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As the 2011 legislative session begins, the above quote took on new meaning as I thought about the involvement, or lack thereof, of my fellow lawyers in the legislative process. It was not long ago that attorneys could presume that quality legislation would be passed due to the involvement of lawyer-legislators. We no longer have the luxury of that assumption.

Presently, only six of the 40 Kansas senators and 12 of the 125 members of the House are attorneys. While the speaker of the House and Senate majority leader are both lawyers and do have significant influence on prospective legislation, the numbers referenced above show that there are relatively few lawyers to assist in the legislative process. While we know that some members of the public may relish the fact that there are so few lawyers in the Legislature, we know that the quality of the laws produced by the Legislature is diminished by that fact.

As members of the KBA, we are fortunate to have the assistance of Whitney Damron, our legislative consultant, and Joe Molina, the KBA director of governmental and legal affairs, to assure that legislation important to lawyers is considered and that laws that would hurt the judiciary or negatively impact the practice of law are resisted. These two individuals work diligently and are effective at promoting our positions. Both are attorneys.

What can we attorneys do to help? Whitney and Joe have the following advice:

Lawyers may believe they have little to offer to legislators as they consider matters of interest in the Statehouse. To the contrary, lawyers’ opinions are relevant and needed and not just on matters related to the practice of law.

In addition to professional work, lawyers are small business owners, employers and employees, parents, and community volunteers with a wide variety of interests. Lawyers pay taxes, have opinions on health care and education, court funding, judicial selection and a wide variety of other issues that are considered annually by the Legislature. Lawyer opinions do matter and are well received by elected officials. Each and every one of us should reach out and make contact with our elected officials and establish a relationship with them based upon mutual respect and interest in promoting good public policy. Even though we may not agree on everything, there are areas of agreement that should be expressed.

Take the time to keep up on the legislative process, find your legislator and contact him or her by phone, e-mail, or in person and make a connection. Information about the Kansas Legislature can be found at the official website: www.kslegislature.org.

In November, the KBA hosted its third annual fall legislative conference. Many of the lawyer-legislators were in attendance and expressed their views on the important issues they will face in the 2011 session. Those in the audience had the opportunity to engage in a frank discussion about these issues. While there was disagreement, there were significant areas where we shared similar goals and concerns. Our fellow lawyers who serve in the Legislature sacrifice time away from their families, and their law practices, to serve the public. They are often repaid for their efforts with unfair criticism and harsh words. When lawyers engage in such negative discourse, it makes an impression on the public because most people believe that lawyers are a majority in the Legislature. We have all heard people comment that there are too many lawyers in the Legislature and while we are aware of the actual numbers, the general public is not. When lawyers openly criticize the members of the Legislature, we give the impression that we are disparaging other lawyers. Such an impression is not good for the image of lawyers or for the legislative process.

The legislators that I have been privileged to work with are motivated by their dedication to the public and to the common good. This is not to say that bad laws or decisions are not made, but generally when that occurs, it is due to misinformation or lack of information, not any evil intent. This misinformation or lack of information is the problem that I want to bring your attention to. We have all seen a bad decision from the bench that results from one side failing to present the proper evidence. We all have equal opportunities to express our opinions to our legislators, just as many other groups do on a regular basis, many of which do not have the best interests of the judiciary or legal community at heart. If theirs are the only messages our legislators receive, it is not too difficult to imagine that bad legislation may get passed.

The Legislature faces a difficult road ahead with a large budget deficit and the need to find adequate funding for our courts and schools. It is easy to criticize but the more responsible action is to get involved. I know of no better people to undertake this task than my fellow attorneys. While we may no longer have the numbers in the elected positions in the Senate or the House, we can still have a positive influence. It is up to us to support Whitney and Joe by contacting our legislators and giving them our opinions on the important issues that affect us all. Thomas Jefferson once said: “Whenever the people are well informed, they can be trusted with their own government.” I challenge each of you to contact your legislators this session to ensure that they are well informed on the issues. If we don’t work democracy, it won’t work for us.
Mock Trial for the Future

By Melissa R. Doeblin, Kansas Corporation Commission, Topeka, melissadoeblin@gmail.com

In the September 2010 Journal, the mock trial/pro bono liaison for the Young Lawyers Section (YLS), Jenny Michaels, wrote an article asking for volunteers to assist with the Kansas High School Mock Trial Program. I want to send a special thank you to everyone who has already volunteered to help!

As you know, the Kansas High School Mock Trial Program offers high school students an opportunity to act as attorneys, as they analyze and present a case before a panel of judges. This provides a chance to see if law is a vocation students might be interested in pursuing. This year, the regional mock trial tournaments will be held on Saturday, March 12 in Olathe at the Johnson County Courthouse, and in Wichita at the Sedgwick County Courthouse. Last year we had more than 20 high schools register for the two regional tournaments with more than 150 students competing, and if the amount of interest already shown in the program this year is any indication, the tournaments may grow to be our biggest yet! The YLS needs your help as the program continues to grow. Attorneys across the state can get involved with the program by volunteering to judge various rounds of the tournament or assisting teams at local high schools.

After teams compete at regional tournaments, the prevailing schools in each region become eligible to compete in the state tournament, to be held Friday, April 1 and Saturday, April 2 at the Johnson County Courthouse. One of the main benefits for students competing in these tournaments is the opportunity to obtain feedback from attorneys, judges, and law students, such as yourself. If you volunteer to act as a judge for one of the trials after students present their cases you get the chance to use the education you gained in law school and the knowledge you have developed as a practicing attorney to assist students, by evaluating their arguments and providing comments and advice about opening statements, presentation of witnesses, cross-examination, and closing statements. By volunteering, you help students develop skills that they will not only use in the practice of law, should they choose to pursue that, but that they will also use in all walks of life, including public speaking, debate, and analysis skills.

In addition to volunteering to use your skills to help teach students about the practice of law, by helping with the mock trial tournament you get the chance to connect with other Kansas attorneys that you might not otherwise have an opportunity to meet. Volunteers have ranged from prosecution and defense attorneys to judges and law students and everything in between.

The Kansas High School Mock Trial Program has been very successful over the years and without volunteers the program would not be able to function! Please consider volunteering a couple hours of your time to judge at least one of the rounds of one of the tournaments – or if you have more time to devote to this great program, consider joining us for the whole day at one of the tournaments. The best way to help promote the legal field is to share your knowledge with the future lawyers of Kansas.

If you are interested in volunteering for the either of the regional mock trial tournaments on March 12 or the state mock trial tournament in Olathe on April 1 and April 2, please contact the YLS mock trial/pro bono liaison, Jenny Michaels, at jnmichaels@parkerhaylaw.com or at (785) 228-5736. She can provide you more information about the tournaments, answer any questions you might have, and will be happy to sign you up to volunteer.

About the Author

Melissa R. Doeblin attended Washburn University School of Law and graduated in 2005 with certification in natural resources law. She currently serves as advisory counsel for the Kansas Corporation Commission in Topeka.

2011 National High School Mock Trial to be Held in Phoenix

Forty-four teams competed at the 2010 National High School Mock Trial Championships, including 40 state champions and teams from South Korea, Guam, and the Marianas Islands. The Kansas team from The Independent School in Wichita was 1-3, but was very competitive in all of its rounds. In two of the rounds that it lost, the Kansas team was judged the winner by one of three judges. The 2011 National High School Mock Trial Championship will be in Phoenix in May. The process of determining the Kansas state champion began with the release of the case packet in November. Regional competitions will be held in March and the Kansas High School Mock Trial Championship will be held in early April at the Johnson County Courthouse.

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High School Mock Trial Grows Young Lawyers

By John Steere, The Independent School, Wichita

Nothing is more rewarding for a teacher than to see students reach goals they didn’t believe were attainable. Although I love teaching, my most rewarding moments as a teacher last year came in the courtroom, not the classroom. Those moments came as our school’s mock trial team won the Kansas State Mock Trial Tournament and then represented Kansas at the Mock Trial National Championship in Philadelphia. My students had an incredible experience at the tournament. Even though they had to work very hard outside of class to get ready and the competition was very intense, they remember it as the highlight of their year. Just a few days ago in a speech to the student body, our team captain identified the national mock trial tournament as his most memorable high school experience. My students and I are very grateful to the Kansas Bar Association for making the mock trial program possible in Kansas.

Anyone who took a trial advocacy class in law school would be familiar with how the high school mock trial competition works. The competitors are provided with a case packet containing background facts, six witness statements, pleadings, photos, diagrams, and other exhibits. Each team has at least three members who act as lawyers. Each lawyer is required to do at least one direct examination and one cross-examination in each trial. The student-lawyers must present opening and closing statements, introduce and use exhibits, make and respond to evidentiary objections, and analyze and appropriately use the jury instructions. Other students act as witnesses. They must memorize the witness statements and be able to testify accurately and in character without notes and stand up to sometimes intense cross-examination. Each team must be prepared to present both sides of the case, so each lawyer must be prepared to direct and cross two witnesses. By the time a team gets through the state tournament they will have participated in 18 hours of trial over three days.

Given the challenges of learning the packet, learning the legal theory, and finding practice time, the trials conducted by high school mock trial teams are remarkably good. I am always tickled and proud to hear lawyers and judges marvel at the students’ command of the courtroom and the law. “Wow” is a pretty frequent comment from first-time judges.

The mock trial program could not exist without the support of Kansas lawyers; the KBA sponsors and runs the tournament. District court judges in Johnson and Sedgwick Counties allow the competition to use their courtrooms. In addition, lawyers and judges act as the trial judges and serve on the three-person panels that score and judge each round. The case is often complex. The national case packet last year was nearly 70 pages long. While the format is similar to a mock trial in a law school trial advocacy class, high school mock trial competitors don’t have the benefit of having taken a course in trial advocacy or evidence. Thus, attorneys who are willing to help coach and train the student-lawyers are an essential component of the mock trial program.

The high school mock trial program provides tremendous benefits to the students who participate. Through mock trial, students become much more effective speakers. They gain confidence to speak in public without a script. The student-lawyers become much more analytical and precise thinkers. It only takes a few experiences of having a poorly worded cross question blow up in one’s face or seeing a witness run away with an open-ended question to teach young mock trial lawyers the importance of clarity. The students develop poise and tenacity when faced on one side with a difficult witness supported by a lawyer with a hair-trigger tendency to object and faced on the other by a judge who expects clear, succinct, and prompt responses to objections. All of the competitors become more logical thinkers. Most importantly, they learn the concept of professionalism.

The mock trial program also benefits the Kansas legal community. All of the students who compete gain valuable insight into the reality of the legal profession and come away with increased respect for the legal system and lawyers. The students learn intimately that the adversarial process is designed to ensure fairness, because that concept is at the core of the jury instructions and rules of evidence and procedure that they must study and apply. As well, the program brings the students into close contact with many members of the bar, which helps to dispel the stereotyped image of lawyers that they have often picked up from the media. They become closely acquainted with the lawyers in their community who coach them. They see the dedication of the young lawyers who run the tournament. They argue their cases in front of prominent lawyers and judges who have given up their Saturday because of their interest in the mock trial program and who stay around after the trial to give them advice and feedback.

(Continued on Page 10)
High School Mock Trial

(Continued from Page 9)

Students who participate in mock trial don’t tell lawyer jokes. Every student I have coached in mock trial has come away with a greater respect for both lawyers and the legal process.

If you ask the students why they participate and spend long hours preparing for competition, however, they won’t talk about how it makes them stronger students or more respectful of the legal system. Their answer is almost always “because it is fun.” That is why working with mock trial students is so rewarding for teachers and attorney-coaches. The students have an infectious enthusiasm. They love the challenge. They genuinely enjoy testing their wits and skills against their peers. They also genuinely enjoy the opportunity to work with real lawyers and judges before trial and to get their feedback and advice during the competition.

Unfortunately, the level of participation in mock trial in Kansas is much lower than in many other states. While many of the Johnson County schools field teams, in recent years none of the schools west of Johnson County have participated, except for a handful of schools in Wichita. There are plenty of talented students who could excel at mock trial. Kansas is routinely one of the strongest states in the country in debate and forensics. Every year the KBA sends letters to all the schools in the state inviting them to field teams. However, those letters usually land on the desk of a teacher who is already very busy, doesn’t have any background in the law and doesn’t know how to coach mock trial. While the KBA offers to help find attorney-coaches for schools, teachers are often nervous about bringing someone they don’t know into their classroom. Since there is no tradition of mock trial in their school, it is easier to ignore the letter and not participate. To increase participation in Kansas we need lawyers, especially those with children in the school, to approach their local schools and volunteer to coach. Once a program gets started it is often self-perpetuating because the students become so eager to compete, but it takes someone to get the ball rolling.

The time spent helping to coach mock trial will be rewarding and well worth the time and effort. Ponce de Leon never found the fountain of youth. He was looking in the wrong place. It exists anywhere a mentor sparks the enthusiasm or feeds the curiosity of a young mind.

On behalf of all my students at the Independent School and all of the mock trial competitors in the state, thank you for providing this valuable opportunity.

About the Author

John Steere graduated from the University of Kansas Law School in 1987, where he was Order of the Coif and articles editor of the Kansas Law Review. He was an associate at Shook Hardy & Bacon LLP in Overland Park and became a partner at Fleeson, Gooing, Coulson & Kitch LLC in Wichita. In 2000 he joined the staff at The Independent School in Wichita, where he teaches AP U.S. History and AP U.S. Government as well as coaches debate and mock trial.
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The KBA Nominating Committee, chaired by Immediate Past President Timothy M. O’Brien, Kansas City, Kan., met on January 21 to consider nominations for KBA officers. Those nominations were not available at press time, but can be obtained by calling KBA Executive Director Jeffrey Alderman at (785) 234-5696. In addition to being nominated by the Nominating Committee, individuals can submit a petition, signed by 50 KBA members, to run for any KBA officer position. The deadline to return petitions is Friday, March 4, 2011.

Petitions can be obtained from Kelsey Schrempp at (785) 234-5696 or via e-mail at kschrempp@ksbar.org.

Board of Governors

There will be eight positions on the KBA Board of Governors up for election in 2011. Candidates seeking a position on the Board must file a nominating petition, signed by at least 25 KBA members from that district, with Jeffrey Alderman by Friday, March 4, 2011. If no one files a petition, the Nominating Committee will reconvene and nominate one or more candidates for open positions. KBA districts with seats up for election in 2011 are:

- **District 1 (2):** Incumbents Gregory P. Goheen and Mira Mdivani are eligible for re-election. Johnson County.
- **District 3:** Incumbent Eric L. Rosenblad is eligible for re-election. Allen, Anderson, Bourbon, Cherokee, Crawford, Labette, Linn, Montgomery, Neosho, Wilson, and Woodson counties.
- **District 5:** Incumbent Teresa L. Watson is not eligible for re-election. Shawnee County.
- **District 7:** Incumbent Matthew C. Hesse is eligible for re-election. Sedgwick County.
- **District 8:** Incumbent Gerald L. Green is not eligible for re-election. Barber, Barton, Harper, Harvey, Kingman, Pratt, Reno, Rice, and Stafford counties.
- **District 11:** Incumbent Nancy Morales Gonzalez is eligible for re-election. Wyandotte County.
- **District 12:** Incumbent William E. Quick is eligible for re-election. Out-of-State.

For more information

To obtain a petition for the Board of Governors, please contact Kelsey Schrempp at the KBA office at (785) 234-5696 or via e-mail at kschrempp@ksbar.org. If you have any questions about the KBA nominating or election process or about serving as an officer or member of the Board of Governors, please contact Timothy M. O’Brien at (913) 735-2222 or via e-mail at tim_o'brien@ksd.uscourts.gov or Jeffrey Alderman at (785) 234-5696 or via e-mail at jalderman@ksbar.org.
U.S. Rep. Kevin Yoder assumed the office as U.S. representative, Kansas 3rd congressional district, on January 3. From 2003-2010, he previously served as the Kansas state representative from the 20th district.

Yoder has been chosen to serve on the House Appropriations Committee, one of only three freshman members invited to serve on the committee that allocates revenues and funds government agencies. He will also serve on the Financial Services, Military Construction and Veterans Affairs, and Commerce, Justice, and Science subcommittees.

Yoder became a member of the Kansas Bar Association in 2002. He also served as a member of the Johnson County Bar Association’s board of directors and as a board member of the Kansas Sentencing Commission.

In 2001, he worked as a special assistant in the Department of Defense Office of Counternarcotics in Washington, D.C. He also completed a congressional internship in Washington in the office of former representative now-Sen. Jerry Moran.

Kansas State Rep. John Rubin, attorney, former federal administrative law judge and Federal Deposit Insurance Corp. regional counsel, and financial arbitrator, was elected to his first term in the Kansas House of Representatives from the 18th District.

He will serve on the Children and Families, Rules and Journal, Federal and State Affairs, Judiciary, and Elections committees and the Joint Committee on Arts and Cultural Resources.

Rubin earned a Bachelor of Arts in political science, magna cum laude, from Boston College in 1970 and a Juris Doctor from the Washington University School of Law in St. Louis in 1973, where he served as a student editor and contributor to The Urban Law Annual.

Rubin’s 30-year legal public service career includes a three-year tour as a Navy JAG Corps officer during the Vietnam War and extensive experience as an administrative trial lawyer with the Army Corps of Engineers and several federal agencies. In 1989, Rubin was named regional counsel of the FDIC’s Atlanta Regional Office.

In October 1994, Rubin was appointed a U.S. administrative law judge, and served in that capacity with the Social Security Administration in Kansas City for 10 years until his retirement. Since his retirement from the federal bench in 2004, Rubin has worked as an arbitrator for the Financial Industry Regulatory Authority.

He is a member of the Kansas, Missouri, and federal bars.

Kansas State Sen. Jeffrey R. “Jeff” King has been selected to fill the 15th District Kansas Senate seat formerly held by now-Attorney General Derek Schmidt. King served two terms in the Kansas House and had been elected to serve a third term in the House representing the 12th District.
We Stand Confident

When evaluating malpractice coverage, keep this in mind:

Being sued for legal malpractice can result in a significant decrease in your firm’s annual revenue. The average cost of a malpractice claim escalates every year, with the average cost of a claim closed with payment over the last decade being about $100,000. This does not include lost billable hours. If you practice with other attorneys, you may be exposed to your partners’ risks as well.

You need coverage from an insurance company who understands your line of work. For more than 25 years The Bar Plan has provided financial security to attorneys through our comprehensive policy coverage, loss prevention programs, and an understanding of the ethical obligations owed to your clients. We’re here today... Tomorrow... Ten years from now...

Every lawyer should have peace of mind when it comes to business matters. Should trouble arise, feel confident that our lawyers are standing behind you and your law practice, protecting your livelihood.

We help lawyers build a better practice

The Bar Plan Group of Companies offers:

- Lawyers’ Professional Liability Insurance • Court Bonds
- Risk Management • Practice Management • Workers’ Compensation • Lawyers’ Business Owner’s Policy

Give a Hand Up to Those in Need

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

For more information or to volunteer, contact Meg Wickham, KBA manager of public services, at (785) 234-5696 or at mwickham@ksbar.org.
The Diversity Corner

There’s No Place Like Home

By Eunice Chwenyen Peters, Kansas Office of Revisor of Statutes, Topeka, Eunice.Peters@rs.ks.gov

Growing up in the Chicagoland area, my proficiency in geography and history was limited to the states located within the Big Ten (pre-Nebraska admission). So when I met my Kansas-born husband, I appalled him with my mistaken assumptions about Kansas, believing Kansas was not only located in the south but also a slave state. After a quick lesson in Kansas history (and being shown a map), I was inspired to learn more about Kansas’ positive impact on the diversity movement in the United States.

The Free State

Kansas began its role in laying the groundwork for cultural diversity before entering into the Union as a free state. The Kansas-Nebraska Act of 1854 established Kansas Territory and stated, in part, that the state constitution would decide the issue of slavery in Kansas. Immediately after the Act’s passage, the race to “claim” Kansas began with proslavery Missourians founding Atchison and Leavenworth and free staters through the New England Emigrant Aid Co. founding Topeka, Lawrence, and Manhattan. Determined to win the vote, both sides clashed in a series of violent events (known as “Bleeding Kansas”). Ultimately, Kansas voters adopted the Wyandotte Constitution, establishing Kansas as a free state.

On January 29, 1861, Kansas became the 34th star on the flag, reflecting its tumultuous journey to statehood through its motto “Ad Astra Per Aspera” (to the stars through difficulties).

African Americans’ Mark on Kansas History

The Civil War began shortly after Kansas entered the Union. In August 1862, the First Regiment Kansas Colored Infantry was formed, recruiting the first African Americans in the Northern states for service in the Civil War. Due to prejudices, they would not be accepted into federal service until 1863. The First distinguished itself during the Civil War. Its regimental flag, which is in the collections of the Kansas Museum of History, documents the unit’s gallantry with battle honors earned at Cabin Creek (first time that African American and white troops fought together), Honey Springs (first time Native American, African American, and white troops fought together), and Poison Springs (many of the African American soldiers who were captured or wounded during the battle were executed; the First’s sacrifice inspired other African American troops, who used the battle cry, “Remember Poison Spring!”).

After the Civil War, a great migration of African Americans took place in Kansas. Because of Kansas’ historic association with John Brown and opportunities for land ownership, former slave Benjamin “Pap” Singleton promoted Kansas as the “promised land.” One of the most successful and long-lasting of the African American settlements in Kansas is Nicodemus, which the National Park Service designated as a National Historic Landmark District in 1976 and Congress designated as a National Historic Site in 1996.

Of course, one of the most famous marks African Americans would have on Kansas history would be the landmark case Brown v. Board of Education in which the U.S. Supreme Court unanimously found segregation in schools to be unconstitutional on May 17, 1954.

Women’s Mark on Kansas History

The right to vote for women also found Kansas to be its battleground. On July 11, 1859, Clarina I. H. Nichols appeared at the state constitutional convention to plead the case for women’s suffrage. Although she was not allowed to speak directly to the convention membership, Nichols lobbied for women’s rights when the delegates took breaks. Due to her efforts, the state constitution provided women with the right to vote in school district elections. In 1887, based on pressure from the Kansas Equal Suffrage Association, Kansas became the first state to make women legal voters at municipal elections.

Full suffrage, however, was not as successful with such amendments being defeated in 1867 and 1894. But in 1912, through dedicated campaigning by Kansas suffragists, voters passed the constitutional amendment. Kansas became the eighth state to extend equal voting rights to women. Eight years later, women nationwide would enjoy these same rights through the ratification of the 19th Amendment to the U.S. Constitution.

Kansans’ Mark on the Ku Klux Klan

The Ku Klux Klan first infiltrated Kansas in 1921. The Klan’s activities consisted of many activities including, but not limited to: (1) intimidating African Americans to join their strike against the railroads, (2) kidnapping and flogging the Catholic mayor of Liberty for refusing them use of a hall, and (3) attempting to hold its first parade in Arkansas City before calling it off due to opposition by Gov. Henry Allen.

Allen’s campaign against the Klan ultimately led the state attorney general to institute quo warranto proceedings with the Kansas Supreme Court, charging that the Klan was a foreign corporation without the Kansas charter necessary to engage in business in the state. On January 10, 1925, the Kansas Supreme Court ruled for the attorney general.2 Kansas became the first state to legally oust the Klan.

This brief glimpse into Kansas’ early history demonstrates that Kansans have roots in the movement for cultural diversity, and I hope this article serves as a reminder to those of their impact. Personally, I am proud to be a diverse attorney practicing in Kansas, and as a Kansan for the last 10 years, I have discovered that there is no other place I would call home.

About the Author

Eunice Chwenyen Peters is an assistant revisor for the Kansas Office of Revisor of Statutes. She is a member of both the KBA Diversity Committee and the Kansas Supreme Court-Kansas Bar Association Joint Commission on Professionalism.

1. Unless otherwise specified, the information contained in this article comes from the following three sources: (1) Kansas State Historical Society, available at http://www.kshs.org; (2) William Frank Zornow, Kansas: A History of the Jayhawk State (1st ed. 1957); and (3) Territorial Kansas Reader (Virgil W. Dean ed., 2005).
A fortuitous final exam schedule last semester provided me with a long weekend and an opportunity to travel home and go deer hunting with both my dad and cousin. After the hunt, I drove back to Lawrence to knock down with my outlines. The trip gave me some time to think. A lot of time to think, actually. It is a seven-hour drive.

I grew up south of Lakin, in the southwest corner of Kansas. Lakin is about 50 miles east of the Colorado state line, significantly closer to Denver than to Kansas City and so far west that, until recently, it was in the Mountain Time Zone.

On my way out of town, I stopped for gas (it takes two tanks to make it), coffee, and a snack. I’ve learned that a combination of audio books, sunflower seeds, cigars, satellite radio, and caffeine can make the trip more bearable. The University of Kansas was my first choice for law school but while I pump gas into my F-150 and summon myself for the drive, I sometimes wonder if I should have chosen an option a little closer to home. But if I had, I would be missing out on the journey across the state, and it’s one heckuva ride.

Driving east, I start to chuckle when I remember a lecture from my Evidence class with Professor Dennis Prater last semester. He wanted a remote western Kansas town to use in a hypothetical scenario. One of my buddies piped up with his hometown: Norton. “Nah,” Prater said. Norton was not remote enough – too cosmopolitan – for this hypo. So I raised my hand, and when I named my hometown, I got a perplexed look. “Where is Lakin?” Prater asked, eyes wide. I told him it is west of Garden City, and his eyes grew wider.

He said “There ain’t nothin’ west a’ Garden City!” My classmates and I laughed. There ain’t much, that’s for sure. However, there is more than one might think. My drive to school shows me a cross-section of the stunning views in Kansas. I never knew we had those before I entered law school and started frequenting that stretch of highway.

I leave from the sandhills in the southwest. U.S. Highway 156 runs me through the Cheyenne Bottoms wetlands. I cross the Smoky Hill River and eventually encounter the dramatic wind farm on Interstate 70 west of Salina, its blades almost hypnotizing as they turn. Then, it is on to the Flint Hills.

I think Kansas is at its most beautiful just before dusk in the fall: golden-brown stubble fields, with cattle grazing peacefully; pheasants strutting on the shoulder of the highway; in the eastern part of the state, brilliant leaves clinging to the treetops (when you come from western Kansas, you don’t take trees for granted).

After dark, I approach Topeka. No matter how early I leave, I never make it the entire way before dark. Seeing all of those lights from the city, I think about the internship I have secured for next summer at the Shawnee County District Attorney’s Office. I entered law school a year and a half ago with the goal of one day becoming a prosecutor. With this internship, my dream is inching closer to reality.

Frankly, I don’t know why the hiring committee chose my resume out of the many they considered, but I know mine has one line item that couldn’t have hurt my chances. Last summer, I interned at the Finney County Attorney’s Office.

I owe every bit of the experience and benefit I gained from that opportunity to the University of Kansas School of Law. It was possible only because of a scholarship I received through the school. The Bremer Summer Intern Scholarship offers money to entice students to work in the smaller towns of Kansas (my parents laughed when I told them that Garden City is one of the “smaller” towns of Kansas).

All summer, when I met new attorneys in the area, they would ask me where I grew up. After I told them, the response was always the same: “Oh,” they’d say, with a hint of proud camaraderie, “so there’s no culture shock.” I like to think that while I was learning about the practical aspects of criminal litigation, my familiarity with my surroundings helped to make me a better public servant. And the education I’m receiving at KU will serve me well when I head back west.

As I pull into Lawrence, I call my parents and tell them I made it back safely. I say a prayer of thanks for the continuing operability of my truck, which topped 185,000 miles on that last trip. It is an exhausting trek. But after finishing it, I always realize how fortunate I am.

I have classmates who travelled far and wide for law school. Once, a classmate from Texas asked where I grew up; he was sure my cowboy boots could only come from the Lone Star State. And once a classmate from Kentucky asked the same question; she was certain she recognized my accent as Southern. My classmates moved across the country (and, some of them, across the world) to broaden their horizons in a distant land. For many, an important part of the experience is going to some place new and different.

I have that same opportunity. I am receiving a top-flight education at a reputable institution while making my way in the world, far, far from home.

Whether from the other side of the state or from the other side of the globe, traveling great distances for an education is both challenging and rewarding. Ultimately, however, I believe many of us are also motivated by the opportunity to use our education in a way beneficial to our homeland in some fashion. Another added bonus for me! Lakin and Lawrence may seem worlds apart, but at least I get to pay in-state tuition.

**About the Author**

**Will Manly** grew up in Lakin and graduated from Fort Hays State University with a Bachelor of Arts in history. He is an avid outdoorsman who enjoys hiking, hunting, fishing, and camping. Recently, he also took up golf. He is a member of The Federalist Society and the Paul E. Wilson Project for Innocence and Post-Conviction Remedies.
Mario Chalmers vs. “Rope” Engleman: No Contest

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

Original article published in the June 2008 issue of the Journal of the Kansas Bar Association. Reprinted for the purpose of again recognizing Howard Engleman, longtime member of the KBA. He passed away on January 12, 2011.

“MARIO’s Miracle” is now forever a part of KU basketball lore. But Mario Chalmers’ trey was hardly the first time KU needed divine intervention in the Final Four. In 1940, KU was in its first NCAA Final Four, and in the semifinal game, KU played Southern Cal, which came into the game as a prohibitive favorite. KU won on a buzzer beater; the person who took and made that shot was named to the NCAA All-Tournament Team. He was also a consensus All-American. His senior year, in addition to everything else he was doing, he was student body president. He is also a Kansas lawyer. You see, before Mario, there was Danny Manning, and before him there was Wilt, and then Clyde Lovellette. But before all of these giants, there was a player who poured the concrete foundation to KU’s basketball legacy. His name is Howard Engleman. And if his name is not familiar to you, all that is about to change.

If Howard Engleman ever wrote his memoirs, book publishers would declare it fiction. If Hollywood made it a movie, Blockbuster Video would have to sell it in four sections of their store: “Adventure/Sports/Drama/Military.” The story begins with Engleman playing point guard at Ark City, leading his team to the state finals. Phog Allen wanted him and Engleman obliged. At KU – where his nickname was “Rope,” after his blond, curly locks – he drained the shot to beat USC 43-42. It was considered – at the time – one of the biggest upsets in college basketball history.

The Kansas City Star, on March 24, 1940, blared this headline: “Howard Engleman’s Shot from the Corner Decides Contest for the Jayhawks.” The news story described that Bobby Allen, son of Phog, “stole the ball and passed to Engleman alone in the corner. Unhurried and calm, the blond forward took his stance and flipped the ball through the hoop with ridiculous ease.”

Engleman was the bright star on a team with some true zeniths. One teammate, Ralph Miller, for instance, went on to coach at Wichita State, Iowa, and Oregon, winning 657 games. Another, Dick Harp, coached KU for seven years.

After graduation, Engleman enlisted in the Navy and during World War II, a Japanese kamikaze plane hit his ship in the Pacific. He sustained severe burns and recovered in a hospital at Saipan. He then returned stateside to attend KU law school.

While in law school, he held a part-time job. Coaching the KU freshman team! When Phog sustained a concussion and missed several games, Engleman coached the varsity in 1947, adding “Head Coach, KU” to his lengthy CV. And on March 1, 2003, his jersey was officially retired and raised to the rafters in Allen Fieldhouse. His speech, delivered at center court, remains a classic: www.kusports.com/multimedia/video/basketball/02-03/highlights/osu.

And then, upon graduation, he settled in Salina, joined Hampton Royce & Engleman, and did something that neither Mario nor Wilt ever attempted, trying cases. His former law partner, Stan Sexton, offered this observation to his trial skills, “He’s the most intense, singularly resolute, and prepared trial lawyer I’ve ever known. His background enabled him to almost ‘will’ a result. But nothing he did was more amazing than the Chester case.” That would be Mills vs. Smith, 9 Kan. App. 2d 80 (1983).

Chester, you see, was a 100-pound male lion who roughed up a 2-year-old girl. Shockingly, litigation followed, and Engleman defended Chester’s owner.

Judge Parks of the Kansas Court of Appeals described the case this way:

“The male lion, named Chester, was approximately three-and-one-half feet long and weighed 90 to 100 pounds. Gary Clarke, the director of the Topeka zoo, testified at the trial that 9-month-old cubs are very strong and dangerous animals.”

“The mother, Althea Mills, “stayed with her two daughters 30 to 50 feet from the lion while the grandparents took pictures.” When older sister Traci distracted the mom, Darci, the second child, “ran off toward her grandparents [the Buckbees], approaching from behind the lion, while Merle Buckbee was taking a photograph of his wife petting Chester.” And this is where it gets interesting. The court’s opinion noted, “Chester reared up on his hind legs, knocked Darcie to the ground, grabbed her head in his mouth” and, as Judge Parks described, Chester “began working his jaws.” [Legal speak for a toddler getting up close and personal with Chester’s molars.] The toddler needed stitches but amazingly sustained no major physical injuries.

So add to Engleman’s CV, “defending a lion who tried to swallow a toddler.” O.J. Simpson’s case would be easier. At the end of trial, the jury basically canonized Chester – sticking the toddler’s parents with 50 percent fault and damages awarded of $99. Moral of the story: both on the court, and in it, Howard Engleman, now retired at age 88, has no peer.
Howard George Engleman died January 12 in his hometown of Salina; he was 91. He was born November 20, 1919, in Elmer, Mo., the son of George and Beulah (Kreider) Engleman. The family moved to Arkansas City in 1920 following the death of his father and Engleman graduated from Arkansas City High School, where he led the basketball team to the state finals in 1937.

He attended the University of Kansas, where he was a member of the Kappa Sigma fraternity, president of the All-Student Council, and star of both the KU men’s tennis and basketball teams. In 1947, he coached the Jayhawks as Phog Allen recovered from a concussion.

Engleman enlisted in the U.S. Navy after graduation, where he was commissioned and assigned to the destroyer USS England, upon which he served as a navigation officer. He would receive the Purple Heart after being badly injured during World War II; the destroyer was sunk by a kamikaze suicide plane. He would return to KU after being released from the Navy to attend law school under the GI Bill. While in school he coached the KU men’s freshman basketball team and was honored to lay the cornerstone of the KU Memorial Campanile.

Upon graduation, he and his wife, Mary Beth, moved to her hometown of Salina, where he was a partner in the law firm of Litowitch, Royce, and Hampton for 40 years, retiring in 1988. He was inducted into the Kansas Sports Hall of Fame in 2006 and KU retired his No. 5 jersey in 2003.

Survivors include his wife, Mary Beth, of Salina; one son, Dr. Dodge Engleman, of San Antonio; two daughters, Ann North, of Bedminster, N.J., and Mary Kemmer, of Wichita; one brother, Kenneth Engleman, of Bartlesville; and three grandchildren.

Keynote Speaker
Scott Turow
Thursday, June 9, 2011

Author of nine best-selling works of fiction, including his first novel *Presumed Innocent* and its sequel, *Innocent.*
Members in the News

Changing Positions

Alene D. Aguilera has joined Lambdin & Lambdin Chtd., Wichita.
Daniel K. Back has joined Hutton & Hutton LLC, Wichita.
Daniel B. Bailey has joined Via Christi Health, Wichita.
Jeffrey S. Bell has joined Polsinelli Shughart P.C., Kansas City, Mo.
Gregory S. J. Beuke has joined the Office of James W. Wilson, Wichita.
Kelli M. Broers has joined Manson & Karbank, Overland Park, as an associate.
John A. Boyd has joined Green Finch & Covington Chtd., Ottawa.
Kelli M. Broers has joined Manson & Karbank, Overland Park, as an associate.
Hillary J. Boye is now a partner with Finley, Miller, Cashman, Schmitt & Boye LLP, Hiawatha.
Kari R. Burks has joined the offices of the Kansas Court of Appeals, Topeka, as a law clerk.
Lyndsey J. Conrad has joined Husch Blackwell LLP, Kansas City, Mo.
Leena P. Fry has joined the Office of General Counsel for Social Security Administration, Kansas City, Mo.
Samuel A. Green has joined Fisher Patterson Sayler & Smith LLP, Topeka, as an associate.
Keith C. Henderson has joined the Johnson County District Attorney’s Office, Olathe.
Addie L. Herres has joined the Keenan Law Firm P.A., Great Bend.
Donald E. Hill has joined the Adams Jones Law Firm P.A., Wichita.
Megan L. Hoffman has joined Morris Laing Evans Brock & Kennedy Chtd., Wichita.
Amber H. Jeffers has joined the Kansas City Missouri School District, Kansas City, Mo.
Jared B. Johnson has been appointed a district judge for Saline and Ottawa counties, Salina.

J. Michael Kennalley has joined Stinson Morrison Hecker LLP, Wichita.
Scott A. Long has joined Armstrong Teasdale LLP, Kansas City, Mo.
Katherine L. McBride has joined the Kansas Office of Revisor of Statutes, Topeka.
Shane J. McCall has joined Lentz Clark Deines P.A., Overland Park.
Megan L. McCann has joined Tamara L. Davis P.A., Dodge City, as an associate attorney.
Aaron B. Oleen has joined Arthur-Green LLP, Manhattan, as an associate attorney.
Mindy J. Olson has joined Paulson Electric, Cedar Rapids, Iowa.
Kahlea M. Porter has joined the Law Offices of Daniel A. Parmele, Wichita.
Mathew F. Rigdon has joined the Kansas Department of Agriculture, Topeka.
Megan C. Roth has joined Shook Hardy & Bacon LLP, Kansas City, Mo.
Ryan E. Shaw has joined SNR Denton, Kansas City, Mo.
Britain D. Sites has joined Konza Law LLC, Junction City, as an associate.
Mathew C. Warren has joined OMB Guns, Olathe, as general counsel.
Patrick Woods has joined Evans & Dixon LLC, Kansas City, Mo., as an associate.

Changing Locations

Bruce W. Beye, Attorney at Law, has moved to 3939 W. 110th St., Ste. 450, Overland Park, KS, 66210.
W. Stanley Churchill has started the firm of Churchill LLC, 75 Via Verde, Wichita, KS 67230.
Kelli N. Cooper has started the firm of Kelli N. Cooper, Attorney at Law, 201 E. Loula, Ste. 109, Olathe, KS 66061.
Patrick G. Copley and Jason P. Roth have joined with Mark C. Wilson to open Copley Roth & Wilson LLC, 7300 College Blvd., Ste. 175, Lighton 1, Overland Park, KS 66210.
Russell W. Davisson has moved to 320 Orpheum Centre, 200 N. Broadway, Wichita, KS 67202.

Jessica R. Madrid has started the Madrid Law Firm LLC, 827 Armstrong Ave., Ste. 104, Kansas City, KS 66101.
Mark D. Molner has opened his own practice at 4800 Rainbow Blvd., Ste. 6, Westwood, KS 66205.
Martha H. Ortiz, Attorney at Law, has moved to 3615 SW 29th St., Ste. 204, Topeka, KS 66614.
C. Eric Pfansiel has started C. Eric Pfansiel, Attorney at Law, 12980 Metcalf Ave., Ste. 180, Overland Park, KS 66213.
Craig Shultz and Michael J. Shultz have opened their own practice, 445 N. Waco St., Wichita, KS 67202.

Miscellaneous

Nancy J. Andervich, Hutchinson, was awarded the certified trust and financial advisor designation from the Institute of Certified Bankers.
Gregory M. Bentz, Kansas City, Mo., was honored by the Kansas City Metropolitan Bar Association for involvement in fundraising and development of new KCMBA headquarters and outstanding legal services.
Hon. Benjamin L. Burgess, Wichita, received the Criminal Justice Professional of the Year Award at the Wichita Crime Commission’s 57th Annual Awards Banquet.
Klamann Hubbard P.A. has changed to the Klamann Law Firm, Kansas City, Mo.
Jack S. McInteer, Wichita, received the 2010 Robert L. Gernon Award given by the Supreme Court Continuing Legal Education Commission.

Correction:
In the January 2011 issue, it was reported in error that Timothy J. Langland had joined Americo. He is now with Kansas City Life Insurance Co., Kansas City, Mo.

KALAP Foundation

A Campaign to Benefit Lawyers in Need

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Howard M. “Tony” Immel
Howard M. “Tony” Immel, 95, of Iola, died October 27. He was born August 29, 1915, in Denver, the son of Ralph Waldo and Hazel (Seibel) Immel. He graduated from the University of Kansas School of Law in 1938 and became the personal secretary of Gov. Payne Ratner. Immel went on to join the legal department of the State Tax Commission and then become special counsel of the Kansas Corporation Commission. Because he was a reserve officer as a graduate of the Wentworth Military Academy, he was called to active duty early in World War II and served on the staff of Gen. Dwight D. Eisenhower’s Allied Command. At the end of the war, he was discharged as a lieutenant colonel and Immel returned to Iola where he lived prior to the war. He began his practice of law and was elected to the Kansas House of Representatives in 1948. He served four terms and was then elected to the Senate in 1956. Immel was a charter member of Iola Industries Inc. and served on its board of directors until his retirement. He was also chairman of the board of Allen County Hospital for many years. In addition to his other honors and accomplishments, Immel was a trustee of the University of Kansas Endowment Association and received the Ellsworth Medallion in 1976. He was past president of the board of governors of the University of Kansas School of Law and past president of the Kansas Chamber of Commerce.

He is survived by his wife, Sue; sons, John, of Lawrence, and James, of Iola; four grandchildren; and eight great-grandchildren. He was preceded in death by two brothers, Ralph and John, and a sister, Hazel.

Kenneth D. Klein
Kenneth D. Klein, 71, of Lake St. Louis, Mo., formerly of Topeka, died November 4. He enjoyed a long and prominent career as executive director of both the Kansas Bar Association (13 years) and the Bar Association of Metropolitan St. Louis (nearly 25 years) and their respective charitable foundations; Klein retired in 2006. Klein was born April 10, 1939, in Topeka, the son of Edgar and Theresa (Bauer) Klein. He graduated from Hayden High School and went on to receive his bachelor’s degree from Washburn University. He then served in the U.S. Navy in San Diego and aboard the destroyer USS Radford in Pearl Harbor, Hawaii. His career began as a newspaper reporter for Stauffer Publications in Topeka. He went on to serve as the publicity manager and legislative agent for the Kansas Power & Light Co. and the investor-owned utility industry before joining the Kansas Bar Association. Klein was instrumental in the creation of programs and services that became national models adopted or replicated by many other bar associations, including the American Bar Association, and bar foundations. He pioneered many “first of their kind” third-party marketing arrangements between bar associations and corporations, including the first affinity credit card program in the nation that became the largest non-dues sources of revenue for associations in the country. He also initiated many other programs benefiting the legal profession and the public and served as speaker or program producer for many national programs. His commitment to excellence in association management and volunteerism earned him the National Association of Bar Executives top award for professionals in association management. During his career, he brought both bar associations more than 20 national awards. He served as either president or a board member of many organizations and chair of several national association committees. He was a founding member and president of the Kansas Society of Association Executives and a distinguished charter fellow of the St. Louis Bar Foundation.

Klein is survived by his son, Mark Klein, of Plano, Texas; daughter, Paula Donovan, of Orlando; his former wife, Ramona White, of New Smyrna Beach, Fla.; and four grandchildren. He was preceded in death by his parents.

James J. Lutz
James J. Lutz, 59, of Kansas City, Mo., died September 4. He was born May 27, 1951, in Omaha, Neb., to Finton and Catherine Lutz, where he graduated from Cathedral High School in 1969. Lutz later received his bachelor’s degree in 1973 from the University of Nebraska and his law degree from the University of Missouri-Kansas City School of Law in 1980. He worked as an estate planning attorney for Lewis, Rice & Fingersh and became a partner in 1990. Lutz was a member of the Missouri and Kansas bar associations.

Lutz is survived by his wife, Deanna Lutz; children, Gina, Peter, and Joey Lutz; stepchildren, Callie Weitzel and Breanna Farnum; brother, Charles Lutz; sisters, Mary and Margie Lutz; and one granddaughter. He was preceded in death by his parents and his first wife, Mary.
Modern Electronics Continue to Evolve

By Larry N. Zimmerman, Valentine, Zimmerman & Zimmerman P.A., Topeka, ksPM@larryzimmerman.com

2011 Consumer Electronics Show

The 2011 International Consumer Electronics Show (CES) in Las Vegas comes on the heels of global recession with a sincere faith that gadget-lust can overcome family and firm budgets. With a few exceptions, this CES was more about the evolution of existing gizmos rather than releasing revolutionary new products. Even Polaroid released a retro-designed Instamatic that takes digital photos and prints to an integrated microprinter — hardly revolutionary.

Television makers continue pushing the envelope for the upper limits of screen size with a 92-inch model from Mitsubishi in the lead — for now. 3-D displays and Wi-Fi access to the hotly contested media streaming market were also everywhere at CES. The content consumption battles heat up on the small screen too as vendors fight Apple for the tablet market. Seemingly endless iterations of Android, Windows, and BlackBerry tablets all hope to find a profitable niche.

Living in a 3-D World

3-D television continues its creep toward ubiquity with hundreds of models rolling out to market. The hottest releases at CES crowd around the 55- to 65-inch range with differentiation focusing on perfecting existing technology. The latest models emphasize better color, greater efficiency, and connectivity with the internet and virtually any home media device. Most of the 3-D models still require (expensive) electronic glasses, though some of the more interesting models use simpler polarized glasses like those offered at movie theaters. Experimentation also continues with no-glasses 3-D displays. When viewing conditions are perfect, the effect is great, though lighting, viewing angle, and even eye movement can break the effect.

Probably the biggest speed bump to widespread adoption of 3-D has less to do with the television displays and more to do with the problem of limited content. Though most blockbusters are now releasing with a 3-D version, more mundane weekend fare is typically still 2-D. Until professional production ramps up, there is some hope that do-it-yourself amateurs might create compelling 3-D content. Scores of new consumer 3-D video cameras rolled out at CES with the promise of flooding YouTube, Facebook, etc., with poorly framed, shaky 3-D videos of cats and kids viewable on internet-connected, 92-inch, 3-D TVs. Sony offers one of the cheapest with the 3-D Bloggie camera for around $250. Unfortunately, video shot with the Bloggie requires old-fashioned red-blue glasses (sold separately).

Tablets Try to Take Hold

Though Apple’s iPad has roughly 90 percent of the tablet market right now, Google and BlackBerry are eager to steal it away. To a lesser extent, Microsoft seems to feel some pressure to join the fray and tagged along with some uninspired efforts.

Google demonstrated its new Android 3.0 (Honeycomb) operating system that aims to build on their popular phone OS. Reviews have been mixed and details somewhat limited by Google. What is clear is that Honeycomb is built from the ground specifically for tablets leveraging larger screens and tighter, feature-rich integration with Google apps like video chat, calendar, and Gmail. At the outset, at least, it appears Google may be addressing one of their prime problems with Android by enforcing a uniform interface design sorely lacking in the Android phone arena.

Motorola looks to have the most interesting application of Android with a device that blurs the lines between smartphone, netbook, and desktop. Their Atrix 4G phone looks like any other generic touch screen phone but dazzles with its accessories. Drop it into a unique cradle that looks like a laptop, and the Atrix becomes a desktop. Slip it into a unique cradle that looks like a laptop, and the dual core processors on the Atrix power a full screen and keyboard laptop. The concept is intriguing.

BlackBerry’s Playbook tablet turned heads as well. This is one of the few that looks like a fully finished product rather than a beta using paying, patient customers to polish. The Playbook is hardware-powerful and runs super smooth with a gorgeous screen. The software is lean and apps few but they are carefully designed, functional, and clearly aimed at business users and stretched information technology departments needing to manage deployed devices.

Evolution

This year’s CES was so mundanely focused on the evolution of existing products that even power plugs saw tweaks. Those with Apple laptops are familiar with their magnetic adapters. Trip on the power cord and the magnetic plug breaks cleanly away instead of dragging the machine off the desk or mangling the delicate prongs. Stanley unveiled a $20 device to provide that feature for any power plug — handy, but hardly revolutionary.

About the Author

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

To join the LPM Section or any other KBA section, you may register online at www.ksbar.org or call (785) 234-5696.
The Kansas Legislature officially opened its doors on Monday, January 10, after a weekend of inaugural events for Gov. Sam Brownback. However, Brownback is merely one new face making an appearance under the dome. All told there will be 35 new members of the Kansas Legislature. The high turnover rate is a result of a landslide victory for Republicans this past election cycle and the filling of vacancies created when current legislators ascended to new posts. While these new members will have a significant impact on the goings-on this session, equally important are those legislators who left to fill new positions in government. In this regard the Kansas Legislature lost decades of institutional memory as Sen. Karen Brownlee is the new Kansas secretary of labor and Sen. Janis Lee resigned from office after being appointed to the Court of Tax Appeals. In addition, Kansas Rep. Pat George has taken the Department of Commerce post. Their loss will be felt throughout the halls as they were key legislators in crafting past state budgets. But these are just three examples of changes in Kansas government. Another vacancy that brought forth significant change was the election of Sen. Derek Schmidt as Kansas attorney general. This change opened two spots in the Kansas Senate, one as the senator for the 15th District and another as Senate majority leader. Sen. Jay Emler has taken the Senate majority leader post while the remaining two-year term in the 15th Senate District has been filled by Rep. Jeff King (R-Independence). This, however, only created another vacancy for King’s seat in the 12th House District. And so the stone tumbles.

Besides the overall change in the Kansas Legislature, new members will serve on committees in both chambers. Committee assignments are based on the ratio of Republicans to Democrats. In 2010, Republicans held a 76-49 or 60 percent majority. After the 2010 elections, this majority grew to 92-33 or 73 percent. With this increased majority Republicans have increased their committee representation by more than 10 percent. The House Judiciary Committee will be seating no less than four new members as Rep. Marti Crow retired at the end of last session, Rep. Raj Goyle lost his bid for U.S. representative, and Rep. Malik Talia lost his re-election race. U.S. Rep. Kevin Yoder’s seat on the House Judiciary Committee will also have to be filled after he won the 3rd District race for Congress. For more information on committee assignments please refer to www.kslegislature.org.

The number of new individuals in the Kansas Legislature has clarified one important point: conservative Republicans have the numbers and the gumption to advance their agenda. As you may recall, it was the moderate Republican/Democrat coalition that approved the 1-cent tax increase, crafted a statewide smoking ban, and passed a state budget in 2010. With such a large majority of conservative Republicans, those days of coalition building may be over. How they use this advantage remains to be seen but there has already been talk of repealing the 1-cent sales tax and moving in a more conservative direction.

While the numbers in the Kansas House support a conservative agenda, House leadership will still need to contend with the Kansas Senate. This dynamic will be the most interesting aspect of the coming session. In the past the Kansas Senate has proven to be the thorn in House leadership’s side, especially when dealing with the budget. How this relationship evolves will determine how conservative an agenda House leadership promotes. House conservatives do have a friend in the governor’s office for the first time in eight years. This could provide the necessary leverage needed to implement some of the more contentious proposals.

2011 Legislative Proposals

It has become an annual tradition to report that the state budget will be underwater. The estimates for the upcoming fiscal year look to be between $350 million and $400 million in the red, and this includes the 1 percent sales tax income. Brownback has made several statements that he intends to put Kansans back to work, thereby growing the pie and increasing revenue. Couple this with a reworking of the school funding formula and you have a way out of the $400 million hole. However, if the sales tax is repealed, an additional $300 million would be needed or more likely cuts to balance the books, a near impossible lift for any administration.

While the state financial situation will garner the lion’s share of lawmaker’s attention, several other items will definitely merit attention as well.

Senate Confirmation Proposals

We can expect to see several variations on this old theme as we start the 2011 legislative session. On December 10, 2010, Brownback mentioned his concerns with the current system of selecting Supreme Court justices and Court of Appeal judges. He has a specific issue with the Supreme Court Nominating Commission and the process by which its members are elected. As you may recall, five of the nine members of the Supreme Court Nominating Commission are elected by attorneys throughout the state. Brownback believes this violates the one person/one vote doctrine. A lawsuit making this very allegation was filed in the fall and its fate lies in the hands of the 10th U.S. Circuit Court of Appeals.

As a practical matter, altering the process for selecting Supreme Court justices is no simple task. A change of this type would require amending the Kansas Constitution and a simple majority vote would not suffice. An amendment to the Kansas Constitution requires a two-thirds majority by both chambers, then the measure must pass a public vote. Complicating matters further is the lack of any statewide elections in 2011. This would force proponents of a change to seek a special election, which is unlikely due to cost, or wait to put the amendment on the 2012 ballot.

However, making a change to the Court of Appeals process is a straightforward procedure since the merit selection system

(Continued on next page)
for Court of Appeal judges is a statutory creation. Proponents of the change would only need simple majorities in both chambers to effect a change.

**Caps on Noneconomic Damages**

Currently the state of Kansas places a statutory limit on the amount a plaintiff can recover for non-economic damages. That limit is set at $250,000. This limit has been challenged by the plaintiffs in *Johnson v. Miller*, a medical malpractice case currently before the Kansas Supreme Court. While the Supreme Court has not issued a ruling on the case, oral arguments were heard in October 2009 and it is rumored that the Court will rule the cap unconstitutional. In anticipation of such a finding, supporters of the $250,000 cap introduced legislation in 2010, HCR 5036, that would allow the Kansas Legislature to set a cap on noneconomic damages. If the Supreme Court strikes the current law, we can expect a very similar resolution to be introduced in 2011.

**Repeal of Sales Tax Exemptions**

Over the past several years we have seen a number of bills aimed at eliminating the number of sales tax exemptions currently on the books. A proposal seeking to repeal these sales tax exemptions was discussed over the summer by former Secretary of the Department of Revenue Joan Wagnon and Kansas State Sen. Dick Kelsey (R-Goddard). This proposal will continue to float around the dome.

**SB 374 – The Apology Law**

The apology bill was first considered in 2009 by the Senate Judiciary Committee when SB 32 was introduced. After extensive testimony, the committee referred the issue to the Kansas Judicial Council for further study. The Kansas Judicial Council opposed SB 32 as written, although it did support the concept of an apology law. As a result of its review, the Judicial Council Civil Code Advisory Committee crafted SB 374.

The Kansas Bar Association was neutral in 2009 when SB 32 was introduced and had no position on SB 374 prior to February 16, when a substitute bill was advanced out of committee. The KBA Legislative Committee reviewed both SB 374 as introduced and the substitute bill, and determined that the recommendations forwarded by the Kansas Judicial Council should be supported. The KBA relayed this position to the interim committee and the interim committee voted 6-3 to recommend the Judicial Council’s version of the apology bill. This by no means has ended the debate on SB 374. When the 2011 session opens, the interim committee will recommend SB 374 as originally introduced. Supporters of the substitute bill will then have the opportunity to debate the bill again and attempt to alter it again.

**HB 2568 – Durable Power of Attorney**

HB 2568 was introduced in 2010 by the Kansas Attorney General’s Office Medicaid Fraud Division in an effort to criminalize abuses performed against dependent adults. The KBA opposed this measure and worked to have it referred to the Judicial Council Probate Law Advisory Committee for further review. The Judicial Council met to discuss this bill over the summer and while no official recommendations have been set, the committee is considering requiring that two witnesses and a notary sign the power of attorney (POA). The committee is also considering requiring that attorneys in fact acknowledge and sign that they understand their duties and responsibilities and putting some bold print language explaining what a POA is at the beginning of each POA. Also, the committee had no objection to the Attorney General’s Office seeking two amendments to the criminal code to strengthen its ability to prosecute financial elder abuse. At this point these are simply recommendations.

**About the Author**

Joseph N. Molina III is the director of governmental and legal affairs for the Kansas Bar Association. Prior to joining the KBA, Molina was chief legal counsel for the Topeka Metropolitan Transit Authority, where his practice involved insurance subrogation, and labor and employment law. He also previously served as an assistant attorney general, acting as the chief of the Kansas No-Call Act. Molina holds a Bachelor of Arts in political science, philosophy, and economics from Eastern Oregon University and a juris doctorate from the Washburn University School of Law.
The Kansas Criminal Code Recodification

The Kansas Criminal Code Recodification was enacted in HB 2668 during the 2010 Legislative Session and is due to become effective July 1, 2011 (chapter 136 of the 2010 Session Laws of Kansas). It is our intent to have a clean-up bill addressed in both Judiciary committees during the 2011 session to make any changes or clean up any errors that may have come out of the passage of HB 2668. We hope to include comments brought to our mutual attention as chairs of the Senate and House Judiciary committees by the members of the bar before the law actually goes into effect.

One only has to look at the sheer volume of HB 2668 and the size of the effort that has gone into the Kansas Criminal Code Recodification to understand its importance. How many times have we, as attorneys, either stated ourselves or heard from others how nice it would be if our statutes were cleaner, simpler and easier to research, no matter which area of law we choose to practice? This effort by the recodification commission attempts to answer that question. It provides, in clear, simple and understandable terms, the elements of prohibited acts and organizes the code in a more easy-to-use manner. HB 2668 also attempts to avoid drafting statutes that raise questions regarding specific versus general offense issues as found in State v. McAdam, 277 Kan. 136, 83 P.3d 161 (Kan. 2004).

The drafters also segregated procedural and administrative provisions (some of which are currently found in Chapter 21 of the Kansas Statutes Annotated and should not be) from matters of substantive law. In addition the commission has recommended the repeal of statutes that no longer have any applicability, such as old sentencing guidelines. It is truly the hope of the recodification commission that the Legislature will see the value of this approach and that the general public and members of the bar, who practice in the realm of the Kansas Criminal Code, will benefit.


To register comments or concerns, please contact Sen. Tim Owens by e-mail at Tim.Owens@senate.ks.gov or Rep. Lance Kinzer by e-mail at Lance.Kinzer@house.ks.gov.
DIVORCE AGREEMENT

John Smith, referred to herein as HUSBAND and Mary Brown, referred to as WIFE, agree: The parties were legally married on 08/27/1962 in Detroit. difficulties have occurred between the parties such that they have lived separate and apart. The parties nevertheless desire to end their marriage and have entered into this agreement.

The parties agree that the children of the marriage Anthony Smith, born

The parties agree to joint custody and each is satisfied with the arrangements and joint

finance

The parties agree to joint support of the children. Neither party shall incur additional legal

risks.

BY WIFE Neither party shall incur additional legal

risks in the event

The parties agree to joint credit of the parties

and shall pay support weekly the


Traps for the Unwary: Avoiding Problems with Employee Benefit Plans in Divorce

By Steven P. Smith
divorce happens. In a recent year, more than 14,000 divorce actions were filed in Kansas alone. In many – in fact, probably most – of those divorce proceedings, one or both spouses were participants in an employee benefit plan that was offered by a current or former employer. Some of them may be entitled to benefits under a pension plan. Some may have had an account balance in a 401(k) plan. And some may have been insured under a group term life insurance plan.

How these benefits should be divided in a divorce is a matter of state law. The benefits themselves, however, are not subject to state law, at least for the most part. The terms and conditions on which these benefits are being offered are governed by federal law, including provisions of the Internal Revenue Code (the Code) and, for most employers, the Employee Retirement Income Security Act of 1974 (ERISA). If ERISA applies – and it applies to benefits offered by any employer other than governmental employers and certain church or church-related employers – state law will be preempted.

Both the Code and ERISA are complicated statutes. The rules they establish are not always well known and may, at times, be contrary to the reasonable expectations a practitioner might have had based on the practitioner’s experience in other areas of the law. For this reason, it is possible that these rules may result in an outcome that practitioners, and their clients, did not expect.

This article is intended to highlight problems that can arise when participants in an employee benefit plan are involved in a divorce and to provide suggestions on how these problems can be avoided.

I. Factors Leading to Problems

Most problems involving 401(k) plans, pension plans, and other ERISA employee benefit plans arise due to one or more of the following factors:

• Not knowing what you are dealing with: The attorneys representing the parties in the divorce may not understand what they are dealing with, from a legal point of view, a factual point of view, or, in some cases, both;

• Not providing clear directions to a plan: The property settlement agreement and/or the proposed “qualified domestic relations order” (QDRO) that has been drafted to reflect that agreement may not provide clear directions as to how the benefit under a plan should be divided;

• Lack of follow through: After a property settlement agreement has been approved by the court and a decree of divorce has been entered, a proposed “domestic relations order” may not be prepared, may be prepared but not be sent to the plan administrator, or may be sent to the plan administrator but not thereafter revised to correct any problems that might have caused the plan administrator to reject the proposed QDRO; and/or

• Failure to update beneficiary designations: After a divorce has been granted, individuals may fail to update their beneficiary designations, with the result that their former spouse may still be named as the beneficiary for their death benefits under a pension plan, their remaining 401(k) account balance, and/or their coverage under a group term life insurance plan, even though the decree of divorce might have provided they were no longer entitled to any rights under any of these plans.

Examples of these problems are not hard to find.

A. Example – An overlooked plan

It sometimes happens that a plan is overlooked. For example, in a Tenth Circuit case from Colorado, the decree of divorce required the ex-husband’s pension plan to treat his ex-wife as his “surviving spouse” if he predeceased her, thereby entitling her to the receipt of survivor benefits. A “domestic relations order” was issued and accepted by the plan administrator as a QDRO. Eleven years later, after he died, a problem came to light. His ex-wife discovered that he had been a participant in two separate pension plans, and not just the one plan addressed in the divorce decree and the QDRO.

The oversight was eventually corrected, but not until:

1. His ex-wife had gone back into state court to obtain a nunc pro tunc order correcting the divorce decree;

2. A new “domestic relations order” was prepared and sent to the second plan;

3. A lawsuit was filed in federal court challenging the second plan’s refusal to recognize a post-death QDRO; and

4. An appeal was taken to the Tenth Circuit.

In all, it took an extra five years before the ex-wife received the additional benefits to which she was entitled.

In fairness to the attorneys who represented the parties in the underlying divorce action, it does not appear that any of

FOOTNOTES


3. On the other hand, it should go without saying that this article is not intended to provide a comprehensive overview of every rule that could potentially apply to or affect a QDRO nor is this article intended to discuss the different ways in which an interest in a qualified plan can or should be valued and/or divided in a divorce. Entire treatises have been written on such subjects. A partial list of resources that may be helpful to a practitioner includes the following: QDROs: The Division of Pensions Through Qualified Domestic Relations Orders, which is published by the U.S. Department of Labor and is available online at www.dol.gov/ersa/pdf/qdronet01.pdf; Qualified Domestic Relations Orders and PBGC, which is published by the Pension Benefit Guaranty Corporation and is focused on plans that are administered by the PBGC but is helpful for other plans as well (available online at www.pbgc.gov/docs/QDRO.pdf); Qualified Domestic Relations Order Answer Book, published by Aspen Publishers; and Qualified Domestic Relations Order Handbook, published by Aspen Publishers.

this was their fault – the oversight was apparently due to bad information provided by the employer – but the case nonetheless points out the importance of trying to gather complete information about all of the plans in which an individual is a participant before a divorce is completed.

B. Example – Out-of-date beneficiary designations

An even more common problem is the failure to update beneficiary designations following a divorce. This has been a frequent cause of litigation, including a case that was decided by the U.S. Supreme Court in 2009.

1. The Kennedy case

In the case that was decided by the U.S. Supreme Court – *Kennedy v. Plan Administrator* – the husband designated his wife as his beneficiary under a defined contribution plan in 1974. Twenty years later, in 1994, they were divorced. Although the divorce decree stated that the wife was “divested of all right, title, interest, and claim in and to” any benefits under any retirement plans existing by reason of the husband’s past, present, or future employment, the husband never updated his beneficiary designation for the plan.

After he died in 2001, his daughter asked the plan administrator for the plan to distribute his benefits to his estate, but, relying on the beneficiary designation form that was on file, the plan administrator paid the entire $400,000 balance to his former wife instead. The estate then filed suit against both the employer and the plan administrator, claiming that the divorce decree amounted to a waiver of the ex-wife’s claim to benefits under the defined contribution plan and that the defendants had violated ERISA by paying the benefits to the ex-wife.

The district court entered summary judgment for the estate, but the Fifth Circuit reversed, and the Supreme Court unanimously affirmed the reversal, holding that the provisions of the plan document controlled and that those provisions required benefits to be paid to the person who had been designated by the participant as his beneficiary.

2. A case from Nebraska

In a Nebraska case, a woman was receiving group term life coverage under an ERISA plan sponsored by her employer. She named her two daughters from a prior marriage and her second husband as her beneficiaries for that coverage. He later filed for and received a divorce. Although the divorce decree provided that each party was entitled to the proceeds of “any life insurance policies currently owned by him or her,” she never updated her beneficiary designation. After she died four years later, and despite the fact that he had lost contact with her and did not even attend her funeral, her second husband asserted his entitlement to a share of the life insurance proceeds. Her two daughters opposed this claim, arguing that, as a result of the divorce, they were entitled to all of the insurance proceeds. The district court granted summary judgment in their favor. However, on appeal, the Eighth Circuit concluded that the Supreme Court’s decision in the *Kennedy* case required the proceeds to be paid according to the beneficiary designation that was on file with the plan administrator.6

II. The Laws Governing Employee Benefit Plans

The first step in avoiding these problems is to understand something about employee benefit plans and the laws that govern them. There are two major sources of law for most employee benefit plans.

- **The Internal Revenue Code:** An employee benefit plan is subject to a number of different requirements that are found in the Code and in the Treasury Regulations. This is particularly true for retirement plans. These requirements are enforced by the Internal Revenue Service (IRS).
- **ERISA:** Employee benefit plans are also subject to the requirements of the Employee Retirement Income Security Act of 1974 (ERISA). These requirements apply to all employee benefit plans, with the exception of “governmental plans” and “nonelecting church plans.” These requirements are enforced by the Employee Benefits Security Administration (EBSA), which is part of the U.S. Department of Labor (DOL).

III. ERISA “Employment Benefit Plans”

ERISA applies to “employee benefit plans” offered by employers to their employees (other than “governmental plans” and “nonelecting church plans”). Under ERISA, there are two types of “employee benefit plans.”7 An “employee pension benefit plan” is a plan that provides income in retirement or beyond the end of the employee’s period of covered employment.8 This includes 401(k) plans and most other types of retirement plans, although it does not include what are known as “nonqualified” plans.9 An “employee welfare benefit plan” is defined, in relevant part, as “[a]ny plan, fund, or program that is ‘established or maintained by an employer’ for the purpose of providing benefits in the event of sickness, accident, disability, or death (among other types of benefits) to participants or their beneficiaries, whether those benefits are provided through the purchase of insurance or otherwise.”10 If an employer is providing these types of benefits to its employees – and the employer is not a church or a governmental entity – an ERISA “welfare benefit plan” probably exists.11

6. Matschner v. Lewis, 2009 WL 35162 (D. Neb., filed 01-06-09), motion for reconsideration denied 2009 WL 387727 (filed 02-13-09); rev’d 622 F.3d 855 (8th Cir. 2010). It is worth noting that the Secretary of Labor chose to file an amicus brief with the Eighth Circuit in support of the proposition that ERISA required benefits to be paid in accordance with the most recent beneficiary designation filed by the participant.
7. ERISA is codified at 29 U.S.C. §§ 1001 et seq.; however, ERISA sections are commonly cited according to the section number in Public Law No. 93-406, and not as they appear in the U.S. Code. We will follow that convention in this article.
8. ERISA § 3(3).
9. ERISA § 3(2).
10. See ERISA §§ 4(b)(5) and 401(a)(1). An analysis of nonqualified plans is beyond the scope of this article.
11. ERISA § 3(1).
12. See, e.g., Peckham v. Gem State Mut. of Utah, 964 F.2d 1043, 1048-49 (10th Cir. 1992) (holding that an employer had established a “plan, fund, or program” by making medical coverage available to its employees). We say that an ERISA plan “probably” exists because there
If an ERISA employee benefit plan exists, a number of different requirements will apply, including a requirement that the plan must be established and maintained according to the terms of a written plan document.  

IV. Qualified Retirement Plans

A “qualified plan” is a plan that is designed and intended to qualify for tax-favored treatment under Section 401(a) of the Code. There are many different types of “qualified” plans. The most common type is the 401(k) plan. Other types include traditional pension plans, “cash balance” plans, money purchase pension plans, employer “profit sharing” plans, and “employee stock ownership plans” (ESOPs). In addition to the requirements found in ERISA (to the extent the plan is subject to ERISA), a “qualified plan” is also subject to a number of different requirements that are set forth in the Code.  

A. Advantages of “qualification”  
“Qualification” under Code § 401(a) provides three significant advantages from a tax perspective:  

1. The employer is allowed an immediate deduction on its tax return for contributions that are made to the plan;  
2. An employee does not, however, recognize income as a result of a contribution made on his/her behalf until money is withdrawn, which will normally be at retirement; and  
3. The earnings on the contributions that have been made to the plan, which are required to be held in trust, are not subject to tax.  

B. Requirements for qualification  
To qualify for this tax-favored treatment, a “qualified” plan must satisfy each qualification requirement set forth in the Code as that requirement applies to that plan, both in “form” and in “operation.”  

To satisfy the “form” requirement, a plan must be established and maintained according to the terms and provisions of a written plan document and the terms and conditions of that plan document must reflect all of the applicable requirements of the Code and all of the “elections” the employer has made as to how specific requirements will be applied to the plan and how the plan will be designed. As a result of this requirement, most plan documents are quite lengthy. A document of 50 to 100 pages is not unusual. To satisfy the “operation” requirement, the plan must be “operated” or administered in a way that is consistent with the terms and conditions of the plan document.  

There are at least two reasons for these requirements. The first reason is fairness. By requiring benefits to be offered through a formal plan, by requiring the plan to have a written plan document, by requiring that the plan document reflect all of the terms and conditions upon which the benefits are being provided, and by requiring that these terms and conditions actually be followed, Congress and the U.S. Treasury were trying to ensure a “level playing field” in which the rules are known in advance and are uniformly applied to everyone.  

The second reason is plan administration. It is much easier to administer a plan when all of the rules that apply to that plan and all of the elections made by an employer are written down in one place. In fact, given the complexity of the Code and the Treasury Regulations and the number of different elections an employer can make, it would probably be impossible to administer a plan correctly without a written plan document.  

These requirements have a number of important implications. Because an employee benefit plan must be administered according to its terms, as set forth in the plan document, an employer is not able to overlook provisions of the plan or to waive requirements that have not been satisfied. Although there is some room for the plan administrator to exercise its discretion when it comes to the application of the provisions of the plan to specific factual situations, that discretion does not allow either the employer or the plan administrator to overlook or ignore the provisions of the plan. When it comes to administering the terms and conditions of the plan, there is no room for exceptions.  

C. Consequences of not complying with the code’s qualification requirements  
If a plan fails to comply with even a single qualification requirement, the plan is subject to “disqualification.” The consequences of disqualification are severe. If a plan is disqualified:  

• Earnings of the trust will become taxable;  
• Deductions taken by the employer for contributions to the trust will be disallowed to the extent participants are not vested; and  
• The value of a participant’s vested benefits will become includible in the participant’s gross income, thereby exposing that amount to taxation even though the participant may not have received or even be able to withdraw that amount from the plan.  

are a few exceptions. Although the language of ERISA itself is broad, the Department of Labor (DOL) has the authority to issue clarifying regulations. Pursuant to this authority, the DOL has recognized an exception for certain “payroll practices,” such as the payment of wages, “unfunded” sick pay, and “unfunded” time off from work. DOL Regs. § 2510.3-1(b). The DOL has also recognized an exception for various types of “welfare benefit plans”; however, these requirements are outside the scope of this article.  

13. ERISA § 402.  
14. The Code also contains requirements that apply to various types of “welfare benefit plans” ; however, these requirements are outside the scope of this article.  
15. Treas. Reg. §1.401-1(a)(2)  
Once a “disqualifying defect” takes place, a plan remains subject to disqualification unless and until the defect is corrected through an official IRS correction program.20

All of this explains why most plans are very cautious and careful when it comes to reviewing and approving a proposed QDRO and are likely to reject a proposed QDRO that, from a practitioner’s point of view, may have nothing more than a handful of insignificant problems. From a plan administrator’s point of view, the consequences of getting it wrong are so severe that the only prudent course of action may be to reject a proposed QDRO until any problems with it have been corrected.

V. Prohibition Against Assignment and the QDRO Exception

A qualified plan is intended to provide benefits to an employee after the employee reaches retirement age. Allowing those benefits to be distributed before an employee reaches retirement age increases the risk that an employee will not have enough money when he/she does retire. To reduce the risk that this might happen, the Code imposes a number of restrictions on distributions from a qualified plan.

A. General Rule – Benefits may not be assigned or alienated

Of particular importance, in the context of QDROS, is the restriction against the assignment or alienation of retirement benefits. The Code provides as follows:

A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated.21

A similar provision is also found in ERISA, which requires a qualified plan to “provide that benefits provided under the plan may not be assigned or alienated.”22

The anti-assignment provision prohibits any assignment of any part of an employee’s benefit to a third person, such as a former spouse, unless an exception applies. The only exception that Congress has authorized for a spouse or former spouse is through the issuance of a “domestic relations order” that is determined, by a plan administrator, to be “qualified.”23

B. Key definitions and concepts

The QDRO exception relies on several key definitions.

1. The plan administrator

Under both the Code and ERISA, every qualified plan must have at least one named fiduciary who is responsible for the administration and operation of the plan. This person is known as the plan administrator.24

The plan may designate the plan administrator by name or by referring to a person or group of persons, such as a designated officer of the employer or a committee established by the employer.25 If a plan administrator is not designated by the plan, the plan sponsor is the plan administrator.26

In our experience, larger employers tend to establish a committee to serve as the plan administrator. Smaller employers tend to designate themselves as the plan administrator. In practice, both types of employers rely on third-party recordkeepers for assistance in administering the plan, including assistance in processing QDROS.

2. Domestic relations order

A “domestic relations order” is defined as “any judgment, decree, or order (including approval of a property settlement agreement)” that relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant and which is made pursuant to a state domestic relations law (including a community property law).27

3. Qualified domestic relations order

A QDRO is defined as a “domestic relations order” that assigns to an “alternate payee” the right to receive all or a portion of the benefits payable to a participant under a quali-

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22. ERISA § 206(d)(1).
24. ERISA § 3(16)(A)(i); Code § 414(g)(1).
25. Treas. Reg. §1.414(g)-1(a).
26. ERISA § 3(16)(A)(ii); Code § 414(g)(2).
fied retirement plan, that meets certain other requirements (as discussed in more detail below), and which is determined by the plan administrator to be a “qualified domestic relations order.” In accordance with this definition, unless and until the plan administrator does make a determination that an order is a QDRO, that order will continue to be nothing more than a “domestic relations order.” This is true even if the order itself states that it is a “qualified domestic relations order.”

4. Alternate payee

An “alternate payee” is the person designated in a “domestic relations order” to receive all or a portion of the participant’s benefits under a retirement plan. In almost every instance, the alternate payee is the former spouse of the participant. The statutory language provides, however, that other persons may be alternate payees as well, such as a child or other dependent of the participant.

VI. Requirements for a QDRO

For a QDRO to exist, each of the following requirements must be satisfied:

1. There must be a judgment, decree, or court order.
2. The order must relate to child support, alimony payments, or marital property rights.
3. The order must be made pursuant to state domestic relations laws.
4. The order must create or recognize the existence of an alternate payee’s right to receive, or assign to an alternate payee the right to receive, all or a portion of the benefits payable with respect to a participant under a plan.
5. The order must clearly specify the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order.
6. The order must clearly specify the amount or percentage of the participant’s benefits to be paid to each alternate payee or the manner in which such amount or percentage is to be determined.
7. The order must clearly specify the number of payments or the period to which the order applies.
8. The order must clearly specify each plan to which the order applies.

In addition to these requirements, the order may not require any of the following:

1. The order may not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan.
2. The order may not require the plan to provide increased benefits (determined on the basis of actuarial value).
3. The order may not require the payment of benefits to an alternate payee that are required to be paid to another alternate payee under another order previously determined to be a QDRO.

VII. Examples of Common Problems with Proposed QDROs

Perhaps the most common shortcoming with proposed QDROs is a failure to clearly specify the amount or percentage of the participant’s benefit that should be paid to the alternate payee. If the proposed QDRO can be read to require the payment of more than one amount or percentage, it will fail to satisfy the statutory requirements for a QDRO, and it will be rejected by a plan administrator. Plan administrators do not want to be put in the position of having to construe ambiguous language, even if the apparent intent might seem to be “obvious.”

A. Example – Problems with vesting

Suppose, for example, that a participant in a 401(k) plan has an account balance of $20,000 but is only partially vested in a 401(k) plan, so that his vested account balance is only

(Continued on next page)
$8,000. Suppose further that a proposed QDRO requires half of the participant’s interest in the 401(k) plan to be paid immediately to his ex-wife.

There are at least two problems with the proposed QDRO in this example. First, it is not clear whether the parties meant to give the ex-wife half of the participant’s total account balance – that is, half of $20,000 – or half of his vested account balance – that is, half of $8,000. Because this is not clear, the proposed QDRO fails to satisfy the requirements of the Code and, for that reason, will be rejected by a plan administrator. Second, if the proposed QDRO was intended to require immediate payment of half of the participant’s total account balance – that is, half of $20,000 – it must also be rejected because it would require the plan to pay more than the amount the participant himself would actually be entitled to receive if his account balance were to be paid to him and, under the Code, a QDRO cannot require a plan to pay increased benefits.

B. Example – Problems with participant loans

Many 401(k) plans permit participants to borrow from their own accounts under the plan. If a participant loan is outstanding, and the proposed QDRO does not address how that loan should be treated, the proposed QDRO may end up being ambiguous.

Suppose, for example, that a participant is 100 percent vested in a 401(k) plan. The account balance is $100,000, consisting of $60,000 invested in various mutual funds and a note receivable on an outstanding participant loan with a balance of $40,000. Suppose further that the proposed QDRO requires the participant’s entire interest to be paid immediately to his/her ex-husband/ex-wife.

In this example, it is not clear whether the parties meant to give the alternate payee $100,000, representing the entire vested account balance, or $60,000, representing the actual value of the investments in the account. If the alternate payee is supposed to receive $100,000, the plan could distribute the note receivable on the participant loan to him/her, but this is complicated and he/she would have to start collecting the regular payments on the loan. (Note that, in our view, the plan cannot be forced to collect payments and then forward them to the alternate payee until the loan is paid off.)

As a result of this ambiguity, a plan administrator will reject the proposed QDRO. To revise the proposed QDRO so that it could be accepted by the plan administrator, the alternate payee would need to limit the amount payable to the value of the investments in the account or else delay the date on which payment is to be made under the QDRO to a date that is after the due date for the loan.

C. Example – Requiring the plan to do something it does not normally do

A QDRO cannot require a plan to provide any form of benefit or any option that is not otherwise provided under the plan. This includes options as to how a distribution will be made.

For example, suppose that the participant’s 401(k) account is invested in a series of highly regarded mutual funds that are either closed to new investors or that carry heavy front-end loads. Suppose further that the plan does not provide for “in kind” distributions – in other words, the plan will sell shares in the mutual funds and distribute their cash value instead of distributing the shares themselves – but that the proposed QDRO requires a portion of the participant’s shares to be distributed to the alternate payee “in kind.”

If the participant does not have the right to receive an “in kind” distribution, a QDRO cannot require a distribution to be made “in kind” to an alternate payee. In this example, the plan administrator would reject the proposed QDRO.

D. Example – Not submitting a proposed QDRO immediately following a divorce

A proposed QDRO does not have to be submitted immediately following a divorce. A delay in drafting and submitting a proposed QDRO will, however, increase the risk that problems with the proposed QDRO will not be detected until they are more difficult or even impossible to correct and that something else will happen to the money in the plan before it can be paid to the alternate payee. For this reason, it is difficult to see how a delay in submitting a proposed QDRO will ever be to the advantage of an alternate payee.

Consider, for example, the following situation:

1. Husband and wife were divorced in 1996. At the time of the divorce, he was a participant in both a defined benefit plan and a 401(k) plan.
2. The decree of divorce awarded the wife an interest in the husband’s benefits under both plans and two separate “domestic relations orders” – one for each plan – were prepared and approved by the court.
3. The proposed QDRO for the 401(k) plan was presented to the plan administrator and was recognized as a QDRO. For unknown reasons, however, the proposed QDRO for the defined benefit plan was never presented to the plan administrator.
4. In 2008, the ex-husband retired and received a distribution of his entire benefit under the defined benefit plan in the form of a lump sum payment.
5. The ex-wife found out about this and now her attorney is trying to find the money.

This situation could have been avoided if both of the proposed QDROs had been given to the plan administrator following the divorce. The ex-wife may have a claim against her ex-husband for some part of the money he received from the defined benefit plan, but trying to collect from him is going be more difficult or even impossible to correct and that something else will happen to the money in the plan before it can be paid to the alternate payee.

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39. Code § 414(p)(3)(B); ERISA § 206(d)(3)(D)(ii); see Alberici Corp. v. Davis, 2005 WL 3307299 (E.D. Mo. 2005) (in a declaratory judgment action brought by the plan administrator, the court agreed that a “domestic relations order” was not a QDRO because the formula in the “domestic relations order” would require the plan to distribute more than the participant’s account balance). We would also note that the fact that one of two possible interpretations of the proposed QDRO is not permissible under the Code it is not enough to correct the fact that the proposed QDRO is open to two possible interpretations and, for that reason, fails to satisfy the separate requirement under the Code that the amount payable to the alternate payee must be clearly identified.
VIII. Suggestions for Avoiding Problems

Many problems can be avoided by working with the plan administrator. The plan administrator has the responsibility of determining whether a “domestic relations order” qualifies as a QDRO. If the plan administrator has concerns about how an order has been drafted, it is likely that the plan administrator will reject the proposed QDRO.

A. Understand the plan administrator’s concerns

As a general proposition, most retirement plans do not have any problem paying part or all of a participant’s benefits to an “alternate payee” rather than to the participant. The money is eventually going to be paid to somebody and whether it is paid to one person or another really does not matter one way or another to the plan. But plan administrators and employers do have some concerns:

• **Loss of the plan’s tax-favored status:** If a plan pays out money when it should not have done so — for example, in a situation in which it honors a “domestic relations order” that turns out to be defective — the plan could be at risk of losing its tax-favored status and could be put in the position of having to regain that status by going through an official IRS correction program. That is something most plan administrators and most plans would very much prefer to avoid.

• **Risk of having to pay the same benefit twice:** If the plan pays out money to an alternate payee pursuant to a “domestic relations order” that turns out to be defective and the plan is not able to recover that money from the “alternate payee,” the plan may end up having to pay the same benefit twice. That is also something most plan administrators and most plans would prefer to avoid.

• **Fiduciary liability:** If the plan pays out money to an alternate payee pursuant to a “domestic relations order” that turns out to be defective, it is also possible that the individuals who made the decision to honor that “domestic relations order” could be exposed to a claim that they breached their fiduciary obligations to the plan and to the participants in the plan.

These concerns help explain why plans are typically very careful in determining whether a given “domestic relations order” qualifies as a QDRO and why they will tend to err on the side of caution by rejecting an order if they are in doubt as to whether or not the order really satisfies all of the requirements for a valid QDRO.

B. Work with the plan administrator

Because the plan administrator will normally have the “final say” on whether a “domestic relations order” will be recognized as a QDRO and because the plan administrator can be a good source of information about a participant’s benefits under a plan, it makes sense for practitioners to work with plan administrators when they can do so. Specific steps that practitioners may take could include the following.

1. **Request information**

The plan administrator will normally be able to provide copies of participant statements, the summary plan description for the plan, and, if desired, the plan document itself.

A practitioner representing an individual in a divorce action will almost always want a participant statement. Typically, a participant statement will help identify the plan or plans in which an individual is a participant, the extent to which the participant is vested, and the participant’s account balance (in a defined contribution plan) or monthly accrued benefit (in a defined benefit plan).

A practitioner may or may not need a summary plan description. A summary plan description is required under ERISA and must be provided to participants in a plan. A summary plan description is intended to serve as a “plain English” summary of the more technical language found in the underlying plan document.

In most cases, a practitioner will not need the plan document itself, although it may be helpful if an individual is entitled to a benefit under a defined benefit plan or if there are questions that are not addressed by the summary plan description and participant benefit statements. As previously noted, plan documents tend to be lengthy and can be difficult to read.

**Practice Pointer:** If they know that information is being requested for the purpose of preparing a proposed QDRO, many plan administrators will place a temporary hold on distributions to the participant. This reduces the risk that money that may be needed to pay the alternate payee will be distributed from the plan before a proposed QDRO is prepared and sent to the plan.

2. **Request model QDRO**

Not every plan has a model QDRO, but many plans do. If a model QDRO does exist, it may make sense to use it as the basis for preparing a proposed QDRO rather than using a form created by the practitioner. A proposed QDRO that is based on the plan’s model QDRO is more likely to be accepted by the plan administrator as a QDRO because it will normally include all of the legally required elements for a QDRO, it will normally contain correct information about the plan, such as the correct legal name for the plan, and it will be less likely to include language that might cause the plan administrator to reject the proposed QDRO.

3. **Provide proposed QDRO to the plan administrator in draft form**

Before requesting court approval of a proposed QDRO, it is a good idea to provide the proposed QDRO to the plan administrator in draft form. Many plan administrators will

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41. A delay in preparing and submitting a proposed QDRO could, in some situations, be viewed as a violation of an attorney’s obligations to his/her clients. See In re Swanson, 288 Kan. 185, 207-09, 200 P.3d 1205, 1219-21 (2009) (finding that an attorney violated KRPC 1.1 (competence), KRPC 1.3 (diligence), and KRPC 1.4 (communication with client) when the attorney did not prepare and submit a proposed QDRO until more than one year after the divorce and only after the alternate payee had filed a disciplinary complaint against him).
review proposed QDROs and will identify any provisions that are, from their perspective, unclear, problematic, or objectionable. By identifying and addressing these provisions before a proposed QDRO is approved by the court, a practitioner will avoid the need to have to return to court in order to request the entry of an amended “domestic relations order.”

C. Request court approval of the proposed QDRO

For a “domestic relations order” to be recognized as a QDRO, it must be approved by the court. Although it is customary in many places for a “domestic relations order” to also be signed by the parties to a divorce, an order can be recognized as a QDRO without being signed or approved by the parties. The only signature or approval that is required is that of the court. 42

D. Send a copy of the approved order to the plan administrator

After the “domestic relations order” has been approved, it should be filed with the clerk of the court, and a file-stamped copy should be sent to the plan administrator. Although there are no specific timing requirements for sending the notice to the plan administrator, a practitioner will normally want to do so as quickly as possible as a delay could adversely affect an alternate payee. This could happen, for example, if

• The participant takes his/her money out of the plan before the plan administrator receives the proposed QDRO;
• The participant remarries, names his/her new spouse as his/her surviving spouse for purposes of any survivor benefits provided under the plan, and commences benefits, in which case it will normally be too late to substitute the prior spouse for purposes of the survivor benefits; and/or 43
• Another ex-spouse submits a proposed QDRO that is accepted by the plan administrator before a proposed QDRO for the current ex-spouse is received by the plan administrator. 44

Upon receipt of the proposed QDRO, the plan administrator will normally be required to send an acknowledgment that it has received the order to both the participant and the alternate payee along with a copy of the plan’s procedures for determining the qualified status of an order. The plan adminis-

istrator has a “reasonable period after receipt” of an order to determine its qualified status and then notify the participant and alternate payee of its determination. 45

E. Remind clients to update beneficiary designations

The entry of a decree of divorce and/or the acceptance of a “domestic relations order” as a QDRO will not, by themselves, change a participant’s beneficiary designations. If the participant named his/her former spouse as a beneficiary before the divorce but is not required to do so by the decree of divorce, the participant should be reminded to update his/her beneficiary designations. This is true both for qualified retirement plans and also for welfare benefit plans, such as group term life insurance plans.

IX. Conclusion

Employee benefits – particularly retirement benefits – can complicate a divorce if not properly processed and handled through completion. By following the suggestions made in this article, the practitioner should be able to avoid many common problems and future sleepless nights.

About the Author

Steven P. Smith is a member of the Hinkle Elkouri Law Firm LLC in Wichita, where his practice is focused on the legal rules that apply to the benefits that employers provide to their employees and related issues. Prior to joining the Hinkle Elkouri Law Firm in 1998, he served as chief counsel – business law at Thorn Americas Inc. and as a research attorney for the Hon. Robert E. Davis at the Kansas Court of Appeals. He received his law degree from the University of Kansas School of Law in 1988.

42. See DOL QDRO Booklet Q&A 1-2 (“There is no requirement that both parties to a marital proceeding sign or otherwise endorse or approve an order”).

43. See Carmona v. Carmona, 544 F.3d 988 (9th Cir. 2008) (holding that the right to be treated as a surviving spouse for purposes of receiving survivor benefits under a defined benefit plan became irrevocably vested when the participant retired and commenced benefits and could not later be changed); Anderson v. Marshall, 856 F. Supp. 604, 607 (D. Kan. 1994) (holding that once the participant had retired, “his election of the Joint and Surviving Spouse Option” under the Boeing Company Employee Retirement Plan “became irrevocable and could not be changed through waiver by the designated beneficiary,” even though he and his wife had subsequently become divorced).

44. See Code § 414(p)(3)(C) (providing that a QDRO may not require the payment of benefits to an alternate payee if those benefits are required to be paid to another alternate payee under another order previously determined to be a QDRO).

45. See Code § 414(p)(6) and ERISA § 206(d)(3)(G), which require a plan to establish written procedures for determining whether a “domestic relations order” is a QDRO and Chapter 2 of the DOL QDRO Booklet, which provides guidance on matters that should be addressed in a plan’s QDRO procedures.
IS PROUD TO ANNOUNCE

**STEVES SIX**
has joined the firm as a partner.

Stevens & Brand, L.L.P., with offices in Lawrence and Topeka, Kansas, is pleased to announce that outgoing Attorney General Steve Six has joined the firm as a partner.

As Attorney General, Six acted as top law enforcement officer for the State of Kansas, personally handling civil and criminal cases throughout the state, including in federal court. Six also brings a wealth of appellate experience to the firm, having argued in the appellate courts in Kansas and Missouri, and before the U.S. Supreme Court.

Prior to his service as Attorney General, Six served as District Court Judge for Douglas County, where he presided over civil and criminal trials. Before his work as a judge, Six was a partner at a leading Kansas City law firm, where he focused on complex litigation. Six is a graduate of Carleton College in Northfield, Minnesota, and earned his law degree from the University of Kansas School of Law, where he was on Law Review and selected for inclusion in Order of the Coif. Following his 1993 graduation from law school, Six served as a judicial law clerk to the Hon. Deanell Reece Tacha of the U.S. Court of Appeals for the Tenth Circuit.

As a partner with Stevens & Brand, Six plans to focus on mediation and helping individuals and businesses solve complex legal problems. He will continue his civil and criminal trial and appellate advocacy throughout the state and the nation. Six lives in Lawrence with his wife, Betsy, who teaches at the University of Kansas School of Law, and their four children.
The Kansas Lawyer Who Saved Lincoln’s Life
By James P. Muehlberger
I. Introduction

On April 18, 1861, America was dying. To many, Abraham Lincoln, not slavery, was the cause. Lincoln had won the presidential election by gaining a majority of the electoral vote, but only 39 percent of the popular vote. In response, seven of the then 34 states seceded, and more threatened to do so. Many American cities, fearing civil war was inevitable, slid into an economic recession.

Years before Abraham Lincoln stepped into Ford’s Theatre for the last time, he was the target of assassins. Upon his election, Lincoln began receiving death threats in telegrams and letters from Southern locations. While traveling by train to Washington for his inauguration, he had narrowly escaped assassination in Baltimore. Southerners knew that, although Lincoln’s term might end in four years, the impact of that term, if it resulted in the abolition of slavery, or merely arrested its expansion, would reconfigure the social, economic and political landscape forever.

Five weeks after Lincoln took office, on Friday, April 12, rebels attacked Fort Sumter. The fort surrendered two days later. The firing on Fort Sumter, the President wrote, has “forced upon the country the distinct issue: immediate dissolution, or blood.” The war came.

On Monday Lincoln called for 75,000 troops to crush the revolt. Two days later Virginia seceded from the Union. Maryland was in revolt and seemed on the verge of also seceding. The capital, surrounded by the two, was nearly defenseless against a rebel attack from the Virginia and Maryland woods.

The nation’s military resources were being reduced daily by massive defections from its officer corps and the wholesale confiscation of its Southern forts and armories. With the constant threat of the capital being attacked, the White House was a center of chaos and confusion. The military force that remained in defense of Washington consisted mainly of government clerks and the military band. Rumors that the rebel army was marching on Washington to hang or capture Lincoln were heard under the city’s gas lamps. Lincoln was without protection, in a rebellious city packed with secessionists, who were hoping to witness a coup d’état.

Lincoln would rest more easily once the 6th Massachusetts Infantry Regiment had arrived in Washington. He was worried, however, because he’d received intelligence that rebels planned to attack the troops as they marched through Baltimore. On Thursday April 18, he sent Maj. David Hunter to newly elected U.S. Sen. James Lane, who had just checked into the nearby Willard Hotel, to come to the White House and meet with him privately.

Lincoln apparently told Lane that he now wished to accept Lane’s earlier offer to protect the president with a bodyguard of Lane’s war-hardened Kansas Jayhawkers. Lane responded that Kansas fighters had recently arrived with him in Washington hoping for employment in the army and that Lane would send runners out to gather them. At nine o’clock that night approximately 50 Kansans marched with Lane to the White House and bivouacked in the East Room, where Maj. Hunter gave them new muskets and boxes of ammunition. The Kansans slept on the carpet that night and made the Executive Mansion their base of operations for the next 10 days, representing the only military force protecting the White House, as rebel forces amassed on the western side of the Potomac River a few miles away.

The next day a Baltimore mob attacked the 6th Massachusetts Regiment. The rebels overwhelmed the soldiers, knocking them down as they wrested muskets from sweaty hands. The soldiers fired a volley in the hope of dispersing the mob, but the rebels responded violently and at least 16 soldiers and citizens were shot dead or killed by bricks and paving stones, and scores more were injured.

When news of the attack reached the capital, many of those loyal to the Union panicked. Rebel militia had torn up large sections of the railroad outside of Baltimore and cut telegraph wires. Washington was now isolated. With wires cut and mail stopped, visitors fled the hotels and stores closed while windows and doors were barricaded. “It was as though the government of a great nation had been suddenly removed to an island in mid-ocean, in a state of entire isolation.” On the west side of the Potomac River, the campfires of Confederate soldiers were visible. It was rumored that they intended to attack Washington that night. The nation’s courage was about to be tested.¹

Why should we care about James Lane? Because the Union’s victory in the Civil War was not preordained, and Lane likely saved Lincoln’s life with a single act of courage, thereby changing history. Without Lane’s actions, there might not have been an Emancipation Proclamation, and the Civil War may have turned out differently. As we celebrate the 150th anniversary of Kansas’s admission into the Union as a free state, it is fitting that we consider the man who was known as the King of Kansas, the man who defeated the proslavery Lecompton Constitution, and the lawyer who may have saved Lincoln’s life.

This article will first briefly delineate Lane’s role as the politician and field general most responsible for Kansas entering the Union as a free state. Part II describes how Lane probably saved Lincoln’s life in April 1861. Part III discusses how the relationship between Lane and Lincoln affected the course of the Civil War. Finally, this article will conclude by offering lessons suggested by the relationship between Lincoln and Lane.

II. The Liberator of Kansas

It was December, but the warm southern air lingered. In tiny Lawrence, farmers and merchants, lately turned ditch diggers, mixed their sweat with the heavy black soil of the Kaw River Valley as they built circular earthworks or “rifle pits.” Occasionally, one of the workmen stopped digging and leaned against the handle of his shovel, peering out to the faded brown hills that encircled this settlement on the Kansas River. He had a crude cabin in the hills, where his family lived and where every gust of winter wind was felt through the gaps between the logs. The short December days would soon end and, with them, the last opportunity to prepare for winter.

Footnotes

Thoughts like these were common among the men, who had come to Lawrence to fight, not dig ditches. Only the occasional rumble of cannon fire, which came from the camp of the enemy, kept them in the trenches. A tall, lean figure in a military cloak sensed their dark mood as he passed among them. He tried joking with the men but was met by frowns and the threat, “We should be at home fixin’ up for winter, instead of foolin’ our time away here.”

The man in the large, circular military cloak sprang to the top of the newly created earthwork and began to speak, and nearly anyone in Kansas would have recognized the force and power of Jim Lane’s voice. Men who heard Lane never forgot. This impromptu speech among the trenches of Lawrence in December 1855 was vividly remembered in later years.

Lane paced back and forth on the fortification, his eyes flashing and voice booming that any man who would desert Lawrence until the villainous invaders had left the territory was a coward; anyone who stayed was a hero. His small audience grew larger as word spread that he was speaking. He soon threw his cloak on the ground. His hat fell next, revealing long, dark, unruly hair, as the men cheered his words of blood and thunder, spiked with profane references to the proslavery invaders. When Lane finished the crowd was in a frenzy, yelling and cheering for him to lead them into battle.²

If one visits Lecompton today you will see a marker pointing to “Constitution Hall,” built by proslavery forces to be the capitol of a slave state, a capital that was never built. Kansas, a slave state? Is that possible? But for lawyer and Gen. James H. Lane, it was nearly a fact. He was a figure of titanic accomplishments. He was one of the first, and certainly the most influential, lawyers in the Kansas Territory. He was called the General Washington of Kansas, the Liberator of Kansas, and the King of Kansas. Lane was simultaneously both a field general and politician who led the Free State forces in the fight to make Kansas free.

A. The witch at the christening

Slavery was the witch at the christening of the nation in 1776. The Founding Fathers recognized slavery’s existence in the southern states, but restricted its introduction into the federal territories, in the hope that it would fade away. By 1854, however, the image presented by abolitionists, “a horrible reptile is coiled in our nation’s bosom,” had nearly the power of a spell.¹

In order to understand the political storm that Lane rode to the U.S. Senate, one must start with the 1854 Kansas-Nebraska Act, which was introduced by Lincoln’s political antagonist of 20 years, U.S. Sen. Stephen Douglas, as a temporary solution to the chronic curse of slavery. As each new state was added to the Union, it threatened to upset the balance of power in the House and Senate between the free and slave states. The bill opened up the new territories of Kansas and Nebraska to settlers from both North and South and let the people (i.e., white males) decide by voting whether to accept or reject slavery. Douglas failed to see that Kansas would become the cradle of a fire that would spread across the country, dividing Democrats, creating the Republican Party, hastening the Civil War, and destroying Douglas’ political ambitions.

Southerners expected that Kansas would become a slave state, given that its northern and southern latitudes were roughly equal to those of the slave states directly to its east—Missouri, Kentucky and Virginia. Missourians threatened: “You’ll have to fight for Kansas. Kansas belongs to the South.” The fate of the new territory was hanging in the balance.³

On October 16, 1854, Lincoln warned:

The Missourians are within a stone’s throw of the contested ground. They hold meetings, and pass resolutions, in which not the slightest allusion to voting is made. They resolve that slavery already exists in the territory; that more shall go there; that they, remaining in Missouri will protect it; and that abolitionists shall be hung, or driven away. Through all this, bowie knives and six shooters are seen plainly enough, but never a glimpse of the ballot box. And, really, what is to be the result of this? Is it not probable that the contest will come to blows, and bloodshed?

Lincoln’s prose was prophetic.⁵

B. Lane leads the Kansas free state forces

Lane had a commanding presence, towering over six feet, with a powerful voice and a mesmerizing speaking ability. He was admitted to the Indiana Bar at the age of 26 and used his innate charisma to his advantage in winning trials. Six years later, he was promoted to colonel in the Mexican-American War, where he commanded two regiments and won national fame successfully fighting Gen. Santa Anna at the battle of Buena Vista. Lane was a master at maximizing limited resources—he commanded the 3rd Indiana regiment, who were outnumbered almost 4 to 1 and yet never retreated and were thereafter referred to as the “Steadfast Third.”

Lane returned to Indiana, where he was elected lieutenant governor. He was then elected to the U.S. House of Representatives, where he voted for the Kansas-Nebraska Act, which he called one of the biggest mistakes of his life when he moved to the Kansas territory. He arrived in Lawrence on April 22, 1855, an event that was recorded in the Free State newspaper under the caption “Distinguished Arrival”: “Col. James H. Lane, late member of Congress from Indiana, arrived with his family. . . . He is comfortably ensconced in a log cabin, and will likely remain permanently with us.”⁶

Lane strode into a highly charged political atmosphere. The first party of immigrants sent out by the Massachusetts Immigrant Aid Company had arrived in August 1854, followed by several others, numbering about 700. Missouri residents,
taking advantage of their proximity, were staking out claims in the Kansas and Missouri river valleys. The first territorial election for a delegate to Congress in November 1854 resulted in a proslavery victory, although it was tainted by illegal voting from Missouri. One month before Lane’s arrival, a proslavery territorial legislature was also elected, thanks to the participation of several hundred Missourians who came into the territory and voted.

The Kansas proslavery legislature adopted Missouri’s draconian slave code for the territory, legalizing slavery and penalizing anti-slavery speech with imprisonment, outraging free-soil supporters in the North. It appeared that Kansas would become a slave state. Lincoln wrote in private correspondence:

That Kansas will form a slave constitution, and, with it, will ask to be admitted into the Union, I take to be an already settled question.7

Lane quickly became the leader of the free state men located in and around Lawrence, the free-state fortress 35 miles outside of the organized United States. On September 19, he was elected chairman of the Topeka Free State convention and charged with drafting the Free State party platform and organizing a Free State government. In taking the chair, Lane said: “You have met, gentlemen, on no ordinary occasion – to accomplish no ordinary purpose. You are the first legal representatives Kansas has ever had. Your work is to give birth to a government – your labor is to add another state to our union.” The Free State movement was now an insurrection, as there was already in the territory an officially recognized (proslavery) government installed by President Franklin Pierce.

Lane used his Mexican-American War experience to organize Free State forces to protect Kansas ballot boxes from fraudulent voting and help defend Free State towns from proslavery forces. Because of his military experience, Lane was appointed as a brigadier general of the Free State Militia in Lawrence. He sent this dispatch: “We want every Free-State man under his command.8

Lane oversaw the construction of circular earthworks, or “rifle pits,” about 75 to 100 feet in diameter to defend the town from attack. From the top of the Free State Hotel, an American flag with 31 stars flapped in the breeze. Three stories below on the pockmarked surface, which townspeople called Massachusetts Street, a military band started to play. Companies of men took their places, and the sharp commands of Gen. Lane could be heard up and down the street. A motley assortment of soldiers – graybeards and teenagers – marched side-by-side, up and down the dusty street past piles of sand, blocks of limestone, and two-story buildings yet to be completed. The Missourians were not enthusiastic about attacking a defended town and rode home. Lawrence was an insurrectionist city, with an illegal militia of “freedom fighters” and was about to witness a dress rehearsal for the Civil War.9

C. Lane’s Army of the North

In May 1856, Judge Lecompt, sitting in his court in the territorial capital of Lecompton, convened a grand jury and brought an indictment for treason against Lane and ordered federal marshals to arrest him. Lane escaped from the territory and toured Chicago and other northern cities raising money and inflaming support for the Kansas cause. He described Kansas as “a blackened and charred land, peopled with widows kneeling to kiss the cold white lips of husbands murdered by proslavery villains.” When Missourians blockaded the Missouri River by boarding steamboats heading for Kansas and disarming the settlers recruited by Lane and sending them back down the river, Lane established an overland trail west from Illinois through Iowa and then south through the Nebraska territory into Kansas, known as “Lane’s Trail.”

Shortly after Lane left Lawrence, on May 21, approximately 800 Missourians attacked the town, burning the Free State Hotel and the newspaper offices. The sack of Lawrence unhinged Kansas. Three nights later, John Brown and a handful of followers retaliated by savagely murdering five proslavery settlers near Pottawattamie Creek. Hundreds of Missourians streamed over the border to hunt the killers, and partisans on both sides murdered and plundered.

On July 4, Col. Edwin “Bull” Sumner dispersed the Free State Legislature with federal troops as it attempted to convene in Topeka. Federal troops marched down Kansas Avenue opposite Constitution Hall in Topeka, where Sumner ordered the convention to disperse. Sumner’s artillery crews had stationed their cannons to sweep the streets and lit their slow matches, the smoke rising lazily in the hundred degree heat. The Free State men did as Sumner ordered.10

Lane decided to fight fire with fire. On August 7, he led an

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8. John Speer, Life of Gen James H. Lane, 70 (Garden City: John Speer 1896) [hereinafter Speer].
army of 600 Free State settlers into Kansas on the Lane Trail. He set out to destroy the series of forts that proslavery forces had built in an effort to encircle and strangle Lawrence. On the night of August 12, Lane and approximately 100 men attacked a fortified block house in Franklin, where proslavery forces were believed to have hidden a cannon. After exchanging gunfire for three or four hours, Lane's men smashed in the front door, as the enemy ran out the back. Lane captured the cannon, nearly 100 arms and a large amount of supplies.

Three days later, Lane led about 400 men against Fort Sanders on Washington Creek. Upon the approach of the Free State men, the garrison deserted without firing a shot, leaving behind large quantities of supplies and gunpowder. Lane's men burned the fort.

Lane's campaigns were models of how guerilla warfare can be successful with a minimum loss of life. On one occasion he ordered his men to march across a ridge in view of a larger enemy force camped in a valley below, then circle back and repeat the process to convince the enemy that his troops were several times their actual number. The enemy retreated during the night.

Word of Lane's victories spread like lightning, and by the end of the summer, the western counties of Missouri were in a state of panic. When false news of Lane's approach reached the border town of Weston, fire bells were rung and the town lay deserted as the people ran for cover into nearby creek beds. Lane quickly became a national figure as a result of sensational newspaper coverage. President James Buchanan denounced the Free State forces as "in rebellion against the government, with a military leader at their head of most turbulent and dangerous character." Lane countered that Buchanan's message was "without a parallel in its falsification of history."

In October 1857, Lecompton constitutional delegates enacted a constitution that provided that all slaves in the territory would always be slaves and never free. Kansas was now a slave state. On May 18, 1858, Lincoln argued in his "house-divided speech" in Illinois that the Lecompton Constitution should be throttled and killed as hastily and as heartily as a rabid dog.

In March 1858, Lane was elected president of the Leavenworth Constitutional Convention, which overturned the Lecompton Constitution. The U.S. Congress, however, still dominated by pro-Southern Democrats, refused to endorse the document. The 1859 territorial legislature, now controlled by Free State supporters (calling themselves Republicans), called yet another convention in Wyandotte, which adopted a Free State constitution.

D. Lane the Lawyer

In May 1858, Lane formed a law partnership with James Christian in Lawrence. Stories about his trials are numerous; only one will be included here. Lane was hired to defend two hog thieves. The prosecuting attorney believed the defendants would plead guilty, given the overwhelming testimony against them. It was then rumored that Lane would defend the thieves against their proslavery accusers. People packed the courtroom to watch.

The prosecutor produced his witnesses and the evidence was indisputable. Lane asked no questions but said the court was bound to take judicial notice of two facts:

One, that I hold in my hand a copy of the poll list, showing that these men [the accusers] voted at Lawrence, and now swear they lived in Missouri. Men that would stuff the ballot boxes, overrun elections, and drive voters from the polls ought to be thankful that they are not hung. Another point of which the court must take judicial notice is that this pretended offense was committed on an Indian reserve, which is not part of the territory of Kansas, and over which the court has no jurisdiction.

The audience was so inflamed that the accusers fled the courtroom. Lane's clients went free.

E. Lane meets Lincoln

Lane met Abraham Lincoln in December 1859 when Lincoln traveled to Leavenworth, to test the speech that he delivered two months later to a packed house at Cooper's Union in New York City, launching his meteoric rise to the presidency.

Lincoln had apparently been reading Lane's speeches, which had been published in Illinois, and came to admire Lane's courage and ability to move men with his words. The two had much in common and quickly became friends.

Both men were about the same age: Lincoln was born in 1809, Lane in 1814. Both were born near the Ohio River and both spent a good deal of their youth in Indiana. Both attended rough, frontier schools. Both studied law in a country store. Both loved homespun stories and did not hesitate at some risqué humor. Both were tall for the day, test 6 foot and slender build. Both were odd looking, even ugly, but could talk away their faces in 20 minutes. Both had “low spells” and could be melancholy. Both had been retired after one term in the federal House of Representatives and seemed destined for obscurity until the Kansas issue arose on the political horizon.

Both were riveting orators, sensitive to the moods of crowds.

In the spring of 1860, Lane went on speaking tours in contested districts in Illinois and Indiana supporting Lincoln's bid for the presidency. Lincoln won his party's nomination in May and the presidential election in November. On January 29, 1861, Kansas was admitted to the Union as a free state, and, on April 4, Lane was elected as Kansas' first U.S. senator. He immediately began making plans to travel to Washington.

III. The White House is Turned into Barracks

The United States shattered in 1861, as the Confederate states and the Union began a fight to the death in a four-year Civil War. The rebels knew that if they could quickly gain control of the nation's capital, they would achieve an important military advantage. Washington could then be declared the capital of the new Confederacy. Foreign governments might recognize the Confederacy as the legitimate government of the United States, possibly rendering aid. People in the North

11. Craig Miner, Lane and Lincoln: A Mysterious Connection, Kansas History 186, 190 [hereinafter Miner].
who were then undecided might tip to supporting Horace Greeley’s view to “let our wayward sisters go in peace.”

Rebel leaders also realized that the South had one undeniable military weakness – it was vastly outnumbered. The South’s best chance for success, therefore, depended on a quick strike leading to sudden victory. Many Southerners 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. Horace Greeley said “there were 40 times the reason for shooting [Lincoln] in 1860 than there was in 1865, and at least 40 times as many intent on killing or having him killed.”

Lane arrived in Washington the day of Fort Sumter’s surrender, and he was asked to make a speech outside the Willard Hotel to the crowd who had assembled on Pennsylvania Avenue. The country was coming apart and it seemed the very survival of the government was at stake. Lane spoke from a dry goods box in the street in front of the hotel. When he climbed upon the box the crowd, consisting mainly of rebels and sympathizers celebrating Sumter’s fall, shouted, “Mob him! Hang him!” Lane’s eyes flashed with more fire than came from the street lamps and his tremendous voice boomed, “Mob and be damned! I have 100 men from Kansas in this crowd, all armed, all fighting men, just from the victorious fields of Kansas! They will shoot every damned man of you who again cries, ‘Mob!’” The Kansas men cheered mightily, and the click of cocking pistols was heard all through the crowd. Order was restored, and the Southern men stood deathly still, for no one seemed to know who stood next to him.

Lincoln said that “all the troubles and anxieties of his life had not equaled those which intervened between his inauguration and the fall of Sumter.” His troubles “were so great that could I have anticipated them, I would not have believed it possible to survive them.” He heard of Lane’s speech and concluded that the men intended to assassinate or capture the president. Hay woke Lincoln to tell him the grim news. Lane slept outside Lincoln’s door, with his sword across his knees.

Recognizing the desperate and historic nature of the event, Lincoln’s secretary, John Hay, began his Civil War diary that 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.”

Late that night, a well-known actress and socialite knocked on the White House door saying she urgently needed to speak to the president on matters concerning his personal safety. Lincoln had already gone to bed, however, and so Hay met with her in the White House doorkeeper’s room. She told Hay that she had spoken to two Virginians who had come into town in a great hurry to buy new saddles. One of the men had bragged to her that he and a half dozen others, including a guerrilla from Richmond named Ficklin, “would do a thing within 48 hours that would ring through the world.” Based upon other details he gave her, she concluded that the men intended to assassinate or capture the president. Hay woke Lincoln to tell him the grim news. Lane positioned sentries at all entrances to the White House and in the basement. B.F. Ficklin, of Richmond, was later arrested for conspiring to assassinate the president.

On Friday and Saturday the federal troops did not come, the railroads and telegraph remained stopped and messengers did not return. Virginia was in arms on one side of the city, Maryland on the other, and the Potomac River was probably...
blockaded. On Saturday, April 20, a small number of troops from the 6th Massachusetts Regiment finally entered the capital and were garrisoned in the Senate chamber. The capital remained cut off from supplies and mail from the North, and by Monday, Washington residents began to fear starvation. Food became scarce and the price for flour skyrocketed beyond the reach of all but the wealthiest. The impatient question heard again and again in the Executive Mansion was, “Why don’t the troops come?”

About this time, Lane’s men captured the first rebel flag of the war. A company of Lane’s men were on duty at the bridge over the Potomac between Washington and Virginia when it was reported that a company of rebels in the Virginia woods on high ground commanding the town intended to attack and capture the bridge. Lane ordered his company to march in the rebels’ direction. Upon their approach, the rebels fled, leaving their flag, which was captured and brought back – the first flag taken by Union forces in the Civil War. Lane hung the trophy outside the window of his room at the Willard Hotel, with a banner inscribed: “Captured by the Frontier Guards on the sacred soil of Virginia.”

Within an hour or two, thousands of people stood outside looking at the flag. Lincoln asked Lane to bring it to the White House. Upon handing the flag to Lincoln, who sat at the end of a long table, he raised it up and said: “What a miserable rag that is to fight for!” Gen. Winfield Scott replied, “Yes, but it convinces me that Gen’l Lee has not yet reached Richmond. He will have a better looking flag.”

On Tuesday a worried Lincoln gazed long and wistfully out the window of the Executive Office down the Potomac River in the direction of expected troop ships and exclaimed, “Why don’t they come? Why don’t they come!” Wednesday was “a day of doom and gloom.” Lincoln received the wounded troops who had been injured in Baltimore at the White House. He thanked them for their patriotism and suffering, praised their courage and contrasted their prompt arrival with the unexplained delay which seemed to have befallen the regiment supposed to be on their way from the various states. He said, “I begin to believe that there is no North. The Seventh Regiment is a myth. Rhode Island is another. You are the only men the unexplained delay which seemed to have befallen the regiment supposed to be on their way from the various states. He said, “I begin to believe that there is no North. The Seventh Regiment is a myth. Rhode Island is another. You are the only real thing.”

When Lane heard that rebels were refusing to allow federal troops to pass through Baltimore (just 38 miles from the capital), he growled that the city would be open to federal troops in two days or “Baltimore will be laid in ashes.” The road was finally re-opened. Lane apparently made it appear to the rebels that his troops exceeded their actual numbers. Although his troops appeared to peak at around 120, newspapers reported their numbers at between 200 and 600 men.

On Friday afternoon, April 26, additional troops from Massachusetts and Rhode Island finally arrived. The arrival of the units cheered Lincoln, along with word that 8,000 additional troops had arrived in Annapolis and would march to Washington immediately. By late April 27 enough federal troops had arrived that Lane wrote to Secretary of War Cameron: “I am satisfied the emergency has ceased that called our company into service. I should be pleased to ... discharge the members thereof ....” Cameron later agreed: “I extend ... my high appreciation of the very prompt and patriotic manner in which your company defended the capital ....”

Think of the trust Lincoln had in Lane for Lincoln to allow Lane and his armed Kansans to sleep under Lincoln’s roof for 10 nights. The Frontier Guard “marked the beginning of an intimate friendship with the President ... which gave [Lane] prestige and influence that continued throughout the war.” At Lincoln’s request, Lane left for Kansas on April 28 to raise two companies of troops in Kansas to protect the country’s critical western frontier.

IV. Lane’s Relationship with Lincoln During the Civil War

Lincoln was so impressed with Lane’s military skill and aggressive field operations that Lincoln appointed Lane a brigadier general in June 1861, an action unprecedented for a sitting U.S. senator and in violation of the Constitution. Lincoln was frustrated with the inaction of Gen. McClellan. When Maj. Gen. Hunter, commanding the Department of Kansas, criticized Lane’s harsh tactics against the rebels in Missouri, Lincoln reminded Hunter that “he who does something at the head of one regiment will eclipse him who does nothing at the head of 100.”

22. Ayers, 17.
25. Hay, 4-10. The Frontier Guards were never enrolled in the Union army. Several bills were introduced in Congress to do so. The last bill passed the Senate in 1894 and was sent to the House, where the record ends. Cong. Rec., v. XXVII, Pt. 3, 2086, 2176.
26. Ayers, 23. It is a tragedy that Lane was not with Lincoln on an April night four years later.
27. “No person holding any office under the United States shall be a member of either house during his continuance in office.” Const., art. 1, sec. 6.
Lane became a vanguard of the Union’s policy of “hard war.” On September 27, 1861, Lincoln telegraphed: “What news from up river?” The response was: “Lane has captured at Osceola large [quantity of] suppl[ies]... and $100,000.” Osceola, Mo., was an important distribution center and shipping point for goods on the Osage River. Lane’s officers decided it should be destroyed rather than allowed to serve as a port for rebels. Lane argued:

This war will never be successfully carried out so long as an army marches through slave states as a boat goes through a flock of ducks. They fly up on its approach and nestle down as soon as it has passed. The boat is safe and so are the ducks. When you march through a state you must destroy the property of the men in arms against the Government. This is war.29

Another Lane trait admired by Lincoln was the senator’s vision. Lane had an ability to form public opinion along lines he foresaw and championed. Prominent among the visions Lane pushed with Lincoln was that of attaching openly to the war the moral cause of freeing the slaves. Lincoln had constitutional scruples on the issue, but Lane, less inclined to legal technicalities, strongly urged the point. He advised Lincoln to issue the Emancipation Proclamation almost from the beginning of the Civil War and advocated it in speeches in 1861, amid threats of assassination. In a November 1861 speech to his troops he said: “Let us be bold – inscribe ‘freedom to all’ upon our banners, and appear just what we are – the opponents of slavery.”30

Lane was also a pioneer in urging the Army to field soldiers of color. In 1862 he did so in Kansas for the first time in the Union Army. On October 29, 1862, the First Kansas Colored Infantry fought in Bates County, Mo., in the Battle of Island Mound. This was the first engagement of an organized black unit during the Civil War. The unit lost eight men in battle before the Confederates retreated. Lane said “they showed as much skill with their weapons as any troops who ever fought.” Although he was not enlightened on racial issues, Lane countered the prejudice toward the soldier of color by the federal government: “When we put the uniforms of the United States on a person, he should be the peer of anyone who wears the same uniform, without reference to complexion.” On these issues, Lane blazed a trail eventually taken by Lincoln and the military.31

By 1862 Lane was one of the most popular men in Washington: He was “a great lion here and his room is filled with visitors; at this moment there is not a man in Washington more sought after.” He received much patronage from Lincoln during the war, which was usually reserved for governors. When the Kansas governor complained, Lincoln’s reply was: Lane “knocks at my door every morning. You know he is a very persistent fellow and hard to put off. I don’t see you very often, I have to pay attention to him.”32

On January 1, 1863, Lincoln signed the Emancipation Proclamation, which contained a controversial provision calling for the enlistment of black soldiers. Emancipating rebel slaves and using them as troops seems logical and inevitable to modern readers but such an act was, at the time, a risky venture. Emancipation was not universally popular, even in the North, and no one could be sure how the officer corps, or the troops, and the Northern public at large would react to it. Lane’s success in fielding soldiers of color no doubt provided some assurance to Lincoln of the wisdom of the policy.

Lincoln selected Lane to open Lincoln’s campaign for his re-election. Lane spoke in New York City at the Cooper Institute, where he defended Lincoln for not issuing the Emancipation Proclamation and arming black soldiers sooner. Although it’s hard to believe now, Lincoln was not a popular president in 1864. He operated in a perpetual crossfire from congressmen, governors, generals, office seekers, and ordinary citizens—all dissatisfied, and many sincerely convinced that he was incompetent and leading the nation down the path of destruction.

During the June 1864 Republican presidential convention in Baltimore, appalling charges were made against Lincoln and it appeared he may not be renominated. It was Lane who then arose, near the front, in the middle aisle of the hall, turned around and gave an eloquent address:

I am speaking individually to each man here. Do you, sir, know in this broad land, and can you name to me, one man whom you could or would trust, before God, that he would have done better in this matter than Abraham Lincoln has done, and to whom you would be now more willing to trust the unforeseen emergency or peril which is to come? That unforeseen peril, that perplexing emergency, that step in the dark, is right before us, and we are here to decide by whom it should be made for the Nation. If we nominate any other man than Abraham Lincoln we nominate ruin!

Lincoln was renominated.33

Vice President Hannibal Hamlin, like Lincoln, also sought to be renominated. Lincoln, however, told Lane that he favored Gov. Andrew Johnson of Tennessee, a strong war Democrat, and he sent Lane to engineer the delicate deal. When the delegates were about to renominate Hannibal, Lane said, “No, Mr. Lincoln feels that we must recognize the South in kindness. The nominee will be Andy Johnson.”34

On Good Friday, April 14, 1865, Lincoln was assassinated and everything changed. So great was the shock and so huge and unexpected was the void suddenly created in the nation’s sense of itself, that Lincoln’s enemies were silenced, his critics converted. Lane was devastated, he suffered:

30. Spurgeon, 225.
32. Ayers, 19.
The deepest grief when he first heard the loss of Lincoln and wept like a child. It is well known that the personal relations of [Lane and Lincoln] were of the most intimate, confidential character. They were close, personal friends, and while representing somewhat different views as to the policy of treating rebels, each had the fullest confidence in, and the greatest respect for, the opinion of the other; and their intercourse was always marked by the greatest harmony and warmest friendship. The president told us that while he was compelled to depart from General Lane’s views, he had the highest respect for them, and that circumstances had more than once compelled him to adopt all of them.35

After Lincoln’s death, Lane championed Lincoln’s, now President Johnson’s, policy of reconciliation with the South. Unfortunately, the radical Republican Congress did not embrace Lincoln’s “with malice towards none” approach. Lane’s statesmanship was excoriated by the radical Republicans, who believed that they were entitled to the spoils of war. Kansas Republicans, having suffered for 10 years at the hands of proslavery Missourians, pilloried Lane for abandoning radical Republican principles.

Lane may have never recovered from Lincoln’s assassination. When newspaper editor John Speer visited the senator at his farm in late June the following year, he joked that he heard Lane was ill but thought that Lane was worth a dozen dead men yet. Lane responded: “The pitcher is broken at the fountain. My life is ended.” On July 1 he shot himself and died several days later. Lane was a man who'd lost a powerful fountain. My life is ended.” On July 1 he shot himself and died several days later. Lane was a man who'd lost a powerful fountain. My life is ended.” On July 1 he shot himself and died several days later. Lane was a man who’d lost a powerful fountain. My life is ended.” On July 1 he shot himself and died several days later.

At his funeral the preacher said that Lane had been for Kansans “dear to our hearts as he certainly was to his friend Lincoln.”36

IV. Lessons of Lane’s Campaigns

1. Courage

Lane risked his life daily for 10 years for freedom: first, during the years of Bleeding Kansas, then during the Civil War, perhaps saving Lincoln’s life. He then risked his career to further the vision of his fallen friend. John F. Kennedy wrote, “Perhaps if the American people more fully comprehended the terrible pressures, which discourage acts of political courage, which drive the senator to abandon or subdue his conscience, then they might be less critical of those who take the easier route – and more appreciative of those still able to follow the path of courage.” Lane did not take the easier road, he took the path of courage.

2. Leadership

But for Lane’s leadership, Kansas may have entered the Union as a slave state (as Lincoln feared). And Lane’s push for the Emancipation Proclamation and for soldiers of color was quite controversial – he didn’t follow public opinion on these issues, he led public sentiment on necessary social, political and military policies. By war’s end, troops of color constituted more than 10 percent of the Union Army and Navy.

3. A page of history is worth a volume of logic

Lane’s practical experiences in fighting proslavery forces in Kansas from 1855 through 1859 led him to conclusions regarding the wisdom of arming soldiers of color and instituting a “total war” policy, long before the logic of these positions convinced federal government officials and army generals.

4. Understand your audience and play to it

Lane was a master of this concept, as evidenced by the differences in his speeches, depending upon the audience. A Connecticut newspaper said of one of Lane’s speeches: “Great was the surprise of some present to find before them a man of fair proportions, of gentle appearance, of unobtrusive manners, instead of the rough and savage animal which the antiwar papers have seen fit to represent him. The speech was well received throughout.”37 Lane’s speeches in the U.S. Senate were formal and dignified, but Lane’s rough appearance and earthy images spoke to the lives of his frontier countrymen. He was a master of tailoring his arguments to his audience.

5. If you can’t silence your critics, try to outlive them

Where a man stands in history depends upon who keeps the record; more than that, it depends upon who lives to keep the record. Lane’s political and personal enemies outlived him and they wrote the early Kansas “history.” Gov. Charles Robinson, Lane’s arch political rival, outlived Lane and spent the last 20 years of his life demonizing Lane, questioning his sanity, and making vague accusations as to Lane’s lack of morals, all in an effort to increase Robinson’s stature as the leader of the Kansas Free State movement. Robinson’s efforts were successful, as few people today have heard of Jim Lane. An historian said of the Lane/Robinson dispute: “Falsehood will travel a mile, while truth is still pulling on its boots.”38

36. Miner, 199.
6. Don’t be afraid of failure
Lane and Lincoln were not afraid of failure. They knew that the best way to avoid failure was to never attempt anything. Lane suffered many setbacks before a Kansas Free State Constitution was adopted. Lincoln found Grant only after learning from the failures of McClellan. Lincoln said, “He who aims at nothing shall surely hit it.” With each failure, Lane and Lincoln learned.

7. Banish the expression: “We’ve always done it this way.”
Lane and Lincoln lived in a time of great technological change. The railroad and telegraph destroyed distance and tied the young nation together. Lincoln and Lane embraced change and used it to their advantage. Lincoln could have insisted on writing by hand all his messages to his generals, but he learned to use new technology, the telegraph, to do so more quickly and effectively, to the Union’s great advantage.

8. Don’t let the perfect be the enemy of the good
Lincoln said, “There are few things wholly evil or wholly good. Most everything is an inseparable compound of the two, so that our best judgment of the preponderance between them is continually demanded.” In other words, the rule in determining whether to embrace or reject something is not whether it has any evil in it, but whether it has more good than evil. “Total war” was hard on civilians, but it helped end the war and probably saved lives. What Lane proposed doing in 1861-62 was substantially what Sherman did in 1864-65.

9. Get out of the office and circulate among the troops
Lane and Lincoln knew the value of mingling with their troops and were attentive to their men’s needs and concerns. They understood and identified with the common man and therefore were able to mold public opinion. Lincoln said, “with public sentiment, nothing can fail; without it nothing can succeed.” They campaigned in poetry and governed in prose.

10. Conviction
Lane and Lincoln were impassioned speakers, who seemed transfigured by their subjects. Lane’s and Lincoln’s eloquence produced conviction in others because of their conviction. The story is told of an old Democrat striding away from an open-air meeting when Lincoln was speaking, striking the earth with his cane as he stumped along and exclaiming, “He’s a dangerous man, sir! He makes you believe what he says in spite of yourself!”

V. Conclusion
Lincoln commented once on the unfairness of written history. The “living histories,” he said were the best examples of history, “but those histories are gone. They can be read no more forever. They were a fortress of strength; but, like invading foesmen could never do, the silent artillery of time has done; the leveling of its walls.” Lane was a casualty of time. But the lives of those who were Lincoln’s companions give us a clearer and more dimensional picture of the president him-
ATTORNEY DISCIPLINE

ORIGINAL PROCEEDING IN DISCIPLINE
IN RE JEFFREY M. JOHNS
TWO-YEAR SUSPENSION
NO. 104,570 – DECEMBER 23, 2010

FACTS: This is an original proceeding in discipline against Jeffrey M. Johns, of Olathe, an attorney admitted to the practice of law in Kansas in 2004, resulting from Johns’ alcohol problems and DUI convictions.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator recommended Johns be suspended from the practice of law for two years.

HEARING PANEL: A panel of the Kansas Board for Discipline of Attorneys determined that the respondent violated KRPC 8.4(b) (2010 Kan. Ct. R. Annot. 603) (misconduct). The panel found that because Johns had maintained his sobriety for two years, the panel unanimously recommended that Johns be suspended from the practice of law for two years rather than indefinite suspension. The panel also recommended that Johns continue his drug and alcohol treatment.

HELD: Court held that based on the mitigating circumstances a two-year suspension was appropriate for Johns made retroactive back to the date of his suspension. Court required a reinstatement hearing before Johns’ license to practice law is reinstated.

CIVIL

MEDICAL MALPRACTICE, JURISDICTION, MANDAMUS, AND DISCOVERY PRIVILEGE
KANSAS MEDICAL MUTUAL INSURANCE CO. V. THE HON. RON SVATY ET. AL.
ORIGINAL ACTION IN MANDAMUS – MANDAMUS GRANTED IN PART AND DENIED IN PART
BARTON DISTRICT COURT – APPEAL DISMISSED
NO. 102,075/102,164 – DECEMBER 10, 2010

FACTS: Allen filed a medical malpractice action against William Slater M.D. During pretrial discovery, Slater designated Dr. Ted Macy as his expert witness. The use of Dr. Macy as an expert became a point of contention, leading Allen to file a motion to strike Dr. Macy as an expert. Judge Ron Svaty denied the motion but allowed additional discovery regarding Dr. Macy and his opinions. Allen served a notice of subpoena to take the deposition of officials at Kansas Medical Mutual Insurance Co. (KaMMCO) since Dr. Macy is an insured of KaMMCO, and Allen believed this formed a connection between Drs. Macy and Slater. Dr. Slater filed a motion for a protective order because the subpoena sought confidential and protected health information of patients, would invade the confidentiality of prior settlements, and was not relevant. KaMMCO also filed a motion to quash and for protective order. Judge Svaty ruled that KaMMCO’s objections regarding privilege could be raised during production and it seemed to be another delay tactic, but that KaMMCO was not obligated to provide privilege material. Enforcement of the district court’s order became an issue and KaMMCO requested certification of the discovery issue for interlocutory appeal. It appeared Judge Svaty denied the appeal. KaMMCO filed an original action in mandamus seeking a writ requiring the district court to perform the duties relating to discovery requests served on nonparties who assert privilege. KaMMCO also filed an appeal in the Court of Appeals using the collateral order doctrine. The cases were consolidated in the Kansas Supreme Court.

ISSUES: (1) Medical malpractice, (2) jurisdiction, (3) mandamus, and (4) discovery privilege

HELD: First, Court found the U.S. Supreme Court’s rejection in Mohawk Industries Inc. v. Carpenter, 558 U.S. ___ (2009), of the application of the collateral order doctrine under circumstances involving the discovery of attorney-client privileged information to be persuasive in the context of this case. Court concluded that discovery orders that do not impose a sanction on a nonparty do not qualify for appeal under the collateral order doctrine even if the order is potentially adverse to a claim of privilege. Therefore, the district court’s discovery order was not immediately appealable pursuant to K.S.A. 2009 Supp. 60-2102 and KaMMCO’s appeal was dismissed. Second, Court determined mandamus was an available remedy for KaMMCO. Court held the district court failed to perform its duties regarding supervising the course of discovery and determining its scope as set forth in Berst v. Chipman, 232 Kan. 180. Court entered a writ of mandamus requiring the district court to comply with Berst in a manner consistent with its opinion. However, Court denied the petition for mandamus in part, concluding it would not be appropriate to quash the request for discovery. Finally, Court ordered that the stay of the underlying action was lifted.

STATUTES: K.S.A. 60-226, -245, -420, -454, -801, -2102; and K.S.A. 65-4915

CRIMINAL

STATE V. KELLY
JOHNSON DISTRICT COURT
REVERSED AND REMANDED
NO. 100,006 – DECEMBER 13, 2010

FACTS: Kelly prosecuted as an adult and convicted in 1994 of felony murder and aggravated robbery. In 2007 he filed pro se motion to withdraw plea and correct and vacate an illegal sentence,
claiming in part ineffective assistance of counsel. District court summarily denied the motion, finding in part the ineffective assistance claim should have been raised in K.S.A. 60-1507 motion years earlier. Kelley appealed.

ISSUE: Motion to withdraw plea
HELD: K.S.A. 22-3210, prior to 2009 amendment imposing time limitation, controls in this case. Any language in State v. Edwards, 290 Kan. 330 (2010), suggesting K.S.A. 2009 Supp. 22-3210 applies under these facts is abrogated. District court erred in assuming all ineffective assistance of counsel claims should be construed as K.S.A. 60-1507 motions, and in denying motion as untimely. Pursuant to K.S.A. 22-3210 when Kelly filed his 2007 motion, his allegations are sufficient to warrant consideration of the filing as a motion to withdraw his guilty plea. Reversed and remanded for district court's determination whether Kelly may withdraw plea to correct manifest injustice.

STATUTES: K.S.A. 2009 Supp. 22-3210(e); K.S.A. 22-3210, -3210(d), -3601(b)(1); and K.S.A. 60-1507

STATE v. WILLIAMS
JOHNSON DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 98,667 – DECEMBER 10, 2010

FACTS: Williams convicted in Kansas on 2005 and 2006 identity theft charges. Criminal history included five identity thefts in Washington in 2001 and 2002. Pursuant to comparable Kansas offense, K.S.A. 21-4018 as amended in 2000, these were scored as person felonies. Williams appealed, claiming the Washington offenses should have been scored as nonperson felonies, pursuant to K.S.A. 21-4018 as amended in 2005, using date of Kansas sentencing or dates she committed the Kansas crimes. Court of Appeals affirmed in unpublished opinion.

ISSUE: Out-of-state convictions in sentencing
HELD: No Kansas statute or case law answers the specific question raised in this appeal. District court correctly scored Williams' Washington convictions as person felonies when sentencing Williams for the 2005 and 2006 Kansas identity theft convictions. In calculating criminal history, comparable Kansas offenses for out-of-state convictions and juvenile adjudications under K.S.A. 21-4711 shall be determined as of date the defendant committed the out-of-state crimes. No merit to Williams' alternative claim to determine comparable Kansas offense at time of Kansas sentencing.

STATUTES: K.S.A. 21-3508, -4018, -4703(c), -4704, -4711, -4711(e); K.S.A. 60-2102(b); K.S.A. 1998 Supp. 21-3508; and K.S.A. 1969 Supp. 21-3508

**Appellate Practice Reminders**

**The Record on Appeal**

Supreme Court Rule 3.01 (2010 Kan. Ct. R. Annot. 22) defines the record on appeal as “that portion of the entire record which is to be filed with the clerk of the appellate courts.” Rule 3.02 directs the clerk of the district court to include certain portions of the entire record in the record on appeal and allows a party, upon written request, to make additions to the record. The district court clerk provides a table of contents to each party which can be reviewed to determine whether additions need to be made.

To make a written request for an addition to the record, the party needs to know the location of the record. Ordinarily, the record is not transmitted to the appellate courts until all briefing is completed.

If the record has not been transmitted to the appellate courts, the party requesting the addition serves the clerk of the district court with the written request. So long as the requested addition is part of the entire record, the district court clerk automatically makes the addition. If the record has been transmitted to the appellate courts, the written request is filed with the proper appellate court. Once the record has been transmitted, additions can be made only on order of the appellate clerk or a judge or justice. A more substantial showing of need for the addition to the record needs to be made at the appellate level because briefing has already been completed.

It is also important to know the location of the record when filing other motions with the appellate courts. If briefing has not been completed, the appellate courts do not have access to the record on appeal. The only materials available to the appellate courts are those provided by the parties at docketing and subsequent appellate filings. When filing motions or responding to orders from the appellate courts before briefing is completed, parties should provide copies of any relevant documents, rather than referring to the record on appeal.

For questions about these or other appellate procedures and practices, call the Clerk’s Office at (785) 296-3229 and ask to speak with Carol G. Green, Clerk of the Appellate Courts.
NOTICE OF AMENDMENT OF LOCAL RULES OF PRACTICE OF THE UNITED STATES DISTRICT COURT

The U.S. District Court for the District of Kansas gives notice of the amendment of local rule 6.1. Copies of the amendments are available to the bar and the public at the offices of the Clerk at Wichita, Topeka, and Kansas City, Kan.. The offices are open from 9 a.m. to 4:30 p.m. on all days except Saturdays, Sundays, and federal legal holidays. The amendments are also available on the U.S. District Court website at www.ksd.uscourts.gov.

Interested persons, whether or not members of the bar, may submit comments on the amendments addressed to the Clerk at any of the record offices. All comments must be in writing and, to receive consideration by the Court, must be received by the Clerk on or before 4:30 p.m., March 4, 2011.

The addresses of the Clerk’s offices are:

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

Signed:

Timothy M. O’Brien
United States District Court
District of Kansas
Henke drew a sample of blood at the police station. Later testing of Henke's blood sample by the KBI confirmed an alcohol concentration of 0.191. Henke challenged the administrative suspension of his driver's license. Henke argued the lab technician who drew his blood was not qualified to do so. At the district court, a dispute arose as to who bore the burden of proof. The district court ruled that Henke had the burden to make a prima facie showing that the person who drew the blood was not statutorily qualified. The district court ruled that Henke failed to meet his burden of proof.

ISSUE: (1) DUI, (2) burden of proof, and (3) blood test

HELD: Court held that an individual holding a driver's license who challenges an officer's certification of a blood test failure may raise issues concerning whether the blood sample was collected in a reliable way. Such issues would include whether the person who drew the blood sample from the individual holding the driver's license was qualified to do so under K.S.A. 2008 Supp. 8-1001(c). Court concluded that although the review of a driver's license suspension is by trial de novo before the district court, the individual holding the driver's license bears the initial evidentiary burden of showing why the driver's license suspension should be set aside.

STATUTE: K.S.A. 8-259(a); K.S.A. 8-1001(c); K.S.A. 8-1002(a) (2); K.S.A. 8-1020(b)(3), (p), (q); and K.S.A. 77-621(a)(1)

JUDGMENT ENFORCEMENT, TOLLING, AND DORMANCY

CASEY V. PLAKE

MONTGOMERY DISTRICT COURT

REVERSED AND REMANDED WITH DIRECTIONS

NO. 103,388 – DECEMBER 17, 2010

FACTS: Plake appeals the district court's decision granting summary judgment in favor of Casey. Casey had filed a petition requesting an accounting and distribution of sale proceeds of real estate in which she owns an undivided one-fourth interest. Plake, owner of one-half the real estate, had filed a counterpetition, claiming that he holds a 1976 judgment lien against the real estate, which should be paid from the sale proceeds. Casey filed a motion for partial summary judgment, alleging that the judgment lien was unenforceable because more than seven years had passed since the judgment was entered, and no attempt had been made to execute on the judgment. Plake's judgment lien had been subject to a stay of execution from 1976 to 2006. Under K.S.A. 2009 Supp. 60-2403(c), the time within which action must be taken to prevent a judgment from becoming dormant does not run during any period in which the enforcement of the judgment by legal process is stayed or prohibited. But the district court granted Casey's motion for partial summary judgment, finding that Plake's judgment lien was void and unenforceable because the tolling provision of K.S.A. 2009 Supp. 60-2403(c) was not enacted until 1990, several years after the judgment already had become dormant.

ISSUES: (1) Judgment enforcement, (2) tolling, and (3) dormancy

HELD: Court held the district court incorrectly determined that Plake's judgment lien was extinguished and unenforceable under Kansas law as it existed prior to 1990. The tolling provision of K.S.A. 2009 Supp. 60-2403(c) merely codified prior Kansas case law. Plake's judgment lien is valid because it only became enforceable upon his mother's death on January 27, 2006, and Plake thereafter timely sought to enforce the judgment. Thus, the district court erred by granting summary judgment in favor of Casey. Court reversed and remanded with directions to enforce the judgment lien.

STATUTES: K.S.A. 59-401; and K.S.A. 60-2102(a)(4), -2403(c)
Appellate Decisions

MEDICATION CLAUSE
VANUM CONSTRUCTION CO. INC. V.
MAGNUM BLOCK LLC
JOHNSON DISTRICT COURT –
REVISED AND REMANDED WITH DIRECTIONS
NO. 103,385 – DECEMBER 10, 2010

FACTS: Vanum Construction Co. Inc. (Vanum) and Magnum Block LLC (Magnum) entered into a contract in which Magnum agreed to build a retaining wall and install pavers for a construction project led by Vanum. After Vanum discovered cracks in the retaining wall, it sued Magnum for breach of contract, negligence, and breach of implied warranty. In its answer, Magnum asserted a counterclaim alleging Vanum failed to pay Magnum for work performed under the contract. A jury found in favor of Magnum on Vanum’s claims and the counterclaim.

However, the district court reversed the jury verdict on the counterclaim and granted a post-verdict motion for judgment as a matter of law in favor of Vanum. The court granted the motion after determining Magnum’s counterclaim was barred by Magnum’s failure to comply with a mediation clause in the parties’ contract, which required mediation of “[a]ny claim arising out of or related to” the contract “as a condition precedent to ... the institution[] [of] legal or equitable proceedings by either party.”

ISSUE: Mediation clause

HELD: Court held that under the facts of this case, when parties to a construction contract agreed to mediate any claim arising out of or related to the contract as a condition precedent to the institution of legal or equitable proceedings by either party, only the plaintiff, i.e., the party instituting the lawsuit, was required to attempt mediation before filing suit. The plain language of the contract did not require the defendant, who filed a compulsory counterclaim after the commencement of litigation, to offer to mediate that counterclaim before filing the counterclaim.

STATUTE: K.S.A. 60-203(a)

STATE OF FRAUDS AND REAL ESTATE
SIGG V. COLTRANE
ALLEN DISTRICT COURT – AFFIRMED
NO. 103,994 – DECEMBER 10, 2010

FACTS: Sigg offered and made a down payment of $27,500 to Daniel and Tanya Coltrane on the purchase of certain land based on an e-mail from the Coltranes. Sigg signed the document and deposited 10 percent of the purchase price in the Coltranes’ bank account. However, the Coltranes entered into a contract to sell their real estate to Douglas Stickler, who was renting the land from the Coltranes at that time. The Coltranes rejected Sigg’s offer to purchase the real estate and returned her deposit. Sigg filed an action contending that she had entered into a contract to purchase the Coltranes’ land and demanding specific performance of the sale of the property. The trial court granted the Coltranes’ motion for summary judgment. The trial court determined that Sigg’s action was barred by the statute of frauds. Moreover, the trial court determined that the Coltranes never accepted Sigg’s offer to purchase the real estate.

ISSUES: (1) Statute of frauds and (2) real estate

HELD: Court agreed with the trial court that an e-mail sent by the party to be charged sufficient to satisfy the requirements of the statute of frauds. Court stated that Sigg’s agreement clearly falls within the ambit of the statute of frauds and there is no instrument in writing signed by the Coltranes that would take the agreement out of the statute of frauds.

STATUTES: K.S.A. 16-1601, -1602(i), -1605(b); and K.S.A. 33-106

TRUSTS
IN RE ESTATE OF OSWALD
RUSSELL DISTRICT COURT – AFFIRMED
NO. 103,512 – DECEMBER 17, 2010

FACTS: In an estate proceeding following the death of Irma M. Oswald, Lloyd E. Oswald, as trustee of the Irma M. Oswald Revocable Living Trust (Trust), appeals the judgment of the trial court ordering immediate distribution of trust assets to the named beneficiaries. Lloyd, one of the beneficiaries of the trust, sought to hold surface title to certain real property in escrow rather than immediately distributing title to the various beneficiaries. Lloyd maintained that the delay in conveying formal title would carry out a material provision of the trust – allowing him to farm the land as long as he wished. The trial court interpreted the trust document as requiring immediate distribution of the trust assets upon the settlor’s death; the court entered a judgment both ordering immediate distribution of the title to the real property and holding that the trust language giving Lloyd the right to continue to farm the land was an enforceable obligation on the beneficiaries.

ISSUE: Trusts

HELD: Court held that based upon the plain language of the Trust, the trial court correctly concluded that the Trust was unambiguous and that its assets were to be fully disbursed to the named beneficiaries upon Irma Oswald’s death. Accordingly, the trial court’s rejection of Lloyd’s escrow plan, as well as its order requiring the beneficiaries to take the real property subject to Lloyd’s right to farm the land, was proper. Court stated that the trust was clear and unambiguous as to its termination, and the trial court’s judgment protects Lloyd’s right to farm the land for as long as he desires.

STATUTE: K.S.A. 58a-101, -401(a), -816(26)

CRIMINAL

STATE V. BERRIOZABAL
SALINE DISTRICT COURT – AFFIRMED IN PART,
SENTENCES VACATED IN PART, AND REMANDED
NO. 100,291 – DECEMBER 10, 2010

FACTS: Berriozabal convicted of rape, attempted rape, and aggravated criminal sodomy. Consecutive hard 25 life sentences imposed for the rape and attempted rape convictions. On appeal he claimed district court erred by granting state’s motion to admit evidence of prior uncharged sexual conduct between Berriozabal and the victim, by denying Berriozabal’s motion for a psychological examination of the victim, and by denying Berriozabal’s motion to admit evidence of victim’s prior sexual behavior under Kansas rape shield statute. Berriozabal also claimed his two hard 25 life sentences constituted cruel and unusual punishment, and that hard 25 life sentence for attempted rape was improper.

ISSUES: (1) K.S.A. 60-455 evidence, (2) psychological examination of victim, (3) rape shield, (4) cruel and unusual punishment, and (5) attempted rape sentence

HELD: Claimed error in trial court’s admission of K.S.A. 60-455 evidence was not preserved for appeal.

Factors in State v. Price, 275 Kan. 78 (2003), for determining if there are compelling circumstances for a psychological examination of a complaining witness, are stated and analyzed. Compared to other Kansas cases, no abuse of district court’s discretion in determining that Berriozabal did not present compelling reasons justifying an order for psychological examination of victim.

Proffered evidence of prior sexual abuse was material, but reasonable people could agree with district court that it was too vague, speculative, and uncorroborated to be probative. No abuse of discretion in not admitting this evidence.
Life sentence on rape conviction is vacated. In denying Berriozabal's motion for dispositional departure, district court did not make necessary factual findings to allow appellate review of argument that life sentence would violate cruel and/or unusual punishment provisions of § 9 of Kansas Constitution Bill of Rights or Eighth Amendment of U.S. Constitution. Remanded for additional findings and resentencing. State v. Gomez, 290 Kan. 858 (2010), is compared.

Life sentence on attempted rape conviction is vacated pursuant to rule of leniency holding in State v. Horn, 288 Kan. 690 (2009). Remanded for resentencing.


STATE V. CUMMINGS
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 102,527 – DECEMBER 10, 2010

FACTS: Cummings convicted of involuntary manslaughter in death of child left unattended in car seat with only top buckle fastened for more than two hours. On appeal, Cummings claimed district court erred by: (1) failing to give specific intent instruction regarding underlying crime of endangering a child; (2) denying request to instruct jury on general intent regarding that underlying crime; and (3) failing to instruct jury on meaning of reasonable probability as used in child endangerment instruction.

ISSUES: (1) Specific intent, (2) general intent instruction, and (3) “reasonable probability”

HELD: Endangering a child, K.S.A. 21-3608(a), is a general intent crime. State required to prove Cummings purposely, willfully, and nonaccidentally placed child in car seat with only top buckle fastened and left child unattended for more than two hours. State not required to prove Cummings knew harm or injury to child could result as a consequence. No error in not giving requested specific intent instruction.

No error in denying request to give jury instruction relating to general intent where Cummings' state of mind with regard to resulting injury or harm was not an issue.

Cases interpreting “reasonable probability” language in K.S.A. 21-3608(a) are reviewed, including State v. Sharp, 28 Kan. App. 2d 238 (2000), and post-Sharp amendment to PIK Crim. 3d 58.10 given in this case. “Reasonable probability” is a risk assessment readily comprehensible to a jury. Reiductant to instruct jury that “reasonable probability” means “more than a faint or remote possibility” and “a likelihood.” Supreme Court has acknowledged the post-Sharp version of PIK Crim. 3d 5810 is the proper legal standard to consider in determining K.S.A. 21-3608(a) violation.

DISSENT (Leben, J.): To go beyond civil liability for negligence and impose criminal liability, terms “reasonable probability, a likelihood that harm ... will result” should be understood in this context to require that harm to child was more likely to occur than not from the defendant’s conduct. Firmly convinced there is a real possibility of a different verdict in this case if jury had been instructed that act had to be more likely than not to cause harm that occurred.

STATUTES: K.S.A. 21-3201(a), -3201(b), -3608, -3608(a); and K.S.A. 22-3414(3)

STATE V. DILLON
SHAWNEE DISTRICT COURT
VACATED AND REMANDED
NO. 102,724 – DECEMBER 3, 2010

FACTS: Dillon entered no contest plea to charging of failure to report as sex offender under Kansas Offender Registration Act. He sought departure sentence, arguing the 114-month presumptive sentence was disproportionate under circumstances of his case. District court imposed presumptive sentence. Dillon appealed. State argued there was no jurisdiction for appeal from presumptive sentence.

ISSUES: (1) Appellate jurisdiction and (2) due process violation in departure sentencing

HELD: When district court’s sentencing procedures violate the constitution, the sentence is not considered a presumptive sentence so as to deprive an appellate court of jurisdiction over an appeal of the sentence. A sentencing judge’s analysis of whether substantial and compelling reasons exist for departure sentence inherently involves some analysis of whether presumptive sentence is still proportional. Where the defendant bases a motion for a departure sentence on claim the presumptive sentence is disproportionate based on specific circumstances of defendant’s case, district court denies due process if it refuses even to consider the proportionality of the sentence. Here, district court limited its consideration of proportionality to a constitutional claim Dillon did not make, and not consider proportionality on facts of Dillon’s case. District court’s refusal to consider individual proportionality where it was basis of departure motion and legally relevant violated Dillon’s right to due process. Appellate court has jurisdiction to consider Dillon’s viable claim. Dillon’s sentence is vacated and case remanded for resentencing.

Eighth Amendment claim, and claim that statutory reporting provisions violate rule against stacking of inchoate offenses, both raised for first time in appeal, are not considered.

CONCURRENCE/DISSENT (Marquardt, J.): Concurs that issues Dillon raised for first time on appeal should not be considered. Dissents from majority’s holding that Dillon’s sentence should be vacated. On detailed facts in record, district court specifically found Dillon presented no substantial and compelling reason for departure. No jurisdiction for appeal from Dillon’s presumptive sentence.

STATUTES: K.S.A. 2009 Supp. 21-4704(d); K.S.A. 2006 Supp. 22-4904(c), -2940(d); K.S.A. 21-4703(q), -4704(a), -4704(e)(1), -4704(f), -4716(a), -4716(c), -4716(c)(1)(E), -4716(c)(2)(B), -4719(b)(1), -4721(c), -4721(c)(1); and K.S.A. 22-4901, -4903(a), -4904(c)

STATE V. ENGLAND
RENO DISTRICT COURT
AFFIRMED IN PART AND DISMISSED IN PART
NO. 102,685 – DECEMBER 10, 2010

FACTS: England convicted of 1993 rape for which he received pre-Kansas Sentencing Guideline Act (KSGA) sentence of 15 years to life, and 1993 attempted rape for which he received KSGA sentence. In 2007, he filed motion to correct illegal sentence, claiming trial court failed to calculate what the rape sentence would have been under KSGA. For attempted rape sentence, he objected to criminal history as containing uncounseled misdemeanor convictions. Trial court denied relief, finding England was not entitled to KSGA conversion of his rape sentence, and finding England’s motion and objection were successive K.S.A. 60-1507 motions. England appealed.

ISSUES: (1) Objection to criminal history and (2) motion to correct illegal sentence

HELD: England’s pro se objection to criminal history is construed as motion to correct an illegal sentence. Because England’s criminal history score was subsequently successfully challenged and adjusted, and a change in his criminal history score in present case would have no practical effect on his sentence, England’s criminal history argument is moot. This portion of England’s appeal is dismissed. Nor did England file a proper motion to add sentencing journal entry of judgment as exhibit to appellate record, and thus did not satisfy burden of setting forth evidence to demonstrate he is entitled to relief.

England not entitled to have controlling sentence for rape converted under KSGA. Although no showing that trial court

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calculated the sentence England would have received for rape conviction under KSGA, that does not make rape sentence illegal, and remain would serve no useful purpose.

STATUTES: K.S.A. 2009 Supp. 21-4715(c); K.S.A. 21-4721(e), -4724(a), -4724(b)(1), -4724(f); K.S.A. 22-3504, -3504(1); and K.S.A. 60-1507

JUVENILE ADJUDICATIONS AND STATUTE OF LIMITATIONS
IN RE P.R.G./IN RE J.C.T.
SEDGWICK DISTRICT COURT
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS
NO. 104,025 – DECEMBER 10, 2010

FACTS: P.R.G., a minor, was arrested for consuming alcohol three years after he allegedly committed the violation. J.C.T., a minor, was arrested for battery more than two years after he allegedly committed the crime. Both juveniles filed motions to dismiss on the grounds the complaints were barred by the statute of limitations. The trial court denied both motions and found both guilty of the crimes charged.

ISSUES: (1) Juvenile adjudications and (2) statute of limitations

HELD: Court stated the common-law rule that a warrant should be executed without unreasonable delay should be applicable in proceedings under the Revised Kansas Juvenile Code (KJJC). The common-law rule is a rule to enforce a judicial order and thus ancillary to judicial authority, not in derogation of legislative intent. Moreover, the rule enforces a right that is basic to a free society, the right of an accused to be arrested within the statute of limitations before charges are stale and evidence is lost. Proceedings under the KJJC are akin to adult criminal proceedings and the same core values protected under the common law are equally at risk in proceedings under the KJJC. At the time of his arrest, P.R.G. was 18 or 19 years old and required to answer a three-year-old complaint for a class C misdemeanor in juvenile court. Court concluded that as a matter of law, his conviction must be vacated and the underlying juvenile proceeding dismissed. In the case of J.C.T., the underlying offense occurred on October 8, 2007, and the arrest warrant was executed on October 31, 2009. Under this acknowledged timeline the court was not persuaded that the determination can be made on appeal whether the warrant was executed without unreasonable delay. Court remanded for further evidentiary hearing.

STATUTE: K.S.A. 22-2002(20); K.S.A. 21-3101, -3106, -3412(a)(2), -3606(7); K.S.A. 38-2301, -2302(s), -2303, -2327; K.S.A. 41-727(a); and K.S.A. 77-109

STATE V. REISS
BUTLER DISTRICT COURT – AFFIRMED
NO. 102,071 – DECEMBER 17, 2010

FACTS: Officer pulled over pickup running with no lights at 1 a.m. Reiss, traveling behind the pickup, pulled over as well with officer's car behind him. When Reiss got out of car angry, officer ordered him to return to car and wait. Officer's subsequent questioning of Reiss resulted in DUl conviction. Reiss filed motion to suppress, claiming officer violated right against unlawful search and seizure. District court denied the motion, finding Reiss was not seized, and finding officer's investigation of Reiss' behavior was reasonable under the circumstances.

ISSUE: Fourth Amendment prohibition against unreasonable seizures

HELD: No Kansas appellate decision discusses whether a person inadvertently stopped by police has been seized. On facts of case, Reiss was seized when officer commanded Reiss to return to his truck, but the brief detention of Reiss was reasonable for officer's safety concerns and did not violate Fourth Amendment.

STATUTES: None

STATE V. URISTA
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 103,089 – DECEMBER 17, 2010

FACTS: Urista entered no contest plea to 15 offenses in exchange for state's agreement to recommend concurrent sentences. At sentencing, prosecutor recommended concurrent sentences, but also made statements about Urista and crimes Urista had committed, which put him in negative light. District court imposed consecutive sentences. Urista appealed, claiming prosecutor violated the plea agreement by effectively arguing against concurrent sentences.

ISSUE: Compliance with plea agreement

HELD: On facts of case, prosecutor's remarks did not so undermine recommendation for concurrent sentences as to negate that recommendation altogether, and were in line with remarks made in other cases where no breach of plea agreement was found. State v. Foster, 39 Kan. App. 2d 380 (2008), is distinguished and limited.

STATUTES: K.S.A. 2009 Supp. 22-4902(a)(7); and K.S.A. 21-4720(b)

STATE V. WADE
JOHNSON DISTRICT COURT
REVERSED AND REMANDED
NO. 102433 - DECEMBER 30, 2011

FACTS: Over stated defense of striking his 15-year-old son in discipline, jury convicted Wade of misdemeanor battery. On appeal, Wade claimed trial court erred by failing to instruct jury on affirmative defense of parental discipline.

ISSUE: Parental discipline affirmative defense

HELD: Although Legislature has not statutorily established it as an affirmative defense, parental discipline is a common law defense in Kansas, tacitly recognized in State v. Severns, 158 Kan. 453 (1944). In Kansas, affirmative defense of parental discipline is based on an objective standard. It is a defense to charge of battery if parent's use of physical force upon a child was reasonable and appropriate and with purpose of safeguarding child's welfare or maintaining discipline. As in Severns, trial court was required to instruct jury as to Wade's defense. Trial court should have given PIK Crim. 3d 52.08 to inform jury that Wade was asserting affirmative defense of parental discipline, and should have instructed jury how to consider this defense in light of state's burden of proof. Under facts of case, jury could not have had a clear and proper understanding of the parental discipline defense. Trial court's failure to properly instruct the jury denied Wade due process of law. Reversed and remanded for a new trial.

STATUTE: K.S.A. 21-3102(1), -3412

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New and Dangerous: Corporate Immigration Issues for Corporate and Employment Lawyers  
Speakers Mira Mdvani, The Mdvani Immigration Law Firm LLC, Overland Park; Amanda L. Miranda, Attorney at Law, St Louis, Mo.; and Trinidad Galdean, Kutak Rock, Wichita  
Telephone CLE

**Tuesday, March 29, Noon – 1 p.m.**  
Current Developments Affecting Tax Exempt Organizations  
Speaker: Bruce R. Hopkins, Polsinelli Shughart P.C., Kansas City, Mo.  
Telephone CLE

**Wednesday, March 30, Noon – 1 p.m.**  
Lending and Deposit Regulatory Changes  
Speaker: Terri D. Thomas, Kansas Bankers Association, Topeka  
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