthony Wayne and fought in the Ohio Indian wars. Burris grew up on frontier farms in Ohio and Kentucky, hunting to help put meat on the family table. A 19-year-old Burris had fought in the Mexican War with the Mounted Rifles, afterward known as the Third United States Cavalry. Burris obtained a law license, and in 1858 he rode to Olathe, Kansas Territory. He was soon elected a member of the Wyandotte Constitutional Convention, and was one of the framers of the Kansas Constitution. After serving in Lincoln’s Guard, Burris enlisted and became a Lieutenant-Colonel in the Fourth Kansas Volunteer Infantry, where he distinguished himself in numerous skirmishes and battles along the Kansas-Missouri border. At the close of the war he returned to Olathe and was elected a member of the Kansas House of Representatives, of which he soon became the speaker. In 1866, he was elected Attorney of Johnson County, and in 1869 was appointed Judge of the 10th Judicial District. After serving in the Kansas legislature he again assumed the role of judge of the 10th District from 1890-1901.17

Corporal John Jenkins grew up on the Indiana frontier. In July 1858, a 22-year-old Jenkins rode to Lawrence: a Free State fortress 35 miles outside of the organized United States. Jenkins opened a small law office and became active in Free State politics. After his service in Lincoln’s Guard, Lincoln appointed Jenkins as a Treasury Guard for the U.S. Treasury during the war. In 1874, President Grant appointed Jenkins Secretary of the Territory of Colorado, where he soon also became Governor.18

Thomas Ewing Jr. was the son of Thomas Ewing, a U.S. Senator from Ohio and later Secretary of the Treasury and the Interior. In 1854-55 Ewing attended law school and began to practice in Cincinnati. Shortly after, he moved to Leavenworth and became active in Free State politics. In January 1858, he risked his life by standing up to armed and threatening pro-slavery men to monitor, investigate, and then testify about the pro-slavery fraudulent voting in the Kansas election.

After his service in Lincoln’s Guard, Ewing returned to Kansas, where he was appointed Chief Justice of the Kansas Supreme Court. In 1862, Ewing resigned to become a Colonel of the 11th Kansas Cavalry. In March 1863, he was promoted to Brigadier General of Volunteers, and was placed in command of the District of the Border, consisting of Kansas and the western Missouri counties. After Quantrill’s August 21, 1863, massacre in Lawrence, Ewing issued Order No. 11, which commanded that Southern sympathizers living in the four Missouri counties bordering the Kansas state line be expelled in an effort to stop guerrilla attacks into Kansas. In March 1865, Ewing was promoted to Major General of Volunteers for his heroic service at the Battle of Pilot Knob, Missouri, where his 800 troops fought off repeated attacks from 15,000 Confederates. Eastern newspaper writers hailed the Battle of Pilot Knob as the “Thermopylae of the West,” and Ewing as a hero. After the war, Ewing moved to Ohio and served in the U.S. House of Representatives.19

Marcus J. Parrott grew up on the Ohio frontier. From 1853-55 he served as a representative in the Ohio legislature. In the spring of 1855 he moved to Leavenworth, began a law practice, and enrolled in the Free State Militia. In October 1855, he was a delegate to the Topeka Constitutional Convention. During the December 1855 siege of Lawrence by pro-slavery
men, Free State Lieutenant Colonel Parrott was taking a load of gunpowder into Lawrence when he was captured by pro-slavery soldiers. The slavers tied him up and took him to their camp on the other side of the Wakarusa River. Parrott got wet crossing the river and feared he would either be hung or freeze to death during his horrible night of captivity. The next morning, however, after Jim Lane and Charles Robinson met with the pro-slavery militia leaders and negotiated a truce, the pro-slavery soldiers released Parrott as they broke camp. In 1857, he was elected as the Kansas territorial delegate to the U.S. Congress. After his service in Lincoln’s Guard, he enlisted as captain in the Adjutant General Department.20

Henry Joseph Adams grew up New York. In his early 20s he moved to Cincinnati, Ohio, where he married and graduated from the Cincinnati Law School. He practiced law, became involved in politics, and worked to abolish slavery. In the spring of 1855, he moved to Leavenworth and became active in Free State politics. In 1856 he was elected as a Senator in the first Free State Legislature. In the spring of 1857, he was elected as the first Free State Mayor of Leavenworth. In January 1858, an unarmed Adams led a group of about 20 Free State men who rode from Leavenworth to Atchison (a pro-slavery stronghold), to confront about 50 heavily-armed pro-slavery men who were there to murder Jim Lane when he arrived in town for a campaign speech. Because of his bravery and bravado, he backed down the Missouri Ruffians without a shot being fired. After his service in Lincoln’s Guard, Lincoln appointed Adams as a paymaster in the army, a position he held through the war.21

James H. Holmes had grown up in Ithaca, N.Y., but moved to the Kansas Territory in 1856 to join John Brown’s fighters. It was reported that Holmes fired the first shot at the Battle of Osawatomie. He was so fierce and frenetic during the battle, rushing to any point in the Free State skirmish line that appeared to be faltering, that Brown called Holmes a “hornet.” Holmes lost his horse during the fight but escaped the overwhelming number of pro-slavery soldiers by swimming across the Marias des Cygnes River. After serving in the Frontier Guard, Lincoln appointed Holmes Secretary of the New Mexico Territory.22

VII. Conclusion

On April 14, 1865, the day he was shot by John Wilkes Booth, Lincoln signed the law that created the Secret Service. It was a terrible tragedy that one or two of the Kansans who had protected Lincoln in April 1861 were not on duty guarding him four years later. Several of the Kansans said as much, and they wept when they heard of Lincoln’s death.23 Today, Lincoln is a marble monument. But for these Kansans, Abe was a passionate, fallible human being—they shook his huge hand, grazed into his gray eyes, felt his breath, and shared laughs over earthy stories. Those who knew and walked with Lincoln have passed away, but by studying those close to Lincoln, perhaps we can gain insights into the great man. Lincoln never forgot these lawyer-heroes from the Kansas Territory. Perhaps we should remember them too.

About the Author

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ENDNOTES

2. The 116, 1-2.
3. The 116, 2.
5. The 116, 18-19.
7. Id., 126, 133.
8. Id., 20-21. As men from other states joined the Kansans over the next several days, their number grew to 116.
10. Id., 141.
11. Id., 143.
12. Id., 145.
15. The reader is referred to The 116 for a discussion of the others. Men from other states joined the Kansans, until the company numbered 116. Because the Frontier Guard was a voluntary organization, the men served without pay, they were never mustered into the regular army, and their names were never placed on the official army rolls.

16. Id., 35.
17. Id., 276-77.
18. Id., 352-33.
19. Id., 296-98.
20. Id., 350-51, 398, n. 25.
21. Id., 75-77; 259-60. Adams’s brother, Franklin George Adams, is the great-great-grandfather of United States District Court Judge Kathryn H. Vratil.
22. Id., 65, 322-23.
23. Id., 153. The other Kansas lawyers in Lincoln’s Guard included: Sidney Clarke, who served as a pallbearer at Lincoln’s funeral and was a member of the U.S. House of Representatives; Martin Conway, who as a representative from the Kansas Territory on the Republican National Executive Committee had cast the tie-breaking vote sending the 1860 Republican presidential convention to Chicago rather than St. Louis, paving the way for Lincoln’s nomination; Addison Danford, who later served as Kansas Attorney General; Jeff Dugger, who had represented clients with Lincoln in Illinois before moving to the Kansas Territory; Samuel Greer, who later served as a Captain in the 15th Kansas Volunteer Cavalry; Robert McBratney, who was later a presidential elector and a member of an exploratory trip to the Solomon River Valley; Edward McCook, who became a Brigadier General in the Union army and who accepted the surrender of Birmingham, Alabama and Florida; James Normile, who later was elected as judge of the Criminal Court in St. Louis; William Ross, who later became Mayor of Topeka; Thomas Shankland, who later served as Assistant U.S. Treasurer at New York; and Patrick Townsend. The 116, passim.
ATTORNEY DISCIPLINE

ORDER OF REINSTATEMENT
IN THE MATTER OF SCOTT C. STOCKWELL
NO. 108,929—MARCH 28, 2016

FACTS: On March 1, 2013, the court suspended the petitioner, Scott C. Stockwell, from the practice of law for a period of one year. Stockwell was ordered to undergo a hearing under Supreme Court Rule 219 before a petition for reinstatement would be considered. Stockwell filed an amended petition for reinstatement on July 2, 2014.

HEARING PANEL: The hearing panel met in March 2016 and subsequently filed a report setting out the conduct which lead to Stockwell’s suspension, a summary of the evidence presented and its findings and recommendations. The panel unanimously recommended that Stockwell’s license be reinstated, subject to practice supervision as detailed in the supervision plan.

HELD: The court accepted the findings and recommendations, and granted the petition for reinstatement, subject to practice supervision.

ORDER OF SUPERVISED PROBATION
IN THE MATTER OF DAVID BEN MANDELBAUM
NO. 114,830—APRIL 8, 2016

FACTS: A hearing panel determined that Mandelbaum violated several of the Kansas Rules of Professional Conduct (KRPC), including 1.8(a) and 1.8(e). Mandelbaum answered and promptly filed a probation plan. The charges arose after Mandelbaum kept settlement proceeds in trust at the request of his client, then received verbal permission to borrow against those funds. He did not advise his client to seek advice from counsel. All of the money was returned to the client. Mandelbaum also advanced funds to for living expenses to multiple clients.

HEARING PANEL: After finding that Mandelbaum violated several of the KRPC, the panel noted that while there was a great deal of potential injury to his clients, there was no evidence that Mandelbaum converted client property. He timely repaid any money that he borrowed and fully cooperated with the disciplinary process. The panel recommended that Mandelbaum be indefinitely suspended from the practice of law, but that imposition should be suspended and Mandelbaum allowed to practice under supervision for two years.

HELD: The court accepted the hearing panel’s recommendation. In addition to the supervision, Mandelbaum was given numerous conditions that must be satisfied in order to avoid suspension. A minority of the court would have imposed more severe discipline.

PUBLISHED CENSURE
IN THE MATTER OF JOHN W. THURSTON
NO. 114,543—APRIL 15, 2016

FACTS: After a hearing, the hearing panel found that Mr. Thurston violated Kansas Rules of Professional Conduct (KRPC) 1.15(a) and 1.16(d), relating to the safekeeping of property and the termination of representation. Mr. Thurston’s issues arose primarily from his incomplete time records, which made it difficult to calculate earned fees. The hearing panel recommended that Mr. Thurston be publicly censured, with conditions attached to the censure. These conditions included a trust account audit, the submission of written policies regarding time records and fee agreements, and the payment of full restitution to the injured client. All of the conditions were supposed to be completed prior to the disciplinary hearing before the Kansas Supreme Court.

HELD: Since there were no exceptions, the hearing panel’s findings of fact were deemed admitted. On that basis, the panel’s findings and conclusions were adopted. The primary issue before the court was whether the hearing panel had the authority to impose mandatory directives to disciplinary respondents. The court answered that question in the negative, finding that nothing in the Kansas Supreme Court Rules permits a disciplinary hearing panel to impose discipline or to require or enforce any conditions. The hearing panel’s sole task is to recommend discipline; the imposition of discipline is left solely to the Kansas Supreme Court. After finding that the hearing panel had no authority to require Mr. Thurston to perform certain behavior, the court imposed discipline of only a published censure.
Appellate Decisions

18 MONTH SUSPENSION
IN THE MATTER OF JOAN M. HAWKINS
NO. 113,579—APRIL 15, 2016

FACTS: The misconduct alleged included numerous violations of Kansas Rules of Professional Conduct (KRPC) 1.16(d), 3.2, 3.3, 3.4, 8.1(b), and 8.4(c) and (d). The hearing panel characterized the conduct as a “common theme [of] . . . obstruction”, finding that Ms. Hawkins “engaged in subterfuge in order to either increase her billable fees” or “cause unnecessary and unreasonable delay.” The disciplinary administrator recommended that Ms. Hawkins be either indefinitely suspended or disbarred. After considering the evidence, a majority of the hearing panel recommended that Ms. Hawkins be suspended for 18 months.

HELD: The court found clear and convincing evidence that Ms. Hawkins violated KRPC 1.6(d), 3.2, 3.3(a)(1), 3.4(d), 8.1(b), and 8.4(c) and (d). Based on this evidence, a majority of the court accepted the hearing panel’s recommendation and imposed the recommended discipline of 18 months’ suspension. A minority of the court would have imposed a shorter term of suspension.

CIVIL

ADMINISTRATIVE LAW—EVIDENCE
PFEIFER V. KANSAS DEPARTMENT OF REVENUE
ELLIS DISTRICT COURT—AFFIRMED
NO. 112,705—APRIL 1, 2016

FACTS: Pfeifer’s driver’s license was suspended after she refused to submit to a breath or blood test that would have determined the presence of alcohol or drugs in her system. On appeal, Pfeifer argued that the district court improperly admitted into evidence the signed and completed “Officer’s Certification and Notice of Suspension” (the DC-27 Form) because the arresting officer did not testify at trial. The DC-27 form established the reasonable grounds that the officer relied on when asking for the test.

ISSUE: Whether, in proceedings under the Kansas implied consent law, the arresting officer must appear to testify in person

HELD: The plain language of K.S.A. 2015 Supp. 8-1002(b) established that the legislature intended for an officer’s properly completed DC-27 form to be admissible as evidence in all administrative hearings and trials de novo under the Kansas Implied Consent Law. The certifying officer need not be present to testify.


APPEAL AND ERROR—DAMAGES—DISCOVERY—SUMMARY JUDGMENT
WATCO COMPANIES, INC. V. CAMPBELL AND STANDLEE
CRAWFORD DISTRICT COURT—AFFIRMED
NO. 113,156 —APRIL 1, 2016

FACTS: The underlying tort case arose after a collision between a truck and a train, where the train conductor was injured. The case was dismissed from federal court and Watco, doing business as a railroad, filed suit in state district court for comparative implied indemnity. Watco settled with the train conductor, but the settlement agreement required Watco to pay part of the judgment in exchange for the conductor’s agreement not to execute on the balance unless or until he was unable to recover from the other defendants. After the district court granted the defendants’ motion for summary judgment, in part finding that Watco came in to the suit with unclean hands, Watco appealed.

ISSUE: Whether the district court erred by granting summary judgment on the basis of Watco’s unclean hands

HELD: When weighing a summary judgment motion, the district court may consider evidence produced in discovery as well as other documents on file. The cause of action brought by Watco was solely for comparative implied indemnity for damages to both its train and its employee, which it was authorized to do under FELA. And because the federal court never compared fault, it was proper to bring that action in state court. Comparative implied indemnity is an equitable remedy, meaning that a court may refuse to apply it if a party has acted “fraudulently, illegally, or unconscionably.” But because Watco set up an agreement where it limited its financial

Appellate Practice Reminders . . .

From the Appellate Court Clerk’s Office

Notice of Electronic Filing

As we continue our transformation into the world of electronic filing in the Kansas Appellate Clerk’s Office, this month we address a common misconception concerning the Notice of Electronic Filing, better known as the infamous NEF. It seems to be a common misconception that the NEF will include either a copy of the court’s ruling or an indication of what has been filed. That isn’t the case. The NEF is simply a notice that something has been filed in a case. We’ve had attorneys not appear for oral argument, cases have been dismissed, and there have been other bad consequences resulting from attorneys’ lack of understanding of NEFs. Upon receipt of the NEF, practitioners need to log into the system and check the ”Notifications” button on the home page. Practitioners also need to be aware of any parties who may not receive NEFs at all, such as pro se litigants.

For other questions related to appellate practice, call the Clerk’s Office at (785) 296-3229 and ask to speak with Douglas T. Shima, Clerk of the Appellate Courts.
exposure, it sought to recover contributions for damages that it knew it would never have to pay.

STATUTES: K.S.A. 2015 Supp. 60-256(c)(2), -258a; K.S.A. 60-258a, -464, -513, -518

APPEAL AND ERROR—EVIDENCE—PHYSICIANS AND SURGEONS—TORTS
BEREAL V. BAJAJ, M.D.
SEDGWICK DISTRICT COURT—AFFIRMED IN PART, REVERSED IN PART, REMANDED WITH DIRECTIONS
NO. 111,954—APRIL 1, 2016

FACTS: Bereal was permanently injured during a heart catheterization procedure. The defendants did not dispute that the injury occurred, but blamed it on a defect in the medical device that was used during the procedure. The manufacturer had been a party to the case, but was dismissed after a settlement was reached with Bereal. After a lengthy trial, the jury found in favor of the defendants. On appeal, Bereal asked the court to review several of the district court’s decisions related to expert witness testimony.

ISSUES: (1) Whether exclusion of Bereal’s rebuttal expert was erroneous; (2) Whether it was error to allow an expert to testify outside of the scope of his disclosed pretrial report.

HELD: Litigants are required by statute to disclose their experts in a time and sequence ordered by the court. Rebuttal expert evidence is appropriate if it “explains, refutes, counteracts, or disproves the evidence put on by the other party,” even if it also bolsters the case-in-chief. A rebuttal expert witness need not always be disclosed prior to trial, since a litigant is not required to anticipate the other side’s theory of the case. For those reasons, the district court erred when it excluded testimony from Bereal’s expert rebuttal witness. An expert may testify on facts made known to the expert at trial if that testimony is within the scope of the expert’s special knowledge, skill, and experience. This may occur even if the testimony was not specifically mentioned in the pretrial report.

STATUTES: K.S.A. 2015 Supp. 60-226(b)(6)(C)(ii); K.S.A. 60-404, -456(b); K.S.A. 60-3301

APPEAL AND ERROR—JURISDICTION
ULLERY V. OTICK
DOUGLAS DISTRICT COURT—COURT OF APPEALS IS REVERSED, CASE IS REMANDED TO THE COURT OF APPEALS
NO. 112,469—APRIL 29, 2016

FACTS: The Ullery plaintiffs filed a lawsuit after a car accident killed one of their family members. After litigation commenced, the district court issued rulings on various motions for summary judgment. Two months later, the plaintiffs asked the district court to certify the journal entry as a final judgment under K.S.A. 60-254(b) so that they could take an immediate appeal of those rulings. After the case was docketed, the court of appeals’ motions panel issued a show cause order asking the parties to explain whether, under Prime Lending II v. Trolley’s Real Estate Holdings, the district court was allowed to retroactively certify a decision as a final judgment. After evaluating the responses, the court of appeals dismissed the appeal because of the retrospective certification, and the supreme court granted the petition for review.

ISSUE: Whether a district court may retroactively certify a decision as final under K.S.A. 60-254(b)

HELD: K.S.A. 60-254(b) permits the district court to modify a prior journal entry. Thus, there is nothing preventing the district court from modifying a prior ruling to include the "no just reason for delay" language that is required by K.S.A. 60-254(b). Once the district court issues a journal entry which includes the "no just reason for delay" language, the 30-day notice of appeal clock begins to run, and the appellate court has jurisdiction to consider the merits of any appeal.

STATUTES: K.S.A. 2015 Supp. 60-254, -254(a), -254(b), -258, -2103

APPELLATE PRACTICE—JURISDICTION—STATUTORY INTERPRETATION
WIECHMAN V. HUDDLESTON
SEDGWICK DISTRICT COURT—DECISION OF THE COURT OF APPEALS IS AFFIRMED
NO. 110,656—APRIL 15, 2016

FACTS: This litigation commenced in 2007, when Wiechman sued Huddleston for negligence after a car accident. After an insurance carrier offered to pay policy limits, the case settled and was dismissed by the district court for lack of prosecution. More than 4 years later, Wiechman moved to set aside the dismissal claiming that although the case settled, he never received payment. There was disagreement about what time limit governed the motion to set aside, which in turn controlled whether the district court had jurisdiction to set aside the 2008 dismissal order. Without addressing which time limit controlled or whether the 4 year delay was reasonable, the district court granted the motion to be set aside. Huddleston appealed to the court of appeals without seeking certification for this interlocutory appeal. He instead argued that a common-law jurisdictional exception allowed for an immediate appeal from an order setting aside a final judgment. The appeal was dismissed by the court of appeals for lack of jurisdiction, and Huddleston’s petition for review was granted by the Kansas Supreme Court.

ISSUES: (1) Whether this appeal is moot, (2) Whether a judge may create exceptions which confer appellate jurisdiction in the absence of statutory authority.

HELD: A case will be dismissed for mootness only if it is clearly and convincingly shown that the actual controversy has ended and any judgment rendered would be ineffectual for any purpose. The parties’ representations at oral argument show that there are ongoing disputes in this case that can be resolved via judgment, rendering it ripe for decision and not moot. The court’s prior holding in Brown v. Fitzpatrick created a “jurisdictional exception” to the statutory requirement that decisions appealed must be final. But decisions in the intervening years have overruled the doctrine of unique circumstances and have cemented the idea that appellate courts cannot create equitable exceptions to statutory jurisdiction requirements. In the absence of statutorily conferred jurisdiction, this appeal must be dismissed.

STATUTES: K.S.A. 2015 Supp. 60-260(b) and (c), 2102(a) and (c); K.S.A. 60-2101(b)
FACTS: The parties were divorced in 2008. Christina had sole legal custody of the couple’s children, but Brian was allowed supervised parenting time. After the divorce, Christina moved to an undisclosed location in Missouri. Both Brian and Christina traveled for Brian’s visits with the children. Visits eventually stopped because the children refused to cooperate, and staff had concerns about the extent to which Christina was negatively influencing the children regarding their father. Once Brian’s spousal maintenance obligation ended, the court trustee filed a motion to modify child support on Christina’s behalf. In response to that motion to modify, Brian filed a new domestic relations affidavit which did not request a long-distance parenting time cost adjustment. The cost adjustment was not mentioned until a hearing on the motion to modify, when Brian’s counsel asked the court to credit him $324 per month to cover travel expenses. Brian was not regularly exercising his visitation rights, but the district court found that was due to Christina’s lack of cooperation and negative influence over the children. Based on that fact, the district magistrate judge granted Brian’s motion for the cost adjustment, but made it clear that Brian was only entitled to the adjustment if he was regularly exercising parenting time to the best of his ability. Christina appealed the modification to the district court. The district magistrate judge’s ruling was affirmed, and Christina appealed.

ISSUE: Whether it is a due process violation to allow a long-distance parenting time cost adjustment without specific notice.

HELD: The issue of child support modification was put before the court when the court trustee filed a motion to modify on Christina’s behalf. But the version of Supreme Court Rule 139(e)-(g) in effect when the motion to modify was filed required any party challenging a motion to modify child support to “apprise the proponent in advance of any area of possible disagreement.” Although Brian responded to the motion to modify with a new domestic relations affidavit, he failed to provide a new child support worksheet. The worksheet would presumably have shown the requested adjustment for long-distance visitation costs. In the absence of such a worksheet, the trustee did not learn about the requested adjustment until right before the hearing on the motion to modify, and that did not constitute sufficient notice. The matter was remanded to the district court for a de novo hearing on whether Brian is entitled to a long-distance parenting time cost adjustment.

CHILD SUPPORT—DIVORCE—DUE PROCESS FULLER V. FULLER MCPHERSON DISTRICT COURT—VACATED AND REMANDED WITH DIRECTIONS NO. 113,948—APRIL 29, 2016

FACTS: Rhodenbaugh was employed by the hospital as an emergency desk clerk. After she was hired, the hospital changed its policy and required all employees to receive a flu vaccination, with exemptions for medical and religious reasons. Rhodenbaugh refused to get a shot and failed to provide a letter from her physician that proved a medical exemption. Based on this refusal, Rhodenbaugh was terminated from her employment. The hospital appealed the award of unemployment benefits to the Kansas Employment Security Board of Review (Board), arguing that Rhodenbaugh was terminated for cause. The Board agreed. Rhodenbaugh appealed to the McPherson County District Court, and the Board moved to change venue to Shawnee County. That motion was granted, and the Shawnee County District Court affirmed the Board’s decision. Rhodenbaugh appeals.

ISSUES: (1) Whether the transfer of venue was proper and (2) Whether the refusal to get a flu shot constituted job-related misconduct.

HELD: Appeals for judicial review of an agency action are governed by the Kansas Judicial Review Act (KJRA). Venue is proper in the “county in which the order is entered.” If venue is appropriate in more than one county, the district court should give weight to the plaintiff’s right to choose venue. In this case, that analysis was not done, and the order to transfer venue was erroneous. However, that error was harmless. Because it was undisputed that Rhodenbaugh knew about the hospital safety rule, and because she failed to meet one of the listed exemptions, the district court correctly determined that she was terminated for cause.

STATUTES: K.S.A. 2015 Supp. 44-706(b), 77-603(a), -621; K.S.A. 2014 Supp. 44-706(b); K.S.A. 60-609(a), 72-5209(b), 77-609(b), -623

CRIMINAL

CONFRONTATION OF WITNESSES—CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—HARMLESS ERROR —HEARSAY EVIDENCE—JURY INSTRUCTIONS STATE V. LOGSDON RENO DISTRICT COURT—CONVICTIONS AFFIRMED, SENTENCE VACATED, REMANDED NO.110415—APRIL 1, 2016

FACTS: Logsdon convicted of first-degree murder, felony murder, conspiracy to commit first-degree murder, conspiracy to commit aggravated robbery, aggravated burglary, criminal possession of a firearm, and aggravated intimidation of a witness. Criminal charges related to death of Heckel who was not the intended victim of a conspiracy by Logsdon, Craig, and others to kill another person. A hard 50 life sentence was imposed. On appeal, Logsdon claimed there was insufficient credible evidence supported the convictions. Second, he claimed the district court erred in denying motions for mistrial that alleged the admission of inadmissible hearsay evidence and violation of confrontation clause, including witness testimony of Craig’s statements where Craig subsequently refused to testify. He also claimed the district court erred in instructing the jury on aiding and abetting, and that his hard 50 life sentence was unconstitutional.


HELD: Evidence in case is detailed. While not overwhelming against Logsdon, the evidence viewed in light most favorable to the State and with deference to jury’s credibility
conclusions is sufficient to support his convictions.

Appellate review of evidentiary issues underlying Logsdon’s motions for mistrial are limited to instances of witness testimony that were subject to timely trial objection and that were adequately briefed. Coconspirator hearsay exception is applied. Error resulting from any assumed error in admission of hearsay evidence, and assumed violation of Confrontation Clause, was harmless in this case. District court did not abuse its discretion in denying both motions for mistrial.

No appellate review of argument regarding aiding and abetting jury instruction. Logsdon invited any error by specifically requesting the instruction.


CONSTITUTIONAL LAW—CLOSING ARGUMENT—CRIMES AND PUNISHMENT—SENTENCING—STATUTES
STATE V. CHARLES
SEDGWICK DISTRICT COURT—AFFIRMED IN PART, REVERSED IN PART—COURT OF APPEALS—AFFIRMED IN PART, REVERSED IN PART
NO. 105,148—APRIL 22, 2016

FACTS: Charles was convicted of reckless aggravated battery, felony criminal damage to property, and criminal threat. District court imposed prison term and found Charles’ commission of aggravated battery employing a deadly weapon required registration as a violent offender under Kansas Offender Registration Act (KORA), K.S.A. 22-4901 et seq. Charles appealed claiming: (1) lesser included offense instruction for reckless aggravated battery was impermissibly overbroad; (2) State failed to prove each means of reckless aggravated battery beyond a reasonable doubt; (3) district court erroneously failed to give limiting instruction on statements Charles made to one store clerk moments prior to statements Charles made to a second clerk; (4) prosecutor impermissibly injected his personal opinion of evidence; and (5) cumulative error denied Charges a fair trial. Charles also challenged the KORA requirement for a judicial fact-finding of violent offender as violating Apprendi v. New Jersey, 530 U.S. 466 (2000). Court of appeals affirmed in unpublished opinion. Review granted on all issues.

ISSUES: (1) Breadth of lesser included instruction, (2) Sufficiency of evidence on asserted alternative means, (3) Prosecutorial misconduct, (4) Need for limiting instruction, (5) Cumulative error, (6) Constitutionality of KORA registration requirement for violent offender

HELD: Giving a lesser included offense instruction that is overbroad compared with State’s charged theory of the case is error. State charged Charles with intentional aggravated battery by using SUV to cause bodily harm to the victim. District court erred by expanding the lesser included instruction to state that Charles could be convicted if jury found he inflicted bodily harm on victim “in any manner whereby great bodily harm, disfigurement or death can be inflicted.” This overbroad lesser included offense instruction was not factually or legally appropriate, but in this case did not qualify as a clear reversible error under K.S.A. 22-3414(3).

Reckless aggravated battery is not an alternative means crime. Sufficient evidence supported Charles’ conviction.

A prosecutor’s repeated use of “I think” or its equivalent or substantive opposites is discouraged as susceptible to interpretation as expression of improper and irrelevant opinion on quantity and quality of evidence. In this case, prosecutor’s use of the phrase was troubling, but viewed in context appears to have been verbal tic or time filler which did not fall outside wide latitude given to prosecutor in discussing evidence during closing argument.

Store clerk’s testimony about statements Charles made to another clerk during Charles’ short time in store was not subject to K.S.A. 60-455. A limiting instruction on prior bad act evidence was not legally or factually appropriate.

Cumulative error doctrine is inapplicable where only a single error is identified on appeal.

Informed by Doe v. Thompson (filed this same date), the registration requirement for violent offenders under 2009 version of KORA qualified as punishment under Due Process Clause. Under Apprendi, imposition of this requirement required a jury to find Charles used a deadly weapon. It could not be constitutionally imposed based on judicial, rather than jury, fact-finding. Registration requirement in Charles’ sentence is vacated. Court notes that the holding by new majority in Petersen-Beard (filed this same date) may influence whether the KORA holding of this case can be relied upon by violent offenders whose appeals have yet to be decided.

CONCURRENCE (Johnson, J., joined by Luckert, J. and Michael J. Malone, Senior Judge assigned): Concurs in the result, but takes exception to majority’s holding that prosecutor committed no error. Would instead find the prosecutor’s erroneous statements of personal opinion were harmless error.


CONSTITUTIONAL LAW—CRIMES AND PUNISHMENTS—CRIMINAL PROCEDURE
STATE V. VASQUEZ
SEDGWICK DISTRICT COURT—SENTENCE VACATED, REMANDED
NO. 113,473—APRIL 29, 2016

FACTS: Vasquez convicted in 1978 of four counts of burglary, and in 1982 of attempted robbery. In 2012 he pled guilty to one count of aggravated escape from custody. He raised no objection or appeal regarding his criminal history report of prior person felonies. In 2014, based on State v. Murdock, 299 Kan. 312 (2014)(modified and subsequently overruled), and State v. Dickey, 301 Kan. 1018 (2015), he filed motion to correct an illegal sentence claiming his pre-1993 felonies should have been scored as nonperson felonies, and that over-classification of the pre-KSGA convictions resulted in an illegal sentence under Apprendi and Dickey. District court summarily denied the motion. Vasquez appealed. State argued appellate review is procedurally barred by doctrines of
waiver and res judicata, that Dickey should not be retroactively applied, and that State v. Warrior, 303 Kan. ___ (2016), later held a motion to correct illegal sentence is not appropriate to challenge constitutionality of a sentence.

ISSUES: (1) Procedural issues, (2) Illegal sentence

HELD: Procedural arguments based on doctrines of waiver and res judicata are defeated by Dickey and State v. Neal, 292 Kan. 625 (2011). Retroactivity argument is defeated because Dickey applied constitutional rule announced in Apprendi, thus that 2000 decision is the relevant date for retroactivity analysis. And unlike claim of illegal sentence in Warrior, a claim under Dickey falls squarely within scope of relief afforded under K.S.A. 22-3504.

As in Dickey, sentencing court violated Vasquez’ constitutional right by finding the four 1978 burglaries involved a dwelling, and thus erroneously misclassified those prior burglaries as person felonies. Resulting illegal sentence did not comply with the applicable statutory provision regarding the term of punishment authorized. Vasquez waived review of his 1982 attempted robbery conviction by failing to brief any issue comparing attempted robbery as defined in 1982 and 2011. Sentence vacated and case remanded with directions to reclassify 1978 burglaries as nonperson offenses, to recalculate criminal history score based on reclassification, and to resentence Vasquez based on recalculated criminal history score.

STATUTES: K.S.A. 2015 Supp. 21-6811(d); K.S.A. 2005 Supp. 21-4635; K.S.A. 21-3715(a), 22-3504, -3504(1)

CONSTITUTIONAL LAW—CRIMES AND PUNISHMENT—JURY TRIALS STATUTES STATE V. WOOLVERTON JOHNSON DISTRICT COURT—AFFIRMED NO. 113,211—APRIL 29, 2016

FACTS: Woolverton convicted by judge of misdemeanor domestic-violence offense, K.S.A. 2015 Supp. 21-5414(b)(1). On appeal Woolverton claimed the offense was serious enough to constitutionally require a jury trial, a right he never agreed to waive. He also claimed he was never advised of statutory right to jury trial.

ISSUES: (1) Constitutional right to jury trial, (2) Statutory right to jury trial

HELD: A misdemeanor domestic-battery offense - punishable by no more than 6 months jail, fine up to $500, participation in and payment for domestic-violence-offender assessment, and compliance with assessment’s recommendations - is a petty offense for which there is no constitutional right to jury trial.

Statutory right to jury trial in a misdemeanor case requires a defendant to request a jury trial within the statutory time frame. Woolverton made no such request, thus no violation of his statutory right to a jury trial.


CONSTITUTIONAL LAW—CRIMES AND PUNISHMENT; PRIOR CONVICTIONS—SENTENCING—STATUTES STATE V. BUSER MITCHELL DISTRICT COURT—REVERSED—COURT OF APPEALS—REVERSED NO. 105,892 —APRIL 22, 2016

FACTS: Buser was convicted in 2009 of indecent liberties with a child. District court ordered lifetime registration as sex offender under Kansas Offender Registration Act (KORA), K.S.A. 22-4901 et seq., because Buser had prior juvenile adjudication. Buser appealed, claiming the prior adjudication was not a conviction, and could not be used to enhance the KORA registration period. State agreed, but argued Buser as a first offender was subject to 25-year registration term in KORA as amended in 2011. Buser argued in reply that a 10-year registration term applied, and that application of 2011 amendment to expand the registration term violated the Ex Post Facto Clause. In unpublished opinion, court of appeals found State correctly conceded error in the lifetime registration term, held the 25-year registration term could be applied retroactively, and remanded case to district court. Buser’s petition for review on the Ex Post Facto Clause claim granted.

ISSUE: Retroactive application of KORA 2011 amendments

HELD: Buser is subject to KORA provisions in effect in 2009. Consistent with holdings in companion Ex Post Facto cases, Doe v. Thompson and State v. Redmond, KORA’s statutory scheme after 2011 amendments was so punitive in effect as to negate implied legislative intent to deem it civil, thus Ex Post Facto Clause precludes application of KORA as amended in 2011 to any sex offender who weighed the qualifying crime prior to July 1, 2011. [This holding is overruled in State v. Petersen-Beard, filed this same date.]


STATUTES: K.S.A. 2011 Supp. 22-4902(b), -4902(c)(2); K.S.A. 22-4906 et seq., -4906(a)

CONSTITUTIONAL LAW—CRIMES AND PUNISHMENT—SENTENCING—STATUTES DOE V. THOMPSON SHAWNEE DISTRICT COURT—AFFIRMED NO. 110,318—APRIL 22, 2016

FACTS: “John Doe” was convicted in 2003 of indecent liberties with a child. He completed probation term in 2006, registered as sex offender under Kansas Offender Registration Act (KORA), K.S.A. 22-4901 et seq., and complied with 10 year reporting requirement. KBI notified Doe in 2011 that application of 2011 amendments was so punitive in effect as to negate implied legislative intent to deem it civil, thus Ex Post Facto Clause precludes application of KORA as amended in 2011 to any sex offender who weighed the qualifying crime prior to July 1, 2011. [This holding is overruled in State v. Petersen-Beard, filed this same date.]
Facto Clause. District court ordered termination of Doe's additional 15-year registration requirement, and deletion of all publicly displayed KORA information. State appealed, arguing district court erroneously (1) refused to strike inadmissible evidence submitted with Doe's motion for summary judgment and took judicial notice of certain journal articles; (2) permitted Doe to proceed under a pseudonym; and (3) concluded the KORA amendments violated the Ex Post Facto Clause. State also complained about district court granting Doe leave to proceed with pseudonym.

ISSUES: (1) Motion to strike material attached to summary judgment motion, (2) Use of pseudonym, (3) Retroaction application of 2011 KORA amendments

HELD: Affidavits attached to Doe’s motion are examined, finding any inadmissible information can be disregarded in reviewing district court’s judgment. Likewise, no need to reference appended journal articles which district court erroneously found were not subject to judicial notice statute.

No abuse of district court’s discretion in allowing Doe to proceed pseudonymously.

KORA as amended in 2011 is compared and distinguished from Alaska sex offender registration act examined in Smith v. Doe, 538 U.S. 84 (2003). District court correctly found the legislature intended KORA to be a civil statutory scheme, but as amended in 2011 the act was punitive in effect. Ex Post Facto Clause is violated by retroactive application of KORA 2011 amendment to any sex offender who committed the qualifying crime prior to July 1, 2011. [This holding is overruled in State v. Petersen-Beard, filed this same date.]

CONCURRENCE AND DISSENT (Biles, J., joined by Nuss, C.J. and Luckert, J.): Agrees that legislature intended KORA and 2011 amendments to be a civil regulatory scheme, and agrees the proper retroactivity test is whether 2011 amendments at issue in this case render KORA so punitive as applied to sex offenders as to negate that intent. Majority, however, disregards substantial federal caselaw that offender registration laws are nonpunitive and may be applied retroactively without violating Ex Post Facto Clause.


CONSTITUTIONAL LAW—CRIME AND PUNISHMENTS—SENTENCING—STATUTES
STATE V. PETERSEN-BEARD
SALINE DISTRICT COURT—AFFIRMED—COURT OF APPEALS—AFFIRMED
NO. 108,061—APRIL 22, 2016

FACTS: District court imposed sentence that included lifetime registrations as a sex offender pursuant to Kansas Offender Registration Act (KORA), K.S.A. 22-4901 et seq. Petersen-Beard appealed, claiming cruel and unusual punishment under U.S. and Kansas constitutions. Court of appeals affirmed in unpublished opinion. Review granted.

ISSUE: Lifetime sex offender registration under KORA

HELD: Lifetime post-release registration for sex offenders mandated by KORA does not constitute punishment for purposes of applying provisions of the U.S. Constitution or Kansas Constitution Bill of Rights. Contrary holdings by majority that heard and decided three companion cases (Doe v. Thompson, State v. Redmond, and State v. Buser) are overruled. Dissent in Thompson is liberally quoted, and reasoning therein is adopted. No textual or historical reason is found to depart from general practice of giving identical interpretation to identical language appearing in both Kansas and U.S. constitutions.

DISSENT (Johnson, J., joined by Beier and Rosen, JJ.): Explains the unusual circumstance whereby opinions in the companion 2014 ex post facto cases are filed the same day as the instant 2015 case that purports to overrule their holdings, and to state that the defendants in the companion 2014 Ex Post Facto cases remain entitled to the relief granted in their appeals. Maintains the majority’s assertion, that KORA is not punitive for Eighth Amendment purposes requires reversal of the prior companion Ex Post Facto cases, is dictum. Criticizes majority’s rationale and reliance on federal circuit court decisions to decide constitutionality of the Kansas act, and argues the current U.S. Supreme Court would now view disclosure provisions in KORA differently than those viewed in the Alaska act in Smith v. Doe, 538 U.S. 84 (2003). Voices opposition to practice of simply adopting federal constitutional interpretation for similar State constitutional provisions.

STATUTES: K.S.A. 2015 Supp. 8-1567(m), -59-29a01, -29a07(g); K.S.A. 20-2616(b), -3018(b), 22-4901 et seq., 60-2101(b)

CONSTITUTIONAL LAW—CRIMES AND PUNISHMENTS—SENTENCING—STATUTES
STATE V. REDMOND
SHAWNEE DISTRICT COURT—AFFIRMED—NO. 110,280—APRIL 22, 2016

FACTS: Redmond was convicted in 2001 of indecent solicitation of a child. His suspended prison sentence included probation and registration as sex offender under Kansas Offender Registration Act (KORA), K.S.A. 22-4901 et seq. with 10-year reporting requirement. State charged Redmond of violating KORA, based on three instances of failing to report in 2012. Redmond filed motion to dismiss the charges, claiming ex post facto violation. District court granted the motion. State’s appeal transferred to Kansas Supreme Court.

ISSUE: Retroactive Application of KORA 2011 Amendments

HELD: Consistent with holdings in companion ex post facto cases, Doe v. Thompson and State v. Buser, district court is affirmed. KORAs statutory scheme after 2011 amendments was so punitive in effect as to negate implied legislative intent to deem it civil, thus the Ex Post Facto Clause precludes application of KORA as amended in 2011 to any sex offender who committed the qualifying crime prior to July 1, 2011. [This holding is overruled in State v. Petersen-Beard, filed this same date.]


ISSUES: (1) Probable cause, (2) Consent, coercion, and good-faith exception to exclusionary rule

HELD: Under totality of circumstances, substantial evidence supported district court's finding of probable cause.

Relying on State v. Ryce, 303 Kan. 899 (2016) (mandate not issued; motion for rehearing or modification pending), K.S.A. 2015 Supp. 8-1025 is unconstitutional on its face. Relying on State v. Nece, 303 Kan. 888 (2016) (mandate not issued; motion for rehearing or modification pending), Kraemer's consent to testing was not freely and voluntarily given. Exclusionary rule, however, does not apply to evidence obtained by police acting in objective reasonable reliance upon K.S.A. 2015 Supp. 8-1025 prior to Ryce and Nece.

STATUTE: K.S.A. 2015 Supp. 8-1001, -1001(a), -1001(b), -1001(k)(1)-(4), -1025, -1567(a)(1)
FACTS: Dupree convicted of felony murder, kidnapping, aggravated burglary, aggravated robbery, aggravated child endangerment, and aggravated assault. On appeal he claimed: (1) the information charging aiding and abetting aggravated assault and aggravated child endangerment was insufficient to confer subject matter jurisdiction because no evidence he committed these offenses as a principal; (2) State's oral amendment at close of evidence to change underlying felony of felony-murder charge was not sufficiently specific, and failure to file amended complaint was reversible error; (3) insufficient evidence supported the felony-murder conviction because jury instructions encompassed a completed burglary and not an attempted burglary; (4) instructions did not properly instruct jury on aiding and abetting liability, the jury should have been instructed on compulsion defense, and error to not instruct jury on lesser-included offenses for felony murder; (5) abuse of district court's discretion to allow case detective to sit at or near prosecution's table, and to exempt case detective from general sequestration order; and (6) cumulative error denied him a fair trial.

ISSUES: (1) Insufficient charging information, (2) Oral amendment of felony-murder charge, (3) sufficiency of evidence supporting felony-murder charge, (4) Jury instructions, (5) Case detective at prosecution's table during trial, (6) Cumulative error

HELD: No departure from longstanding rule applied in State v. Williams, 299 Kan. 509 (2014), to prior version of aiding and abetting statute. Under K.S.A. 2015 Supp. 21-5210, State is not required to include “aiding and abetting” in charging document to pursue theory of accomplice liability at trial.

State's oral amendment to felony-murder charge, and failure to memorialize the amendment by filing an amended complaint, did not deprive district court of jurisdiction or otherwise constitute reversible error in this case.

Sufficient evidence supported the felony-murder conviction. Victim's death occurred within the res gestae of felony murder, and jury instruction reflected facts of the case and Kansas precedent. K.S.A. 2015 Supp. 21-5402(a) does not require State to prove whether the killing specifically occurred once intruders crossed the threshold, as opposed to while they were forcing their way into the home.

Instructions regarding felony murder, aggravated robbery, and aiding and abetting properly and fairly stated the law as applied to facts of the case. No reversible error by district court in declining to instruct jury on compulsion defense which was legally available but not factually warranted. As in State v. Todd, 299 Kan. 263 (2014), district court did not err in failing to give a lesser included offense instruction for felony murder.

After Dupree's trial, State v. Sampson, 297 Kan. 288 (2013), abrogated prior holdings that district court had discretion to allow testifying law enforcement officer to sit at prosecution table. Even assuming abuse of discretion based on reasons articulated in Sampson, the assumed error was harmless in light of overwhelming evidence against Dupree.

The single error assumed in this case does not constitute cumulative error.

STATUTES: K.S.A. 2015 Supp. 21-5206(a), -5206(b), -5210, -5402(a), -5402(a)(2), 22-3601(b)(3); K.S.A. 2013 Supp. 21-5109, -5402(d), -5402(e); K.S.A. 2011 Supp. 21-5210(a); K.S.A. 2010 Supp. 21-5210; K.S.A. 21-3205, -3205(1), 22-3201(b), -3201(e); G.S. 1949, 62-1016

EVIDENCE; STATUTORY INTERPRETATION—SUFFICIENCY OF EVIDENCE

STATE V. BOYSAW

SEDGWICK DISTRICT COURT—AFFIRMED

NO. 112,834—APRIL 8, 2016

FACTS: Boysaw was charged with aggravated indecent liberties. Before Boysaw's trial, the State moved to admit evidence of his 1987 Nebraska conviction for sexual assault of a child, and at the hearing on the motion they expanded the request to include a 1979 sex crime conviction. Finding a "striking similarity" between the 1987 crime and the one being tried, the district court allowed evidence of that conviction, but excluded the 1979 offense. The evidence was presented to the jury as a stipulation, over Boysaw's objection. Because of his prior convictions, Boysaw was sentenced as a habitual sex offender. He appealed the conviction, primarily on evidentiary grounds.

ISSUES: (1) Whether the evidence presented at trial was sufficient to sustain a conviction absent evidence of Boysaw's
intent to arouse or satisfy sexual desires, (2) Whether K.S.A. 2015 Supp. 60-455(d) violates the constitution by allowing for the admission of evidence of general propensity, (3) Whether prior crimes qualified Boysaw as a habitual sex offender.

HELD: Aggravated indecent liberties is a specific intent crime, and intent to arouse or to satisfy sexual desires is an element that must be proven to the jury, either by direct or by circumstantial evidence. At trial, there was both direct and circumstantial evidence sufficient for the jury to conclude that Boysaw intended to arouse or to satisfy his sexual desires. Evidence of the commission of unrelated crimes is inadmissible because that evidence is unduly prejudicial to the defendant. But through K.S.A. 60-455 and its amendments, evidence of a defendant’s commission of acts or offenses of sexual misconduct is admissible and may be considered if it is relevant and probative to the matter at hand. That statute does not violate a defendant’s due process rights as long as the prior conviction evidence is relevant, especially in light of Kansas’s common law evidentiary history. Boysaw’s Nebraska conviction was for a crime similar enough to aggravated indecent liberties with a child as to warrant the habitual sex offender label.

STATUTES: Kansas Constitution Bill of Rights § § 10 and 18; K.S.A. 2015 Supp. 21-5506(b)(3)(A), -6626, 60-455(d); K.S.A. 60-455

EVIDENCE—SPEEDY TRIAL—STATUTORY INTERPRETATION STATE V. DUPREE SEDGWICK DISTRICT COURT—AFFIRMED NO. 111,518—APRIL 8, 2016

FACTS: Dupree was identified as being part of a group of men who burglarized a residence and murdered an occupant of the home. While he admitted to making threatening phone calls, Dupree denied being involved with the burglary and murder. Multiple individuals named Dupree as the “mastermind” of the crime, even though video evidence did not put him at the crime scene. After he was convicted of multiple crimes including felony murder, Dupree raised several issues before the court on appeal.

ISSUES: (1) Whether the convictions are reversible under the speedy trial statute, (2) Whether the district court properly overruled a Batson challenge, (3) Whether the issue of the voluntariness of statements was preserved for appeal, (4) Whether photographs admitted at trial were unduly prejudicial

HELD: The general rule for speedy trial calculations is that an attorney cannot continue a trial over the defendant’s objection. In this case, Dupree claimed that he was not consulted about continuances and never acquiesced to any delay. However, under the court’s prior holding in State v. Brownlee and K.S.A. 2014 Supp. 22-3402(g), even if the delays are now attributed to the State Dupree is not entitled to the reversal of his convictions. This is true even though subsection (g) was not in effect at the time Dupree was arraigned, because subsection (g) does not create a vested right. Although it was undisputed that the State exercised a preemptory challenge on the basis of race, Dupree failed to prove error in the district court’s finding of a race-neutral reason for the preemptive strikes and failed to show purposeful discrimination. Dupree challenged the admissibility of a statement that he made over the telephone, but because he did not lodge a timely objection to the introduction of that evidence the issue was not preserved for appeal. The photographs admitted at trial – taken in the emergency room, at autopsy, and at the crime scene – were both material and probative, and were thus appropriately admitted at trial over Dupree’s objection.

STATUTES: K.S.A. 2014 Supp. 22-3208(7), -3402(g), 60-261; K.S.A. 22-3402, 60-401(b), -404, -2105

PRIOR CONVICTION—SENTENCING—STATUTES STATE V. HANKINS JOHNSON DISTRICT COURT—REVERSED AND REMANDED; COURT OF APPEALS—REVERSED NO. 109,123—APRIL 22, 2016

FACTS: Hankins filed motion to correct illegal sentence, claiming sentencing court used incorrect criminal history score by including an Oklahoma deferred judgment as a prior conviction. District court denied the motion, finding defense attorney’s comments during sentencing waived Hankins’ right to challenge criminal history score, and Hankins failed to prove score was incorrectly calculated. Court of appeals affirmed, holding invited error doctrine barred Hankins’ challenge, and opining Hankins would lose on the merits because his Oklahoma deferred judgment sufficiently established his guilt to make it a conviction for Kansas sentencing purposes.

ISSUES: (1) Invited Error - Review of an illegal sentence, (2) Criminal history scoring of Oklahoma deferred judgment

HELD: In Kansas, a defendant cannot agree to an illegal sentence. Stipulation of Hankins’ attorney was directed at a legal finding, not a factual one. Hankins’ illegal sentence challenge is subject to appellate review.

District court and court of appeals are reversed, and case is remanded for resentencing with proper criminal history score. Under Oklahoma’s deferred sentencing statute, when Hankins met all conditions of the deferred judgment, his guilty plea was expunged and the charge dismissed with prejudice. A judgment of guilt by the foreign court is required to meet Kansas’ definition of a conviction. Because no judgment of guilt was ever entered upon Hankins’ plea of guilt, the Oklahoma case did not constitute a conviction for purposes of calculating Hankins’ criminal history score under the Kansas Sentencing Guidelines Act. Also, the fact that the mitigated sentence imposed from the incorrect grid block is less than the potential sentence from the correct grid block does not legalize an otherwise illegal sentence.

DISSENT (Stegall, J., joined by Luckert, J.): Would affirm lower court’s application of invited error doctrine in this case. Applying rule in State v. Vandervort, 276 Kan. 164 (2003), as modified in State v. Dickey, 301 Kan. 10108 (2015), Hanks stipulated to the existence of the conviction he now challenges, and that stipulation was factual, strategic, and intentional. Would not extend the Dickey exception to the Vandervort rule to encompass failures to object to the existence of conviction noted on a defendant’s PSI.

ISSUE: Are marijuana clippings with no root system sitting in a growing medium "marijuana plants" as contemplated By K.S.A. 2015 Supp. 21-5701(c)

HELD: The dictionary definition of "plant" includes "stem, leaves, roots, and sometimes flowers." The clippings found at Holsted’s residence were potential plants, but without roots they could not sustain life by absorbing water or nutrients. In order to be a plant there must be a visible root system. Holsted’s intent does not change what constitutes a plant. Since the clippings cannot be defined as "plants", Holsted could not be convicted of any criminal charge involving marijuana cultivation.

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