INTERVIEW OF JUSTICE FRED SIX BY RICHARD ROSS AND DEANELL TACHA, 12-04-21
KANSAS ORAL HISTORY PROJECT, Inc.

Richard Ross: Today is December 4, 2021. I'm very excited to be here today in the home of retired Justice Fred Six in Lawrence, and the occasion is we are participating in an oral history project that is sponsored by the Kansas Historical Society with a grant from Humanities Kansas. The Honorable Deanell Tacha and I will be interviewing Justice Six. He's an icon in the judicial and legal community of Kansas. Assisting us today is our videographer, former Representative David Heinemann.

This will be the first of a series of interviews of retired justices and judges and court personnel in Kansas to examine the judicial branch in the last quarter of the 20th century and the first decades of the 21st century. Recordings and transcripts of these oral history interviews will be accessible to researchers, educators, and the general public at the Kansas Historical Society, the State Library of Kansas, and also online, if you go to https://ksoralhistory.org.

My name is Richard Ross. I served the state of Kansas for thirty-eight years as the Reporter of Decisions for the Kansas Supreme Court and Court of Appeals, and I was lucky and honored to have served in that capacity during the entire tenure of Justice Six when he was on the Appellate Courts. Justice Six, thank you very much for participating in this oral history project and giving us your perspective.

Fred Six: You're welcome.

RR: Judge Deanell Tacha has a very honored career of her own, and I'd like for you to tell that as you introduce yourself, and as you talk about how you got to know Justice Six and then continue with the interview that we're here for today.

Deanell Tacha: I will. Thank you, Richard, and thank you, Justice Six. I'm Deanell Reece Tacha, and I have had the privilege of serving on the United States Court of Appeals for the Tenth Circuit for twenty-five years representing the state of Kansas on that court. But before that, I was a very new law professor at the University of Kansas, and one of my favorite memories of that period was the day I first met Justice Six. I'm just really anxious to hear, Justice, if you remember. I had just been appointed to run the Legal Aid Clinic in Lawrence, and let's just say legal aid at the time, low income legal services, was not the most popular organization in town among the local bar and bench. So Jim Postma, a wonderful Lawrence lawyer, advised me that the first thing I should do was go around and meet all the lawyers in Lawrence and Douglas County actually, and the first person I went to see was Justice Fred Six, then a practicing lawyer in Lawrence. Do you remember that?

FS: I remember, you mentioned Jim Postma, coming by your house before sun-up and Jim, you, and I, you jumped in, and we drove to Wichita for a bar meeting, and that I think was an adhesive that bonded us. Here we were, two older gentlemen with this charming young faculty woman who was heading up Legal Aid. So during the automobile ride three-some hours, why we became acquainted and it went on from there.

DT: And it's important to say that Justice Six, along with Jim Postma, the two of them were very instrumental in weaving legal services into the legal community in Lawrence because at the time, there were lots of struggling lawyers, and they worried about whether it was competitive. But Justice Six and Jim Postma led the way.

Then over the years, we spent a lot of time doing Bar Association and various activities in Lawrence. So before Justice Six was ever a Justice, he was a pillar, or to use Richard's words, an icon, of the legal community. How did you decide you wanted to go on the bench? And you first went to the Court of Appeals. What was in that decision?

FS: Yes, that was in 1987. The legislature that year had created five new positions for the Court of Appeals. Originally there were only five appellate judges, but the legislature authorized five new, making ten. Our daughter had finished the University of Kansas, was employed, and our other child, a son, was winding up his college. My wife Lillian had just been hired by the dean of the law school as Director of Admissions, and I'd always enjoyed research. It seemed to me a time to change. The children were out of the nest, and Lillian was employed. So I thought, “Well, with five vacancies, the odds are enhanced,” and the governor was Governor Mike Hayden. I was fortunate to be appointed as one of the new five.

DT: That jump to public service was a jump that probably was inspired by some of your experiences with your parents and in your childhood. Could you talk a little about those experiences and who your parents were?

FS: My dad was the County Farm Agent here in Douglas County for thirty-six years. My mother was involved in civic activities of all types, during World War II, Bundles for Britain, on and on and on And then she started teaching because there was a shortage of teachers during World War II. And after she retired as a teacher, she ran for the school board and was elected. My dad had previously served on the school board. So there was a public interest there, and my mother took that assignment very thoroughly. I thought when I was on the court, on the Supreme Court, I thought of my mom. Now she was retired, but we had a case that involved the opportunity or right of an active teacher to serve on the school board. The Court ruled that that was not permissible.

DT: When you went to the Court of Appeals, what were the challenges of moving from private practice into the Court of Appeals, into the judicial world?

FS: Yes, that would be quite individualistic. For me, it was smooth, not because of anything I did, but I had such a wonderful law firm, Barber, Emerson, Six, Springer, and Zinn. Richard Barber, who was one of my mentors, it was just a smooth transition. They were proud of me. I had no difficulties at all. I was indeed through the many years thankful for those associations. John Emerson, my longtime partner, died last year. In the old firm, there are still a couple left, but was a smooth one. I commuted to Topeka but chose to stay in the office in Topeka rather than work out of my home.

DT: What attributes would you say, if you were going to speak to a young person about, “Oh, do you want to go to the judiciary?” what would you say the attributes of a good judge are?

FS: I'd first ask this young person what they're interested in. Why are they approaching me? Have they known a judge? Was there a member of their family that was on the bench? What is it that brings them to me?

I then would, if we moved beyond that point, say that I think that the qualities are compassion on one hand; patience; of course, independence; but an interest in writing; an interest in research; an interest in probing; an interest in following up a vein like a miner. You tap a vein and then just don't stop but continue to pursue it and find out what's really at the end of it. And those are the conversation guidelines that I would channel.

DT: Then you jumped quickly from the Court of Appeals to the Supreme Court. Talk about what motivated that.

FS: Yes, I had the opportunity as did all appellate judges federal and state to attend the University of Virginia in Charlottesville at their law school. They had a funded program for a master's degree in jurisprudence. It took two summers. You committed eight weeks for two summers. So a lot of judges couldn't do that. Class was limited to thirty. A new colleague on the Court of Appeals, a wonderful man, Robert Abbott who was a longtime Chief Judge of the Court of Appeals had attended that, and he mentioned it to all of us. And Judge Mary Beck Briscoe was on the Kansas Court of Appeals at the same time.

So we applied. And unbeknownst to either one of us, we both were accepted in the same class. So I was headed towards Charlottesville in 1988, and a position opened up. David Praeger, the Chief Justice of the Supreme Court, announced his retirement. So we attended our son's graduation at Carleton College in Minnesota. He said to me, “Dad, are you going for it?” I thought, “Well,” so I put my name in. But I was down in Charlottesville.

So Governor Hayden set up some interviews, and his staff was accommodating and waited for mine until I returned. I had an interview with the governor, and then he waited until the last minute and made the announcement. So I moved on to the Supreme Court of Kansas in September of 1988.

RR: Justice Six, I know that there's a lot of difference between the two courts, and I'd like to take the opportunity to review some of the interactions you had at the Supreme Court. But before we get started, I think a lot of people, even a lot of attorneys, have no idea how the court operates Could you give a brief introduction or synopsis of the process through the Supreme Court when an appeal gets accepted?

FS: Yes. That will I think vary, if you were to ask that same question to a sitting member of the court now. There may be a substantially different answer. My years, fourteen on the Supreme Court, '88 to 2003, we were through the growing pains of the IT revolution. We had no computers, no word processors. A class was set up for us, and two of us attended, Justice Don Allegrucci and myself, but the law clerks used yellow pads. Now law clerks start in kindergarten with cellphones and IT. So that made a substantial difference in processing opinions.

But once an appeal, there's certain statutory appeals that are mandatory, and then the Court can take cases by its discretion. Then the Court, the Supreme Court, can grant a petition for review to review an opinion of the Court of Appeals or deny that petition. And that's a large part of the Supreme Court's work. Every week we had a time to meet, and those were assigned to each one of us.

Now, when I started in 1988, we, the seven of us except for the Chief Justice, did our own petitions for review. Over time, a central staff was developed to make recommendations. We each had one law clerk, no central staff. The Chief Justice had one law clerk and an administrative assistant. Now I understand with computers the secretaries have been reduced. Members of the Court share a secretary, and they have two law clerks each. Of course, the law clerks are computer literate. So petitions for review evolved during that fourteen-year period.

The mandatory cases were in the criminal area, and a large part of the Supreme Court's work during my fourteen years dealt with criminal cases, leaving the development of civil jurisprudence in my opinion in large part to the Court of Appeals because there's so many cases, and it's so important that the client gets a resolution. So the Supreme Court with seven members couldn't possibly handle all of its criminal load, mandatory criminal load. We would take what we deemed to be the most significant civil cases, or if a different panel, two panels on the Court of Appeals had reached a different result, we would take that case to resolve it.

But the case, of course, begins with the plaintiff at the trial court level, a local level, and then moves up by appeal to the Court of Appeals or a direct appeal to the Supreme Court. And then, of course, there are original actions, mandamus, quo warranto, testing the right of government officials to do this or that or trying to enjoin a trial judge from dispatching So and So to Little Rock on an extradition or getting some immediate relief.

The Court has detailed rules. They're published. Now everything is online. The whole world of electronic filing was beyond my time in 2003. That will be your interview for some younger individual.

RR: So the cases have oral arguments.

FS: Yes. An oral argument can be granted. It's requested. There is what's called a summary docket of cases that are put without oral argument. That type of case is usually a repetitive criminal case that's already been resolved, but the public defender is appealing it because the

public defender or the appellate defender feels an obligation to exhaust all remedies for the defendant.

So oral argument is set by the Clerk of the Appellate Courts and the Chief Justice. That has evolved to some extent. We had terms of court running from September around through May, and we would meet in the Robing Room, take the bench, and the cases were assigned for writing, speaking for the Court.

RR: Before oral argument, you knew which case would be yours.

FS: That's something that I have found is misunderstood. People think if Justice McFarland, the longtime Chief Justice, wrote the opinion, McFarland, J., then that's her opinion when it's really the opinion of the Court, assuming four join to make a majority.

RR: Right.

FS: One of the things that came up, I was the first member of the Court of Appeals to be appointed to the Supreme Court, and since then there have been many. But we had a situation which the Supreme Court had granted a petition for review from the Court of Appeals. Now I didn't sit on that panel, but we felt I ought to recuse myself. So that only left six. Well, it was a 3-3 decision, which affirmed the lower court. And the attorney for the party who had appealed I think properly had a gripe. But from that point forward, whenever a member of the Court of Appeals would be on the Supreme Court, the Court would then assign a district judge so there would always be seven, and that problem was met.

RR: So you set precedent.

DT: Let's go to the substance of opinions a little bit. I know in the State Supreme Court and in all the federal courts, among the hardest things one has to do is balance some kind of a constitutional issue with the practical issues of personal liberties and things like that. How does a judge start thinking about how to balance the competing interests in a case?

FS: If you are a state Supreme Court justice, you of course look to the federal precedent on constitutional issues unless it's a Kansas constitutional question because the Kansas Supreme Court would be the final answer on a Kansas constitutional question. But the federal courts on constitutional issues, search and seizure was a common one. Deanell, you wrote an opinion for the 10th Circuit, I can't remember the name, but it was a search and seizure, maybe a car stop, somebody coming down from Marysville or somewhere. Of course, that would interpret the federal Constitution, 4th Amendment, 5th Amendment, 14th Amendment. So we would be bound to follow the federal constitutional issues as a result, as best as we could determine them.

RR: When you talk about we resolved such and so, you go into conference after the oral arguments?

FS: Yes, you know the cases you are responsible for, and during my tenure, argument would end Friday afternoon. Friday afternoons were a bit depressing because those were the discipline cases. We would hear discipline of attorneys who had been found by a panel to have violated a code of ethics for an attorney and appealed.

But after Friday afternoon, we would have preparation days, Monday and Tuesday, where we, the individual members, would prepare a presentation of our case. And on Wednesday at 9:00, we'd meet in the conference room and start with the junior member of the Court, going around, presenting the case. And then there'd be a preliminary vote taken and sometimes somebody would scratch their head and say, “Well, I'll see how you write it,” meaning “I want to read what you're going to say before I join in the opinion.” Or it may be a clear 7-0 or 6-2 or what have you.

Another I think unusual thing, when the vacancy was known and David Praeger retired, of course, the Court had to continue to prepare its caseload. So they didn't know who the new justice would be. The Chief Justice then, Robert Miller, picked the easiest case he thought and set it aside for whoever the new member of the court would be. That happened to be myself.

So we went into conference, and it turned out that that was a 4-3 decision the other way.

RR: Real easy.

FS: So I ended up I think writing a dissent. But you then conclude all of the preliminary conference, and you go back to your chambers and start writing your opinion. When you are ready to go, a flysheet is attached, and it starts circulating from one chamber to another, and the member of the Court reviewing it okays it or says, “I'll write a dissent.” If a dissent is indicated, if you know ahead of time, you immediately send it to the person who's going to write the dissent, and then the dissent is written, and the two are circulated together so that members of the Court can indicate which way they would join. Then those sheets are tallied, and sometimes it's reconferenced, reconferenced twice. Sometimes it's held over because it isn't prepared yet.

That, in my years looking back, I've been retired now about eighteen years, I've looked at opinions from time to time. I've cringed looking at my old opinions. There's so much verbosity. Opinions, in my opinion, are too long, were too long. You need to get the opinion out. You need to bring resolution to the party's conflict, and you don't need sixty pages to resolve an issue.

But then we had a hand-down day once everybody had cleared. The opinions were wheeled into the conference room. The announcements were to make sure everything was the way it ought to be in accordance with the wishes of the seven members, and then we called you,

Richard, your office, and you sent a representative down to pick the opinions up. The Reporter of Decisions was an invaluable resource to the Court because grammar was checked, citations were checked, and it was so helpful.

Richard's office would then sometimes conference with the individual member of the Court about this or that, and when the Reporter of Decisions had approved, why the opinion was ready to be published.

DT: You have already alluded to it's very hard to remember all the opinions that you've been involved with, and then when you look at them, you go, “Really? Did I do that?” As you reflect back on all the cases that you were involved in, do any come to the surface as most difficult or most challenging, either personally or professionally? And how do you deal with that?

FS: Yes, there were cases that I was not assigned to write which were difficult. For example, during my time on the Court, we were dealing with death penalty jurisprudence. Kansas adopted the death penalty in 1994 and has yet to really execute anyone. But the Gary Kleypas case was the first case that came up. That was the name of the defendant. The legislature had bifurcated death penalty jurisprudence. The first trial was the guilt or innocence. The second trial was the sentencing phase. The legislature had talked about aggravating and mitigating factors for the trial judge to weigh in determining the sentence, death, life, so forth.

The argument was advanced that that leaves an impasse because if they weigh equally, it disadvantages the defendant, that actually the mitigating circumstances ought to outweigh the aggravating circumstances. And then the appellate defendant had an able staff. With that case, they raised, I don't know, maybe forty different issues which we had to treat, and that was a per curiam opinion. Per curiam means “by the Court.” You don't know who actually authorized it, and maybe different members of the Court took different parts of it or worked together.

But that was around 2000 in time, and the opinion came down in around holiday time as I recall. So that was certainly—also we were dealing with the tension between the legislature and the medical malpractice field and caps on noneconomic damages. For pain and suffering, does the legislature have the right to put a cap on the amount of recovery? There was a different rule for wrongful death cases, and the term “quid pro quo” entered the jurisprudence. That was a manifestation of the tension in the state between the Kansas Trial Lawyers Association and the Kansas Medical Society and the legislature. So that opinion was one that was watched closely. The Court held that a quid pro quo existed, and a cap of $250,000 could be—now over time, that has gone on and changed.

To add a light touch, the most popular, if I were to ask you to guess the most popular case in terms of attendance, standing room only, people in the hallways, we needed monitors, marshals, was a case out of Wichita on who gets the engagement ring when the engagement is broken off. A young couple in Wichita, he had proposed, she had accepted, and he had

purchased an expensive ring, and the engagement was broken. She said, “I want to keep the ring.” He said, “No, you're not going to marry me. I want the ring back.”

The Court took that case and ruled that, yes, the donor gets the ring. There were two dissenters. I joined the majority. We trolled the entire U.S. State Supreme Courts on engagement rings, but I don't know if you remember that, Richard. The crowds were just, we never had—

RR: I do remember.

FS: We never had crowds in the courtroom. I mean, I looked up from the bench and clear out into the foyer near the elevators, there were people trying to get in. Also there were a number of cases that came on about 2002, the United States Supreme Court had announced a ruling in criminal cases called Apprendi, and Judge Tacha will remember that. It related to sentencing of a defendant, and whether or not a trial judge needed a jury finding to give the defendant full rights on a sentencing hearing, and the US Supreme Court had held that that would be the rule. We had floods of cases of defendants who had been sentenced under the old rule. So what were you to do about it? That was a factor that we dealt with.

The civil cases, of course, the field of oil and gas was important in Kansas, and there were lawyers who specialized in that area, particularly in the Wichita area, who would always be with those cases, and that was a challenge. One of the problems of being an appellate judge is you don't bring a bear-trap mind in every field of the law to the bench, and what do you do about it? You spend whatever time you need trying to read all of the scholars and trying to make sure you've resolved the issue the way logically it ought to be resolved.

DT: We're getting towards the end of our time, but if you were wanting to give advice or if you were asked to give advice to a young person coming into the profession, would you advise them to be judges? And if so, what should they think about?

FS: Again, I'd go back to why they've come to me. What made them think they might like to be on the bench? There are various opportunities—the magistrate level, the trial court level. There are administrative law judges, Workers Compensation judges. You resolve resolutions. Appellate judges set the precedent. So I would again go back to what their interests are. Do they like the trial arena? Do they like scholarship? What challenges them? And since Judges are appointed by and large on the federal bench, of course, by the president or at the state level by various methods. Kansas has what's called a Nonpartisan Court Plan, [a] committee submits three names to the governor, and the governor makes an appointment. There's always that element of someone in politics, an elected official, involve in appointing, elevating someone to the court.

After I retired, a year and a half or a couple of years, I got a call one Thursday night from Justice McFarland who was then the Chief Justice. She wanted to know if I could appear next Monday

before the Kansas Legislature to represent the Court, speak for the Court because the Senate House Judiciary Committee was considering legislation introduced by the then Attorney General to alter the Merit Selection Plan. I said yes, scratched my head, and the first thing I did was get a hold of one of my favorite judges, Judge Steve Leben who was on the Court of Appeals, [now retired], he's now a professor of law at UMKC Law School and say, “Have you got any material for me?” He's a phenomenal fellow.

So he emailed me some background, and I boned up over the weekend and appeared Monday, and that was ongoing from 2005 through 2011. I don't know if there's still a movement that way. That's a concern for me as a former member of the Court because having an independent judiciary, I didn't bat one eye. I didn't kiss one baby. I didn't take one dime. I just put my name in, and if I was appointed, fine. If I wasn't, fine. I didn't feel any—and on the bench, we had an amiable mix. We had initially two former state Senators, Justice Harold Herd and Justice Don Allegrucci, and we had a mix of party affiliation, and the camaraderie I think was something I respect and was glad I was a part of.

RR: You mentioned the word "precedent” a minute ago. That seems to be a word that's talked about a lot in the US Supreme Court right now. Can you explain how precedent during your tenure, what the Court believed or how often it applied, or how could you change precedent, how important that is.

FS: There's a presumption that the Court follows precedent. There's a presumption that a statute is constitutional. But if a court wants to declare a statute unconstitutional, where does the presumption go? That always puzzled me.

So precedent, you start the race. You're in front. But I remember reading about a scholar who tried to answer that question, saying that years ago, there was a path cut through the woods, and it was a winding, circuitous path, but everybody just followed it. It took twice as long to get wherever you wanted to go, but just because there was a path there, they went with that path. So one day came along when someone said, “Why are we taking this path?”

One case I recall, Kansas had a guest statute. If you were a guest in an automobile and there was negligence on the part of the driver, you had to show gross and wanton negligence. Well, that was the precedent for years, and eventually the Court, four members said no. Then during my time on the Court, there was a precedent for a host in a home. If you were a guest in a home and a new stairway had been put in and you went to the bathroom, looked for the bathroom and opened the door and fell down the stairs and wanted to sue the landlord, you had to prove gross and wanton negligence. But four members of the Court said, “No, that's not reasonable.” So the rule was changed. You just had to show ordinary negligence against the landlord. So it will take a wiser individual than myself to give a clear definition of when and why a court says, “Well, it's precedent,” and when the court says, struggling, “No, no, no, there's a human element there.” That's the best I can do with it.

DT: At the end of the day, when we begin to think back on these judicial careers, what are the greatest rewards for you and what were the challenges?

FS: My greatest takeaway during my time was the establishment in 1992 of the Lawyers Fund for Client Protection. That's what I'm proudest of. The president of the Kansas Bar at that time was John Tillotson, a lawyer from Leavenworth, a great guy. The executive director of the Kansas Bar Association was Ron Smith, now a lawyer out in Larned. And the American Bar in 1989 had adopted model rules. Now this fund is funded by lawyers. If a lawyer commits malpractice and has no malpractice insurance and the client is left bruised, out of money, embezzled, filched, a statute of limitations has run. There's a resource to go to.

So it was difficult because change is always difficult, and there was a lot of resistance to the Kansas court setting up this fund because it came out of the lawyers' annual registration fee. But Ron and John figured out a way to deposit the funds with the Department of Administration. The three of us were worried the legislature might sequester them, but that worked. It cleared with the legislature, and it's been a wonderful thing. I don't know how much money is in it now, but if you are bruised financially, a lawyer has a duty to represent you before the commission set up by the Court. The commission consists of two lay members, lawyer members, a judge or two, and they hear these appeals and grant them or deny them. Funds are paid to the client. I think that should have been in place long, long ago.

DT: We see lawyers all over the TV these days. What do you think the greatest challenges are now facing the legal profession, and certainly out of that, the judiciary?

FS: A challenge is to each lawyer to put his or her shoulder behind the wheel of legal services and public defenders. Legislatures are parsimonious about funding public defenders, and yet everyone has a constitutional right to counsel for felony cases. Let's just talk about those. And the American Bar has tried to lead that march, and the Bar has supported it, but providing adequate legal counsel is a challenge.

And then supporting the judiciary and the independence of the judiciary. If, for example, a trial judge rules in a community in an unpopular decision, if my view, the Bar ought to galvanize around that trial judge and say, “Hey, wait a minute, this is one opinion. Here's the background.” So the institution of the bench and bar I think needs to focus more on providing legal services, public defenders, and protecting the independence of the judiciary.

DT: Justice Six, thank you. This has been for me a personal privilege, and I'm sure Richard shares that.

RR: I totally agree.

FS: You're welcome.

DT: And on behalf of this state and the nation, thank you for all you have done. We rarely say thanks to our public servants, but it's something we probably ought to do more often, and you are a shining example. Thank you.

FS: Thank you.

RR: I said earlier that it was my pleasure to work with you and for you during the time you were in the Appellate Courts and exclamation points on that. You brought back so many memories for me. Your recall of all that information, that's what this project is about, that, and to educate people.

FS: Well, I wish you two well on your journey.

RR: Thank you very much.

FS: And Dave as well. All right.

DT: Thank you.

FS: Yes.

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