

Legal Fees in Nineteenth-Century Kansas

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There is no aspect of law practice that has been more controversial than the question of fees.¹ In Roman law, lawyers were first forbidden to ask for or accept fees at all.² When this prohibition failed to have effect, legal fees were established by imperial legislation.³ During the Middle Ages, canon lawyers were prohibited from charging fees to their clients on the grounds that knowledge was a gift of God, and it would be an insult to God, therefore, to charge for the use of knowledge which had been given freely.⁴ In English law, lawyers were permitted to charge their clients for their services, but barristers, those who constituted the highest branch of the legal profession, were prohibited from suing clients who failed to pay.⁵ In effect, clients had the option to pay or not.⁶

During the earliest colonial period in American history, lawyers were not popular.⁷ In the earliest days of the Massachusetts Bay Colony, lawyers were forbidden to practice altogether.⁸ When the colonists realized that they needed lawyers, the profession was grudgingly accepted into the colony, but the colonial government established fee schedules which set the maximum fees which could be charged for any particular transaction.⁹ These governmentally mandated fee schedules became popular throughout the thirteen colonies and, indeed, survived the Revolution.¹⁰ The justifications for these schedules were primarily distrust

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1. On fees, see generally WILLIAM G. ROSS, *THE HONEST HOUR: THE ETHICS OF TIME-BASED BILLING BY ATTORNEYS* (1996) (discussing various ethical aspects of time-based billing).

2. *See id.* at 9 (referring to a 204 B.C. Roman statute, *Lex Cincia*, that prohibited lawyers from accepting fees).

3. *See id.*

4. *See* James A. Brundage, *The Profits of the Law: Legal Fees of University-Trained Advocates*, 32 *AM. J. LEGAL HIST.* 1, 2-4 (1988).

5. *See* ROSS, *supra* note 1, at 10.

6. *See* 3 WILLIAM BLACKSTONE, *COMMENTARIES* *28.

7. *See* GERALD W. GAWALT, *THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS 1760-1840*, at 8 (Paul Murphy ed., 1979).

8. *See id.* at 8-9.

9. *See id.* at 9.

10. *See* ROSS, *supra* note 1, at 10-12.

of the legal profession and the belief that lawyers, if left to their own devices, would overcharge their clients.¹¹

The legislation of maximum fee schedules continued well into the nineteenth century, as did distrust of the bar. It was also during this period, however, that lawyers began to band together in professional associations. These groups, these bar associations, had a number of purposes. First, they were designed to maintain professional standards, including regulation (usually in conjunction with the judiciary) of lawyers. Second, they were designed to foster collegiality amongst members of the bar. For instance, the Suffolk County Bar in Massachusetts promulgated rules for its members in a published document in 1819.¹² Article II of these rules provided that the Bar would have an annual dinner, to which each member would contribute a portion of the cost.¹³ Even more interesting, these rules also provided for a form of insurance.¹⁴ Article V provided that each member of the Bar should contribute one dollar annually to a fund: "to be holden in trust for the relief of such members of the Bar, or their families, as by reason of reduced circumstances shall stand in need of assistance."¹⁵

The longest of the articles is Article X.¹⁶ Article X established a schedule of minimum fees to be charged.¹⁷ Unlike the statutory fee schedules designed to limit legal costs, the fee schedule adopted by the Suffolk Bar—which itself was a model for other bar associations—was designed for a very different purpose. The Bar Association, itself, provided a justification for publishing the minimum fee schedule:

Taking into [account] that the rules of the Supreme Judicial Court require that nine years, at least, should have been passed in literary and professional pursuits, to qualify a man for admission to that Court as an attorney thereof . . . and [] that those who take upon themselves to perform professional duties are, and ought to be, [bound] to indemnify their clients for all losses or damages which are occasioned by negligence or want of professional knowledge; and lastly, that the members of the profession are never applied to, if the party can obtain, without their agency, the rights which the laws of the land secure to [them] . . .¹⁸

In other words, the lawyers of Suffolk County believed that it was time consuming and expensive to become a lawyer, that they were subject to

11. *See id.* at 11-12.

12. *See* COUNTY OF SUFFOLK, RULES OF THE BAR OF THE COUNTY OF SUFFOLK (1819) (on file with author).

13. *See id.* at 4-5.

14. *See id.* at 7.

15. *Id.*

16. *See id.* at 10-16.

17. *See id.*

18. *Id.* at 10.

malpractice suits, and that clients only came to them when they had no other choice. Thus, they reasoned they were entitled to receive reasonable fees. What the Suffolk rules do not mention is that competition for law clients was fierce at this time and that competition tends to lead to price-cutting. So, the Bar came together collectively and decided to exercise oligopoly power. All lawyers who became members of the Bar Association agreed to abide by the minimum fees established in the rules.¹⁹

What were these fees? A lawyer who was asked to advise on property in dispute of a value less than \$500 could charge no less than \$4.²⁰ If the property was valued at more than \$500, he could charge no less than \$5.²¹ A variety of other fees are set forth.²² For instance, for arguing a case in the supreme judicial court, a lawyer could charge no less than \$20.²³ A divorce action could cost no less than \$20 in fees.²⁴ The same charge was to be made for representing a client in a naturalization process.²⁵ Needless to say, these amounts charged, while they sound negligible today, were quite substantial in 1819.

During the period before the Civil War, it was common to see a variety of regulations about fees. In some states, statutory maximum fee schedules remained in force.²⁶ In other jurisdictions, bar associations copied the Suffolk County model and established minimum fee schedules.²⁷ In other places, no regulation of any sort was in place and lawyers were left to fend for themselves when it came to setting and charging fees. We do know that many lawyers grew rich in the practice of law and that fees could range from only a few dollars to thousands of dollars in complex cases involving famous advocates. Thus, by the end of the Civil War, there was no uniformity of the way to treat lawyers' fees in the United States.

And, thus, we come to Kansas. In its earliest days as a territory, Kansas had a small but active bar centered in Leavenworth, where there were both a state and a federal court and a number of practicing lawyers.²⁸ This continued into the first years of statehood. By the end of the Civil War, the number of lawyers in Kansas was growing and lawyers were

19. *See id.* at 4.

20. *See id.* at 11.

21. *See id.*

22. *See id.* at 10-16.

23. *See id.* at 14.

24. *See id.*

25. *See id.*

26. *See* ROSS, *supra* note 1, at 13.

27. *See id.* at 12.

28. *See* Paul E. Wilson, *The Early Years: The Bench and Bar Before 1882*, in *REQUISITE LEARNING AND GOOD MORAL CHARACTER: A HISTORY OF THE KANSAS BENCH AND BAR* 27, 36 (Robert W. Richmond ed., 1982).

practicing throughout the state.²⁹ Both Lawrence and Wichita were growing communities and, as such, had growing bars. We can begin with Lawrence.

By the end of the Civil War, Lawrence was a thriving community.³⁰ Having suffered from the murderous raids by Quantrill and his followers and having been burned several times, it refused to die.³¹ In 1866, the recovery of the town was confirmed by publication of a city directory.³² The directory lists all of the citizens of the town as well as the many thriving businesses they owned and operated.³³ The town had several newspapers, boarding houses, restaurants, and a growing bar.³⁴ The city directory white pages list nineteen attorneys and the business directory lists twenty-three practicing lawyers, of whom sixteen practiced in partnership and seven as solo practitioners.³⁵ All of the lawyers had offices on Massachusetts Street, with five occupying the "Eldridge Block" at 77 Massachusetts and three each at 81 Massachusetts and 63 Massachusetts.³⁶ We actually know a fair amount about the Lawrence and Douglas County Bar of this period because of a letter preserved in the Kansas Collection at the University of Kansas published by Paul Wilson in 1961.³⁷ This letter was written by a young lawyer named Elliot V. Banks in 1862 to a friend in New York, from where Mr. Banks had emigrated.³⁸ Mr. Banks was one of the lawyers listed as practicing in the Eldridge Block in 1866.³⁹

In his letter, Mr. Banks described a typical frontier bar. The members varied in knowledge from being rather ignorant to those with a firm grasp of the law.⁴⁰ Their business consisted in large part of working for the railroads, trying land disputes, and drawing deeds and mortgages.⁴¹ Added to this were a variety of other civil and criminal matters.⁴² What comes

29. *See id.* at 40.

30. *See* DAVID DARY, LAWRENCE, DOUGLAS COUNTY, KANSAS: AN INFORMAL HISTORY 139 (1982).

31. *See id.* at 113-16.

32. *See* THE LAWRENCE CITY DIRECTORY AND BUSINESS GUIDE FOR 1866 (photo. reprint n.d.) (Lawrence, Kan., Boughton & McAllaster 1866) [hereinafter 1866 DIRECTORY] (on file with the Douglas County Historical Society Library, Lawrence, Kan.).

33. *See id.* at 37-82, 85-95, 103-04.

34. *See id.* at 30, 85, 87, 94.

35. *See id.* at 37-82, 85.

36. *See id.* at 85.

37. *See* Letter from Elliot V. Banks to John Hutchings (May 3, 1862), in Paul E. Wilson, *A Survey in Retrospect: A Letter of Elliot V. Banks*, 10 U. KAN. L. REV. 123, 125-32 (1961).

38. *See id.* at 123.

39. *See* 1866 DIRECTORY, *supra* note 32, at 85.

40. *See* Letter from Elliot V. Banks to John Hutchings, *supra* note 37, at 125-32.

41. *See id.*

42. *See id.*

through clearly in Mr. Banks's letter is that there were a fair number of lawyers doing business in Lawrence during the 1860s. Indeed, Mr. Banks pointed out that some lawyers did not even practice much, if at all, preferring to earn their income through land speculation.⁴³ The ratio of lawyers to the general public was relatively high, especially for a frontier community. All of this suggests that the potential for competition amongst the lawyers in Lawrence was very real.

Evidence of the existence of such competition can be found in the pages of the Lawrence newspapers. Lawyer advertising is common. The majority of the advertisements are reproductions of the lawyers' business cards in the following form:

SMITH & HAMPTON,
Attorneys at Law,
War Claims Agents,
AND NOTARY PUBLIC,
LAWRENCE, KANSAS.
WILL PRACTICE IN DIFFERENT Courts of this State. Particular attention
given to collecting and securing claims. Office over Geo. Leis's Drug Store[.]⁴⁴

But evidence of real competition, beyond simple advertising, is also to be found. The following advertisement appeared in the *Kansas Daily Tribune* published in Lawrence on May 10, 1867:

E. D. LADD,
Attorney at Law,
Notary Public, Conveyancer,
LAND & CLAIM AGENT.
HE WILL ATTEND TO ALL business intrusted to him, with neatness and
dispatch, and at LOWEST RATES.
Office in Miller's Old Block, where he has been for seven years past.⁴⁵

And there, we have it: price-cutting by a lawyer in 1867 Lawrence.

Further evidence of competition among lawyers in Lawrence is presented by the 1871 Lawrence city directory.⁴⁶ In this directory, published only five years after the first, we find a marked increase in the number of lawyers in the town.⁴⁷ In 1871, there were, by the city directory white pages, thirty-three lawyers and twenty-seven lawyers listed in the

43. *See id.* at 128.

44. Advertisement, KAN. DAILY TRIB. (Lawrence, Kan.), May 1, 1868, at 1.

45. Advertisement, KAN. DAILY TRIB. (Lawrence, Kan.), May 10, 1867, at 3.

46. DIRECTORY OF THE CITY OF LAWRENCE FOR 1871 (photo. reprint n.d.) (Lawrence, Kan., J.T. Atkinson 1871) (on file with the Douglas County Historical Society Library, Lawrence, Kan.).

47. *See id.* at 17-101, 107.

business directory.⁴⁸ Again, we may speculate that the growing westward movement in the United States, the extension and increase in the number of railroads, and the growing importance of Kansas as an agricultural center may all have contributed to this increase in lawyers because all of these changes must have also brought more opportunities for legal business. Whether these speculations are true, however, the lawyers of Lawrence, Kansas, decided to lessen competition by restricting price-cutting in September of 1869 when they banded together, and agreed to and published a minimum fee schedule, a copy of which is preserved in the library of the Kansas State Historical Society in Topeka.⁴⁹

The fee schedule adopted by the members of the Douglas County Bar in September, 1869 was published in the form of a single-sheet broadside. Presumably, it took this form so that it could be prominently posted in law offices so that clients would be made immediately aware of its contents. It is headed "Douglas County Bar, Tariff of Fees."⁵⁰ This heading itself is of some interest because it suggests this document was a product of an organized bar. In fact, the broadside is signed at the bottom by twenty-three signatories, consisting of lawyers and law firms, a number which would suggest that virtually all of the practicing lawyers in Douglas County were signatories. Thus, this broadside is evidence of the first organized bar in Kansas, although it would appear that the lawyers did not act collectively for any purpose other than this fee schedule.

The schedule itself is divided into seven categories: Supreme Court, District Court, Collections, Criminal Cases, Probate Court, Justice Court, and Miscellaneous.⁵¹ Each of these categories is further subdivided. These categories and subdivisions are quite important, for they reveal not only what legal fees were charged, but also provide a window into the nature of practice in Lawrence during this early period.

A number of features of this schedule are worthy of comment. First, the types of legal activity mentioned in the fee schedule are consistent with those mentioned by Mr. Banks in his 1862 letter. Lawrence lawyers seem to have spent much of their time either in litigation, collections, drawing notes, deeds, and mortgages, or in probate matters, including will drafting. One type of business which is absent from both Mr. Banks's letter of 1862 and the fee schedule of 1869 is appearances in the federal court system.

48. *See id.*

49. *See* DOUGLAS COUNTY BAR, TARIFF OF FEES (1869) [hereinafter DOUGLAS COUNTY FEES] (on file with the Kansas State Historical Society, Topeka, Kan.). A copy is reprinted with permission in Appendix A of this Essay.

50. *Id.*

51. *See id.*

The absence of a specific reference to federal court litigation suggests that this was not a routine type of activity for Lawrence and Douglas County lawyers. Perhaps they left this to the Leavenworth County Bar.⁵²

Among the types of cases which were routine enough so as to be mentioned in the fee schedule, several are quite interesting. For instance, the schedule provides fees for both contested and uncontested divorces.⁵³ There is also a set fee for giving written opinions as there is for depositions.⁵⁴ Interestingly, Douglas County lawyers charged a differential fee for attending court in Lawrence and for having to attend court "in the country."⁵⁵ And, of course, it is notable that these lawyers were prepared to take cases up to the Kansas Supreme Court sitting in Topeka rather than leave such appeals to their brethren of the Shawnee County Bar.

The fees themselves are fascinating. The three most expensive activities listed are for arguing a case in the Kansas Supreme Court, for representing a party in a contested divorce, and for defending a client in a capital case.⁵⁶ For each of these, the lawyers demanded no less than a \$100 fee.⁵⁷ The next most expensive fee was \$50 for defense of a felony case as well as a petition for habeas corpus in a criminal case.⁵⁸ An ordinary civil case in the district court cost at least \$25 but could run quite a bit more depending on how long it took and what motions were made.⁵⁹

A will cost no less than \$10 but most other documents cost only a minimum of \$2.⁶⁰ Even a simple letter cost no less than \$1.⁶¹ Collections were the only type of business in which the Douglas County lawyers charged percentage fees: 10% on sums less than \$3,000 and 7.5% on sums greater than \$3,000.⁶² Obviously, then as now, a collections practice could be quite lucrative.

Evidence of the relationship between the amounts in dispute in cases and the actual cost of lawyers' services during this period comes from the reports of cases printed in the local Lawrence newspapers. Often these reports include not only the facts of the dispute and the court's decision,

52. On the early federal courts in Kansas, see generally James K. Logan, *The Federal Courts and Their Judges—The Impact on Kansas History*, in *THE LAW AND LAWYERS IN KANSAS HISTORY* 57 (Virgil W. Dean ed., 1993).

53. See DOUGLAS COUNTY FEES, *supra* note 49.

54. See *id.*

55. *Id.* In some cases, the fee for attending court "in the country" was considerably higher. *Id.*

56. See *id.*

57. See *id.*

58. See *id.*

59. See *id.*

60. See *id.*

61. See *id.*

62. See *id.*

but also the amounts in dispute. For instance, four cases were reported by the *Kansas Daily Tribune* on May 10, 1867.⁶³ All four had been tried and decided in the Douglas County District Court on the previous day. The first was a case between Richard Stephens and Peter Barton. The case was tried before a jury and a verdict was given for the plaintiff in the amount of \$167.⁶⁴ The second case was between one Federick Ledrick and Harvey Spalding. This, too, was tried before a jury, which returned a verdict for the plaintiff in the amount of \$146.75.⁶⁵ The third case heard that day was between George Thomas and Harvey Spalding. It was tried to the court and judgment was given for the plaintiff in the amount of \$116.50.⁶⁶ The fourth case was between William Butler and A.A. Spicer. This case, too, was tried to the court and a judgment for the plaintiff was given in the amount of \$636.54.⁶⁷ If one compares these awards to the minimum fees set out in the 1869 fee schedule, one sees that the minimum fee for trying each of these cases would have been \$25, a significant percentage of these awards.

To further put in perspective the level of the fees prescribed in the 1869 schedule, it is useful to have some idea of what other goods and services cost in Douglas County at this time. First, we might look at the salary of the Lawrence City Attorney, A.H. Foote. He was paid a retainer of \$250 per year, the same amount as paid to the Lawrence medical health officer.⁶⁸ The superintendent of the Lawrence public schools received \$500 per year.⁶⁹ A copy of *Webster's Dictionary* cost \$6.25.⁷⁰ A copy of the *Kansas Daily Tribune* was a nickel, and the Durfee House, a hotel and boarding house in Lawrence, which labeled itself as a "first class house," cost \$2 per day.⁷¹ Mr. Banks, in 1862, wrote to his friend back east that the trip from New York to Lawrence cost him \$50, but he probably could have saved himself \$10 if he had brought his own provisions.⁷²

What all of this adds up to, of course, is that the minimum fees collectively agreed to by the Douglas County lawyers on September 6,

63. *District Court*, KAN. DAILY TRIB. (Lawrence, Kan.), May 10, 1867, at 3.

64. *See id.*

65. *See id.*

66. *See id.*

67. *See id.*

68. *See Council Proceedings*, KAN. DAILY TRIB. (Lawrence, Kan.), May 1, 1868, at 3 (ordering payment of the \$62.50 quarterly salary to the city attorney and the \$250 annual salary to the medical health officer).

69. *See* DEPARTMENT OF PUBLIC INSTRUCTION, CITY OF LAWRENCE, SECOND ANNUAL REPORT OF THE BOARD OF EDUCATION FOR THE YEAR ENDING JULY 31ST, 1869, at 14 (1869).

70. *See id.* at 15 (showing a purchase of 12 such dictionaries for \$74.84).

71. *See* Advertisement, KAN. DAILY TRIB. (Lawrence, Kan.), May 1, 1868, at 3.

72. *See* Letter from Elliott V. Banks to John Hutchings, *supra* note 37, at 131.

1869, were fairly high and, as a result, the cost of hiring a lawyer was substantial.

Due to the vagaries of time and chance, it is possible to compare the fees charged by lawyers in Douglas County with those of their brethren in Sedgwick County. The Bar of Wichita and Sedgwick County published a minimum fee schedule on July 27, 1872.⁷³ This schedule, like the earlier one from Douglas County, was printed as a single-sheet broadside and, presumably, for the same reason. It is interesting to note that the typeface of the Wichita broadside, particularly of the title, is far more elaborate than that of the Douglas County document.

The Sedgwick County schedule also resembles the Douglas County schedule in that it was subscribed to by the members of the Sedgwick County Bar. Sixteen signatories, consisting of lawyers and law firms, signed the schedule.⁷⁴ The title of the document also refers to “the Bar of Sedgwick County,”⁷⁵ again, what may be the first instance of collective action by this county’s lawyers. This schedule is divided into six categories: Supreme Court, District Court, Collection Without Suits, Probate Court, Justice’s Court, and Miscellaneous.⁷⁶ Interestingly, while one might expect that Wichita lawyers had a somewhat different practice than Lawrence lawyers, since Wichita in 1872 was less settled than was Lawrence in 1869, the types of cases and activities listed in the fee schedules are rather similar.⁷⁷ This may well be because the Sedgwick County document may have been copied from the earlier Douglas County document, although there is no proof—beyond the similarity between the two documents—of this. What is different about the two schedules, however, are the minimum fees to be charged. Many of the minimum fees prescribed by the Wichita document are half of those prescribed for the same transactions by the Lawrence document.

In Wichita, the minimum fee for appearing in the Kansas Supreme Court was \$50⁷⁸ and for appearing in the District Court of Sedgwick

73. See SCHEDULE OF MINIMUM FEES OF THE BAR OF SEDGWICK COUNTY, KAN. (Wichita, Kan., Wichita Eagle Print 1877) [hereinafter SEDGWICK COUNTY FEES] (on file with the Kansas State Historical Society, Topeka, Kan.). A copy is reprinted with permission in Appendix B of this essay.

74. See *id.*

75. *Id.*

76. See *id.*

77. On the early history of Wichita, see generally RICHARD M. LONG, WICHITA 1866-1883: CRADLE DAYS OF A MIDWESTERN CITY (1945); H. CRAIG MINER, WICHITA: THE EARLY YEARS, 1865-1880 (1982).

78. See SEDGWICK COUNTY FEES, *supra* note 73. In Douglas County, the fee was \$100. See DOUGLAS COUNTY FEES, *supra* note 49.

County was \$10.⁷⁹ A contested divorce cost \$50 as well.⁸⁰ Quite interestingly, no separate fee was set out for defending a capital case, though certainly such cases were tried. Defense of a felony, however, cost \$50, the same as in Douglas County.⁸¹ Written opinions and wills cost \$10, again, the same as in Douglas County.⁸² Deeds and mortgages only cost \$1.50 in Wichita, but contracts were \$3, one dollar more than in Douglas County.⁸³

Once again, it is possible to speculate as to why the Wichita and Sedgwick County lawyers decided to publish their schedule of fees in July, 1872. It may be that they were imitating the Douglas County Bar. It seems likely that some of the members of the Wichita Bar would have known of and seen the Douglas County document. It is also quite possible that the Wichita lawyers were attempting to stifle cost-cutting and price competition in the same way as the Lawrence lawyers. By 1872, Wichita was already becoming a "boom town." According to Professor Craig Miner, Wichita's preeminent historian, by 1870 "Wichita proper had . . . a population of eight hundred people. In late 1870 there were 3 churches . . . 2 billiards saloons . . . 'and too many law offices to count.'"⁸⁴ The Wichita Business Directory for 1878 lists twenty-one law partnerships or solo practitioners, a rather remarkable number given the fact that the first lawyer opened practice in Wichita in 1869.⁸⁵ No doubt, the Texas cattle drives, which began to come to Wichita in 1872, did much not only to improve the economy of Wichita, but also to attract lawyers to the town.⁸⁶ Indeed, Kos Harris, who first moved to Wichita to practice law in 1872, gives the impression that the Wichita Bar of this period was quite active and not averse to collective action to rid itself of unwanted members.⁸⁷ Thus, we may well suppose that the Wichita lawyers who signed and published the fee schedule of 1872 did so in order to maintain a high level

79. See *SEDGWICK COUNTY FEES*, *supra* note 73. In Douglas County, the minimum fee for a civil case in district court was \$25. See *DOUGLAS COUNTY FEES*, *supra* note 49.

80. See *SEDGWICK COUNTY FEES*, *supra* note 73. A contested divorce cost \$100 in Douglas County. See *DOUGLAS COUNTY FEES*, *supra* note 49.

81. See *SEDGWICK COUNTY FEES*, *supra* note 73; *DOUGLAS COUNTY FEES*, *supra* note 49.

82. See *SEDGWICK COUNTY FEES*, *supra* note 73; *DOUGLAS COUNTY FEES*, *supra* note 49.

83. See *SEDGWICK COUNTY FEES*, *supra* note 73; *DOUGLAS COUNTY FEES*, *supra* note 49.

84. MINER, *supra* note 77, at 48.

85. See LONG, *supra* note 77 (inside back cover) (reprinting the "Wichita Business Directory," which lists Wichita's "Attorneys-at-Law" in 1878); LONG, *supra* note 77, at 3 (noting that Reuben Riggs opened the first law office in Wichita).

86. See *id.* at 6, 8-9 (estimating \$2,000,000 of cattle money changed hands in Wichita in 1872).

87. See Kos Harris, *A Lawyer's Reveries of the Times When Wichita Was in the Gristle*, in *HISTORY OF WICHITA AND SEDGWICK COUNTY, KANSAS* 132, 150 (O.H. Bentley ed., 1910). Harris continued to practice well into this century in Wichita. There is now a high school named in his honor.

of fees. Of course, these fees were not so high as those in Lawrence and Douglas County.

Both the Sedgwick County and the Douglas County fee schedules not only set minimum fees, but also address the issue of payment of fees. A fee is only so good as it is collectible. Both schedules contain the same language on when and how fees become due or payable: "The above fees shall be due and payable, whether the moneys are made or not, and whether the party succeeds or fails."⁸⁸ First, of course, this statement expressly disclaims the possibility of charging contingency fees. During this period, contingency fees were considered to be highly unethical and impermissible.⁸⁹ Second, the statement does not specify when fees are to be paid. There is evidence, apart from the fee schedule, that some attorneys chose to avoid collection problems by demanding their fees during the pendency of a case. Kos Harris wrote of one Wichita lawyer, George Salisbury, who took this course: "It was said of him . . . that he never asked a client for money until one hour, or at [least] half a day, before a case was called for trial [and] [t]his course caused the client to 'hump himself' for money, when George whispered to him: 'No money, no trial.'"⁹⁰ While today such a course of action would be deemed unethical, we must remember that many of the clients Kansas lawyers had may well have been transients who might flee without paying their fees.

When we consider the significance of these two fee schedules, it becomes apparent that they are quite important. First, they stand as testimony to what was most likely the earliest collective action by Kansas lawyers and the first hints of the organized bar to come in later decades. They also provide evidence of the nature of Kansas legal practice in both Douglas and Sedgwick Counties and, therefore, provide strong corroboration for Mr. Banks's letter to his friend and for Kos Harris's published reminiscences. And, of course, they permit us to have a unique glimpse at the cost of legal services in Kansas during its early days and provide hints as well that, even in the earliest days of statehood, Kansas may well have suffered from a "lawyer glut."provide hints as well that, even in the earliest days of statehood, Kansas may well have suffered from a "lawyer glut."

88. *Infra* Appendices A and B. It is interesting—and indicative of a relationship between the two documents—that both have exactly the same language on this point.

89. On the nineteenth-century American prohibition against contingency fees, see generally EDWIN COUNTRYMAN, *THE ETHICS OF COMPENSATION FOR PROFESSIONAL SERVICES: AN ADDRESS BEFORE THE ALBANY LAW SCHOOL AND AN ANSWER TO HOSTILE CRITIQUES* (Albany, N.Y., W.C. Little & Co. 1882).

90. Harris, *supra* note 87, at 146.

Appendix A

Douglas County Bar, Tariff of Fees.

ADOPTED SEPTEMBER, A. D. 1869.

SUPREME COURT.

- 1st. For Cases in the Supreme Court, not less than \$100 00
 2nd. No continuance in said Court for less than 15 00

DISTRICT COURT.

- 1st. No civil case, whether tried or not, for less than \$25 00
 2nd. Each continuance, not less than 5 00
 3rd. Motion and Demurrer, each not less than 5 00
 4th. Arguing Motion or Demurrer, not less than 5 00
 5th. Motion for New Trial, not less than 10 00
 6th. No retainer less than 10 00
 7th. Bill of Exceptions, or made case, not less than 10 00
 8th. Preparing Brief, not less than 10 00
 9th. Trial of case, each day, not less than 20 00
 10th. Divorce case, without contest, not less than 50 00
 11th. Divorce case, with contest, not less than 100 00

COLLECTIONS.

- 12th. Without suit, no case less than \$5 00
 13th. On all sums claimed less than \$3,000 00, not less than 10 per cent.
 14th. On all sums excess claimed over \$3,000 00, not less than 7 1/2 per cent.
 15th. For every provisional remedy in addition to the above rates, not less than \$15 00
 16th. Confirmation of sale, not less than 5 00

CRIMINAL CASES.

- 17th. In all cases of Felony, not less than \$50 00
 18th. In all cases of Misdemeanor, not less than 25 00
 19th. In all Capital Cases, not less than 100 00
 20th. In cases of Habeas Corpus, not less than 50 00

PROBATE COURT.

- 1st. Obtaining Letters of Administration or proving will, or retainer for estate when value does not exceed \$1,000 00 each, not less than \$10 00
 2nd. Retainer when estate is over \$1,000 00, not less than 25 00
 3rd. Collections and other services, same as in the District Court
 4th. Appointment of Guardian, not less than 15 00
 5th. Superintending sale of land, and confirmation of same, not less than 10 00
 6th. Preparing accounts of Executors, Administrators or Guardians, not less than 10 00

JUSTICE COURT.

- 1st. In cases of Forcible entry and Detainer, not less than \$25 00
 2nd. In all other cases in town, in cases of \$100 or less, if contested, not less than 10 00
 3rd. Ten per cent. additional on all sums in controversy over \$100 00.
 4th. For time employed in trial before Justice, per day, not less than 10 00
 5th. Double the above rates out of the city and in the country.
 6th. Criminal trials, including preliminary examinations, in the city, not less than 15 00
 7th. Out of the city and in the country, not less than 25 00

MISCELLANEOUS.

- 1st. Taking Depositions, per day, exclusive of expenses, not less than \$10 00
 2nd. Preparing notices to take depositions and instructions, not less than 5 00
 3d. Drawing wills, not less than 10 00
 4th. Drawing deeds and mortgages, each not less than 2 00
 5th. Drawing contracts, agreements, bonds, leases, and bills of sale, not less than 3 00
 6th. Drawing assignments for benefit of creditors, not less than 25 00
 7th. Counsel fees, not less than 3 00
 8th. Written opinion, not less than 10 00
 9th. Correspondence, each letter 1 00
 10th. In all cases, Attorneys are at liberty to charge such fees as may be equivalent to the character of the case, but not less than the above mentioned.
 11th. The above fees shall be due and payable whether the moneys are made or not, and whether party succeeds or fails.
 12th. All disbursements to be added to the foregoing charges.
 13th. The above rules shall be observed alike by attorneys, for both plaintiff and defendant.

We, the undersigned attorneys, heraby agree and pledge ourselves to fully observe and comply with the foregoing rules in our practice, from and after this date.

Dated, September 6th, 1869.

SHANNON & SHANNON.

AKIN & BARKER.

J. E. GORDIN.

T. BRY. PRITTE.

D. T. MITCHELL.

JAMES M. BRIDGES.

THACHER & HANKS.

RIGGS, NEVISON & FOOTE.

HOYSHADT, BROWN & CREW.

HUPCHINGS & BROWNE.

JAMES CHRISTIAN.

W. A. CHRISTIAN.

A. M. F. RANDOLPH.

GEO. A. HANKS.

JOHN Q. A. NORTON.

M. SUMMERFIELD.

GEORGE S. HAMPTON.

Appendix B

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SCHEDULE OF MINIMUM FEES
OF THE
Bar of Sedgewick County, Kan.
ADOPTED JULY 27TH, 1872.

SUPREME COURT.		For habeas corpus case, same as District Court.	
For any appearance in said Court, not less than	\$50 00	For collections against estates, same as in District Court.	
DISTRICT COURT.		JURISTICE'S COURT.	
For instituting suits in, not less than	10 00	For any appearance in, not less than	\$ 5 00
For conducting trial, not less than	15 00	For conducting case or trial,	10 00
For assisting in a trial, not less than	10 00	In cases where amount in controversy does not exceed \$25 00, by agreement of parties.	
For making and arguing any motion or demurrer,	5 00	MISCELLANEOUS.	
For retaining fee,	10 00	Preparing and filing mechanics' liens,	\$ 3 00
For bill of exceptions or case made,	10 00	Taking depositions, per day, not less than	10 00
For divorce case or default,	25 00	Drawing wills,	10 00
For divorce case contested,	50 00	Drawing deeds and mortgages,	1 50
For defending on charge of a felony,	50 00	Drawing bonds, leases and bills of sale,	3 00
For defending on charge of misdemeanor,	25 00	Drawing contracts and agreements,	3 00
For case of habeas corpus,	25 00	Drawing assignments for benefit of creditors,	25 00
For closure of mortgages and mechanics' liens, in addition to the regular fee for the suit, 10 per cent. on the amount of the judgment when less than \$250, over \$250 and less than \$500 5 per cent. on the amount of the judgment, over \$500 and less than \$1000 5 per cent. and 2½ per cent. on the amount in excess of \$1000.		Counsel fees, not less than	3 00
For petition in partition, not less than	50 00	Written opinion, not less than	10 00
COLLECTION WITHOUT SUITS.		<p>IN ALL CASES, attorneys are at liberty to charge such fees as may be equivalent to the character of the case, but not less than the above mentioned.</p> <p>The above fees shall be due and payable, whether the moneys are made or not, and whether the party succeeds or fails.</p> <p>All disbursements to be added to the foregoing charges.</p> <p>The above rules shall be observed alike by attorneys, for both plaintiffs and defendants.</p> <p>When a payment is made to a client, after a claim is placed in the hands of an attorney for collection, the attorney shall be entitled to the same fees as if the payment had been made to himself.</p> <p>A compromise, without the consent of the attorney, for less than the full sum claimed, shall be considered and charged for the same as a payment for the full sum.</p>	
On all sums of \$300 or less, not less than	10 per cent		
On excess over \$300 and not exceeding \$500, not less than	8 per cent		
On excess over \$500 and not exceeding \$1000 not less than	5 per cent		
On excess over \$1000	2½ per cent		
PROBATE COURT.			
For obtaining letters testamentary not less than	\$10 00		
For obtaining letters of administration or guardianship,	5 00		
For conducting administration of estate,	10 00		
For obtaining sale of real estate,	20 00		

§ 1. That hereafter it shall be unlawful for Probate Judges or Justices of the Peace to write any petition or answer, or other pleadings in any proceedings, or perform any service as attorney or counsellor at law, in any case or cases pending before them, or to be interested in any amounts arising out of any practice in their own courts, except costs.—Gen. Stats., p. 257.

We, the undersigned attorneys, hereby agree and pledge ourselves to fully observe and comply with the foregoing rules in our practice, from and after this date.

Dated, July 17, 1872.

WM. BALDWIN, H. C. SLUSS, CHAS. A. STAFFORD, GEO. SALISBURY, CHARLES HATTON, J. M. BALDERSTON, MORSE & KIRKPATRICK, JAMES McCULLOUGH,	ALBERT EMERSON, J. M. ATWOOD, JAMES L. DYER, WM. C. LITTLE, R. B. JEWETT, WILLIAM H. ROARKE, W. PERKINS, S. M. TUCKER,
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B. H. FISHER.

WENTZ EARLE PRINT.

