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Ryan Purcell, graphic designer, rpurcell@ksbar.org

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Change Brings Opportunity

by Chief Justice Marla Luckert, Kansas Supreme Court

Change is in the air at the Kansas Supreme Court. Chief Justice Lawton Nuss and Justice Lee Johnson recently retired, and two new justices will soon join the Court. The nearly simultaneous addition of two members to a court of seven is in itself major change.

The change does not stop there, however. On December 17, 2019, Chief Justice Nuss passed the gavel to me and I swore to discharge the duties of chief justice. In assuming the constitutional responsibility of efficiently administering Kansas courts, I have taken to heart the motivational speaker’s mantra: “Change brings opportunity.”

One opportunity arises simply because change provides the impetus to reflect on where we have been and where we are going. Meaningful reflection includes evaluating past practices, seeking input from stakeholders and examining data about performance. The Supreme Court will soon undertake these tasks and discuss possible changes in court practices to, among other things, improve disposition time for appeals. More broadly, we will evaluate courts statewide and many of our programs.

Reflection and evaluation also require consideration of challenges faced by the Kansas courts and our profession. Some challenges arise from the systemic social problems that bring people into court. Our courtrooms are flooded with dramatic stories of Kansas children, families and communities struggling to cope with the effect of mental illness, addiction, poverty, domestic violence, human trafficking and elder abuse. Nationwide, 64 percent of people in local jails suffer from mental illness, and the rate of serious mental illness among those jailed is four to six times higher than in the general population. The rate of substance use disorders is seven times higher among those in jail than in the general population.

The resulting challenges are immense. Judges find themselves in the vanguard of those coping with major societal issues. Plus, courts face multiple other challenges as social and technological changes alter the types and complexity of the questions litigants ask courts to resolve. Despite the scope of the challenges, we must adapt and respond. If we don’t, we will fail to meet our constitutional duty to provide justice.

Fortunately, we have made great strides under the leadership of Chief Justice Nuss toward addressing many of our challenges. The Supreme Court and the Office of Judicial Administration will continue to execute ongoing initiatives, including:

- Modernization of judicial branch technology as we execute the rollout of the Odyssey case management system and unveil a Kansas judicial branch website.
- Implementation of Workshare, where court employees in one county use Odyssey to assist remotely with the workload of another county.
- Implementation of updated accounting practices and controls in all courts, the provision of more rigorous training on accounting procedures, and the establishment of a centralized payment processing center.
- Continuation of the Pretrial Justice Task Force and the Task Force on Attorney Well-Being.
- Continuation of the Supreme Court on the Road program, which involves the Court traveling to communities around the state, holding oral arguments, speaking in schools, and meeting with community members.
- Continuation of case- and work-load studies for court services officers, clerks, and judges.
- Implementation of administrative restructuring by moving some of the Supreme Court’s boards and commissions into the Office of Judicial Administration. This restructuring includes several attorney services functions, such as registration and continuing legal education. We will realize significant and lasting internal resource efficiencies by eliminating duplicative administrative efforts and saving some fa-
cility expenses. And those managing these programs will be able to devote more time to the program and less time on administration.

In addition, we must—and will—strengthen efforts to remove barriers that limit access to Kansas courts. I recently heard a speaker refer to science fiction writer William Gibson’s comment that “[t]he future is already here—it’s just not evenly distributed.” It struck me that the same could be said of justice: Justice is already here—it’s just not evenly distributed. We must find ways to better help unrepresented persons, those with disabilities, and persons with limited English proficiency navigate the court process. We must also guard against erecting barriers by overburdening indigent court users with fines and fees that prevent access to needed court services.

The ongoing work of the Access to Justice Committee and the Language Access Committee will be key to these efforts. The Supreme Court intends to encourage and support the development of self-represented litigant assistance centers. We will continually review court rules and procedures to ensure they do not create barriers by unnecessarily increasing the costs of litigation, causing needless delays, or otherwise burdening the resolution of disputes.

We will also work to encourage and support the development of specialty and problem-solving courts. Specialty courts focus on a specific type of litigation and follow practices allowing more efficient case processing. Problem-solving courts include veterans treatment, mental health, drug, DUI sobriety, and truancy courts. Criminal and juvenile offender problem-solving courts generally focus on providing treatment and intense supervision to low-risk offenders as an alternative to incarceration.

Data from our sister states document that problem-solving courts following evidence-based practices have had great success in reducing recidivism. Individuals in those programs are generally low risk offenders with addiction or mental health issues. Typically, for those individuals, incarceration undermines mental health or other treatment outcomes, causing needless supervision to low-risk offenders as an alternative to incarceration.

Kansas has problem-solving courts developed through local and grant funding in 15 judicial districts. We need to capture data from those courts in a systematic fashion in order to build support for statewide resources to support these and other courts. We also need to strengthen training on evidence-based practices and their importance, help those districts hoping to develop a problem-solving or specialty court, and study ways to use telecommunications in those court programs. The Johnson County veterans’ court reports successful results with telehealth therapy. This success provides hope that we can establish problem-solving courts in all areas of the state, including those without veterans’ centers or other adequate therapy resources.

Many of the underlying societal issues that bring people to those courts and other courtrooms are issues also encountered by local and state executive agencies. Some fall within areas being studied by the legislature. When this is true, we need to work with those agencies and the legislature to find solutions. I will do all in my power to promote and enhance constructive relations between the judicial branch and the other branches of our state government. I welcome every opportunity for conversation with members of the Kansas Legislature and with Governor Kelly, and have already enjoyed many such conversations over the past few weeks.

Finally, I will close with the judicial branch’s most important and long-standing challenge—obtaining salary increases for our employees and judges. In last year’s legislative session, the judicial branch received a 2.5 percent across-the-board increase. While greatly appreciated, this increase did not make up for years without raises. An employee compensation study performed by the National Center for State Courts has been updated to reflect the increase in the consumer price index during fiscal year 2019. Those updated numbers show that pay for our employees is anywhere from 1.7 to 17.9 percent below market, depending on job category. We are asking the Legislature to allocate $9.9 million for fiscal year 2021 to increase all employee salaries to market rate.

As for district judge salaries, the 2.5 percent increase allocated last session moved Kansas’ district court judges’ actual pay from dead last in the country to 49th out of the 50 states. We have asked the Legislature to raise a district court judge’s salary to the average salary of our four neighboring states as adjusted for cost of living. We are also seeking to increase the pay of appellate jurists and magistrates by the same percentage.

The judges and employees of the judicial branch greatly appreciate the support of the Kansas Bar Association and its members in our legislative efforts. Pay increases are essential to our ability to recruit and retain qualified individuals and to provide our employees a fair wage for the work they do for the people of Kansas.

I look forward to working with all of you as we seek to improve our profession and the system of justice the people created in their Constitution.
As I write this article, I am wrapping up my first full year as Executive Director of the Kansas Bar Association. In my first Journal article I told you that I was grateful for the opportunity to serve the members of the KBA and excited to embark on a new adventure together. It has definitely been an exciting adventure and we’re just getting started! I remain grateful for the opportunity and will also add “proud”, proud to serve as your Executive Director and proud of our collective accomplishments in 2019.

This year, with the active involvement of our members, we engaged in ever stronger and more influential advocacy on critical challenges facing the legal community. We weighed in on a number of important issues at the state level and continued to educate policymakers about the legal profession, which remains strong, growing and vitally important in the execution of justice.

We have conducted research and analysis to document industry trends and the collective challenges we face. We have implemented and expanded programs and resources to help you meet those challenges, successfully manage and grow your firms and build collegial relationships with peers.

In 2019, more than 7,000 members chose to partner with the KBA as the largest bar association in the state. Now more than ever, it is crucial that the legal profession actively support our efforts, to ensure that your views on significant issues are heard and carry maximum weight.

The KBA was founded in 1882 to uphold the Constitutions of the United States and the State of Kansas; to advance the professionalism and legal skills of lawyers, promote the interests of the legal profession, provide services to its members, advocate positions on law-related issues, encourage public understanding of the law and promote the effective administration of our system of justice. These principles are as important, and relevant, as ever. The KBA exists to promote and defend these principles and to advance the success and contributions of the legal community.

In 2020, we will continue to look for ways to expand and enhance our CLE offerings, re-engage committees, invigorate sections and working groups and collaborate with local bar associations. Your continued participation in KBA sections will help provide more robust data for members to understand the current state of the profession and opportunities for growth in the future.

In an effort to update our approach to communications and messaging we will work to enhance platforms, including our website, social media and KBA collateral materials. A priority for outreach in 2020 is to conduct focus groups and surveys among targeted stakeholder groups that will allow us to assess the KBA’s brand awareness and help articulate the KBA’s narrative, guiding messaging initiatives as they gain momentum in 2020 and beyond. This will feed a comprehensive communication strategy and framework that we will begin to implement and roll out moving forward.

We will launch our inaugural KBA Bar Leadership Institute in April. The program will bring emerging leaders in the legal community together to raise the level of awareness regarding a broad range of issues facing the practice of law and to equip participants with the vision, knowledge and skills necessary to serve as leaders of the profession and ambassadors for their communities.

Mark your calendar for June 11-12 in Wichita. With a strong, thought-provoking speaker line-up supported by the right mix of legal leaders, the KBA Annual meeting is poised to be a must-attend event.

Our path forward looks bright as we work diligently to represent the profession through advocacy, to create community with enhanced social and networking opportunities and to support members through high-quality professional development.

We appreciate your continued participation in the Kansas Bar Association, and we look forward to working with all of you in 2020 to strengthen an already trusted voice in policy arenas and to provide enhanced services and resources of ever greater value to our members. As always, we welcome your suggestions and feedback.
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Spotlight the BEST & BRIGHTEST attorneys you know with a 2020 KBA Awards Nomination

- Phil Lewis Medal of Distinction
- Distinguished Service
- Professionalism
- Pillars of the Community
- Christel Marquardt Trailblazer Award
- Distinguished Government Service
- Courageous Attorney
- Outstanding Young Lawyer
- Diversity
- Outstanding Service
- Pro Bono

Learn more about the awards online at www.ksbar.org/awards
2020 Awards of the KBA

The KBA Awards Committee is seeking nominations for award recipients for the 2020 KBA Awards. These awards will be presented in June at the KBA Annual Meeting in Wichita. Below is an explanation of each award and a nomination form for completion. The Awards Committee, chaired by Sara Beezley, of Girard, appreciates your help in bringing worthy nominees from throughout the state of Kansas to the committee’s attention!

Deadline for nominations is Friday, March 6.

Phil Lewis Medal of Distinction

The KBA's Phil Lewis Medal of Distinction is reserved for individuals or organizations in Kansas who have performed outstanding and conspicuous service at the state, national, or international level in administration of justice, science, the arts, government, philosophy, law, or any other field offering relief or enrichment to others.

- A recipient need not be a member of the legal profession or related to it, but the recipient's service may include responsibility and honor within the legal profession;
- This award is only given in those years when it is determined that there is a worthy recipient.

Distinguished Service Award

This award recognizes an individual for continuous long-standing service on behalf of the legal profession or the public, rather than the successful accomplishment of a single task or service.

- The recipient must be a lawyer and must have made a significant contribution to the altruistic goals of the legal profession or the public;
- Only one Distinguished Service Award may be given in any one year. However, the award is given only in those years when it is determined that there is a worthy recipient.

Professionalism Award

This award recognizes an individual who has practiced law for 10 or more years who, by his or her conduct, honesty, integrity, and courtesy, best exemplifies, represents, and encourages other lawyers to follow the highest standards of the legal profession.

Pillars of the Community Award

This award is available to a Kansas lawyer and KBA member with a minimum of 10 years active non-specialized, general legal practice in a predominately low-density population area of Kansas. Recipients will have had substantial practice in small or solo law firms or local government service. Requirements are flexible but consideration will be given to the following factors, including how such factors apply to the lawyer’s community:

- the variety/diversity of law practiced
- impact/high profile law work
- general contributions to the law and legal profession
- specific contributions to the legal profession
- mentoring and support for legal education
- contributions to the State/community
- notable civic activities
- periods of elected or appointed public/government service
- military service
- examples of volunteerism and charitable activity
- reputation in the organized bar, State and community

This award may be but need not be given every year. More than one recipient can receive the award in a one year.
**Christel Marquardt Trailblazer Award**

This award is named in honor of Hon. Christel Marquardt, the first woman to serve as President of the Kansas Bar Association, by recognizing exceptional KBA members who break new ground, shatter glass ceilings, or pave new paths for others to follow. The award is bestowed upon a member who has made innovative contributions to improve the legal profession or our communities, exhibiting courage, leadership, professional excellence, and service to the profession in a manner that makes a substantial and positive impact on all those who follow in his or her footsteps. The award will be given to a KBA member who demonstrates qualities Judge Marquardt has exemplified, such as:

- Service to the Bar or to the legal profession generally;
- Courage in challenging societal, institutional, or historical barriers;
- Innovation and carving a path for future lawyers through mentorship, hard work, and compassion;
- Leadership by word and example.

The Trailblazer Award will be given in years where there is a worthy recipient.

**Distinguished Government Service Award**

This award recognizes a Kansas lawyer who has demonstrated an extraordinary commitment to government service. The recipient shall be a Kansas lawyer, preferably a member of the KBA, who has demonstrated accomplishments above and beyond those expected from persons engaged in similar government service. The award shall be given only in those years when it is determined that there is a recipient worthy of such award.

**Courageous Attorney Award**

The KBA created a new award in 2000 to recognize a lawyer who has displayed exceptional courage in the face of adversity, thus bringing credit to the legal profession. Examples of recipients of this type of award in other jurisdictions include a small town lawyer who defended a politically unpopular defendant and lost most of his livelihood for the next 20 years, an African-American criminal defense attorney who defended two members of the white supremacist movement, and a small town judge who lost his position because he refused the town council’s request to meet monetary quotas on traffic offenses. This award will be given only in those years when it is determined that there is a worthy recipient.

**Outstanding Young Lawyer**

This award recognizes the efforts of a KBA Young Lawyers Section member who has rendered meritorious service to the legal profession, the community, or the KBA.

**Diversity Award**

This award recognizes an individual who has shown a continued commitment to diversity; or a law firm; corporation; governmental agency, department, or body; law-related organization; or other organization that has significantly advanced diversity by its conduct, as well as by the development and implementation of diversity policies and strategic plans, which include the following criteria:

- A consistent pattern of the recruitment and hiring of diverse attorneys;
- The promotion of diverse attorneys;
- The existence of overall diversity in the workplace;
- Cultivating a friendly climate within a law firm or organization toward diverse attorneys and others;
- Involvement of diverse members in the planning and setting of policy for diversity;
- Commitment to mentoring diverse attorneys, and;
- Consideration and adoption of plans to continue to improve diversity within the law firm or organization, whereas;
- Diversity shall be defined as differences of gender, skin color, religion, human perspective, as well as disablment.

The award will be given only in those years when it is determined there is a worthy recipient.
**Outstanding Service Award(s)**

These awards are given for the purpose of recognizing lawyers and judges for service to the legal profession and/or the KBA and for recognizing nonlawyers for especially meritorious deeds or service that significantly advance the administration of justice or the goals of the legal profession and/or the KBA.

- No more than six Outstanding Service Awards may be given in any one year.
- Recipients may be lawyers, law firms, judges, nonlawyers, groups of individuals, or organizations.

Outstanding Service Awards may recognize:

- Law-related projects involving significant contributions of time;
- Committee or section work for the KBA substantially exceeding that normally expected of a committee or section member;
- Work by a public official that significantly advances the goals of the legal profession or the KBA; and/or
- Service to the legal profession and the KBA over an extended period of time.

**Pro Bono Award(s)**

This award recognizes a lawyer or law firm for the delivery of direct legal services, free of charge, to the poor or, in appropriate instances, to charitable organizations whose primary purpose is to provide other services to the poor.

- No more than three Pro Bono Awards may be given in any one year.

In addition to the Pro Bono Award, the KBA awards a number of Pro Bono Certificates of Appreciation to lawyers who meet the following criteria:

- Lawyers who are not employed full time by an organization that has as its primary purpose the provision of free legal services to the poor;
- Lawyers who, with no expectation of receiving a fee, have provided direct delivery of legal services in civil or criminal matters to a client or client group that does not have the resources to employ compensated counsel;
- Lawyers who have made a voluntary contribution of a significant portion of time to providing legal services to the poor without charge; and/or
- Lawyers whose voluntary contributions have resulted in increased access to legal services on the part of low and moderate income persons.
KBA Awards Nomination Form

Nominee’s Name _______________________________________________________________

Please provide a detailed explanation below of why you have nominated this individual for a KBA Award. Attach additional information as needed.

☐ Phil Lewis Medal of Distinction  ☐ Courageous Attorney Award
☐ Distinguished Service Award  ☐ Outstanding Young Lawyer
☐ Professionalism Award  ☐ Diversity Award
☐ Pillars of the Community Award  ☐ Outstanding Service Award
☐ Christel Marquardt Trailblazer Award  ☐ Pro Bono Award/Certificates
☐ Distinguished Government Service Award

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Nominator’s Name _______________________________________________________________
Address ________________________________________________________________________
Phone _______________________________ E-mail ______________________________________

Return Nomination Form by Friday, March 6, 2020, to:

KBA Awards Committee
Attn: Deana Mead
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Topeka, KS 66612-1806
Help Us Meet the Challenge!
KBA YLS is on a mission to raise $2,500 for the
2020 Mock Trial Competition

The KBA YLS Mock Trial Competition is only weeks away. Funding for this program includes a $1,000 gift from the Shook, Hardy & Bacon, L.L.P. Mock Trial endowed fund and $2,500 from an IOLTA grant. If the KBA YLS can raise another $2,500 in sponsorships, the KBF Board of Trustees will entertain a request for another $2,500.

To Sponsor, please go to: https://www.ksbar.org/donations/ OR
Contact: Anne Woods, KBA Public Services Director at: awoods@ksbar.org

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• Paola A. Stange is on the list of Rising Stars for Family Law in 2019 by Missouri & Kansas Super Lawyers Magazine.
• Jillian A. Wood is on the list of Rising Stars for Family Law in 2019 by Missouri & Kansas Super Lawyers Magazine.

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Getting to know....

Marla Luckert
Chief Justice of the Kansas Supreme Court

Ed. Note: We thought it might be fun to get to know the new Chief Justice just a little bit better, so we asked her some odd and interesting questions that definitely allow you to see a little more of the individual. We appreciate her gracious responses to our inquiries. Enjoy....

Will you please provide a thumbnail sketch of your childhood? (Where were you born...your family...what did your mother/father do...where do you fall in birth order with siblings...where were you raised...etc.)

I was born in Goodland, but my parents took me home to a farm located between Edson and Brewster. When I was about 7, my parents moved our family, which included my older sister and younger brother, into Goodland. After that, my father worked for the state highway department, and my mother was a department manager for a grocery store.

In what extracurricular activities did you participate in high school/college? What schools did you attend?

The beauty of small town schools is that you are encouraged to do everything—sports, music, debate, student government, publications, and clubs; I did all of those while attending Goodland High School. My favorite activities included debate and band. For college, I attended Washburn University. There, I was involved in debate and student government, serving as student body president my senior year.

Did you have a favorite childhood pet? Do you currently have a pet or pets?

As children, my siblings and I always had at least one dog—and sometimes as many as three. We also had turtles, guinea pigs, fish, hamsters and rabbits. My husband and children also love animals. My children had dogs and, at times, birds, guinea pigs, hamsters, fish and many hermit crabs. Certainly, dogs have been a beloved constant throughout my life. Sadly, just a few weeks ago, we lost our 15-year-old English Labrador, Lucy. So we are currently a pet-free home.
What music did you enjoy in high school/college? What and who do you listen to now?

In high school and college, I listened to what we now think of as classic rock and the folk music of performers like Gordon Lightfoot, Jim Croce, and Simon and Garfunkel. I still do. I also enjoy classical, jazz, and show tunes.

What is the last book you read and did it affect you in any way?

I’ve just finished *The Tyranny of Public Discourse: Abraham Lincoln’s Six-Element Antidote for Meaningful and Persuasive Writing* by David Hirsch and Dan Van Haften. Using the compositions of Lincoln and Thomas Jefferson, the authors explain a six-element proposition—labeled as “a verbal form of the scientific method”—that “light the path to reasoned persuasion.” I’m sure I will consider the six elements as I write, and I will try to incorporate the concepts.

How do you deal with the stress/pressures of your job? What is your favorite leisure activity?

My favorite leisure activity is spending time with my family, and playing with my grandchildren is the best way to unwind.

At what point in your life did you first hear your calling to the law? Did you ever consider another career path?

Like most children, I frequently changed my mind about what I wanted to be when I grew up. That was until about fifth grade when I read *To Kill a Mockingbird*. After that, I never considered anything other than the law.

If you had a month to travel anywhere in the world with unlimited funds, where would you go and why?

I would travel to New Zealand and Australia. When I was a child, I had a pen pal in New Zealand. Since then, I have wanted to visit, but I have not yet made it to that part of the world.

2017 - Justice Marla Luckert being sworn in by then-Chief Justice Lawton Nuss.
The Kansas State High School Mock Trial competition is one of the largest programs run by the Young Lawyers Section. We host a regional competition in Johnson County and Sedgwick County, and host a state competition including the three top-scoring teams in each region in Shawnee County. Hundreds of high school students compete. Dozens of lawyers and judges from across the state volunteer as mentors, coaches and mock trial judges. The program builds awareness for the civil and criminal trial process and provides a platform for students to showcase public speaking, critical thinking and organizational skills. Not a single round goes by that a mock judge fails to proclaim “you've done better than some lawyers!”

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 (yes, they really memorize the rules of evidence!), 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.

John Steere, current teacher at The Independent School in Sedgwick County, KU Law grad, and former practicing at-
Mitch Biebighauser is an Assistant Federal Defender for the District of Kansas in Wichita, where he practices criminal defense of indigent individuals charged with crimes by the federal government. He was previously in private practice at Bath & Edmonds, P.A., in Overland Park, where he practiced local, state, and federal criminal defense.

mitch_biebighauser@fd.org

About the Author

Attorney, has coached the school’s mock trial team for longer than I have been a member of the KBA. He believes that nothing is more rewarding for a teacher than to see students reach goals they didn’t believe were attainable. The KBA YLS Mock Trial program makes that possible. His students have traveled to national tournaments on more than one occasion. Coach Steere explained that even though they had to work very hard outside of class to get ready and the competition was very intense, the students remember it as the highlight of their year. Coach Steere’s team captains have marked it as the highlight of their high school career.

Steere explains the tremendous benefits to his students:

Through mock trial, students become 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.

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.

Each year we recruit members of the KBA to volunteer a couple hours of their time to invest in the students who pour so much effort into presenting their case. Because of our volunteers, 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. After each round, students welcome feedback on their presentation and professionalism. Volunteers who participate over the course of the day report seeing their feedback adopted by students in later rounds. We hope that you will consider volunteering to impart your valuable perspective on the lessons that can be learned from the legal profession to young advocates of all stripes that compete in the Kansas High School Mock Trail Program. I encourage everyone to respond to this year’s call for judges over the next couple of months before our regional competitions kick off in February.

To volunteer, visit: https://www.ksbar.org/mocktrialjudges

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Kansas Bar Foundation awards $382,500 to eleven organizations

by Susan Saidian

The Kansas Bar Foundation (KBF) recently provided checks to the recipients of 2020 IOLTA grants. In September, the IOLTA Committee selected eleven organizations to recommend to the Board of Trustees. After some discussion at their October 3rd Board meeting, the Board approved the slate presented by the IOLTA Committee.

Funding for IOLTA comes from the Interest on Lawyer Trusts Accounts program. The program is a partnership with Kansas bankers and lawyers that started in 1984 and provides interest from attorney trust accounts to be used to fund charitable purposes. The Kansas IOLTA program has generated over $4 million for nonprofit organizations over the last 35 years.

IOLTA Grants

Kansas Legal Services $40,000
To provide civil legal services through advice and representation to victims of domestic violence, sexual assault, and crime victims throughout the state. www.kansaslegalservices.org

Kansas CASA $15,000
To increase their ability to advocate for children by increasing the number of trained volunteers and increasing the supervision of volunteers in the state. www.kansascasa.org

Kansas Coalition Against Sexual and Domestic Violence $13,000
To adopt the SAFeR method (developed by the Battered Women’s Justice Project) to conform with Kansas laws and then distribute the new information to family law practitioners. www.kcsdv.org

“Money...is like manure. It isn’t good for anything unless it is spread around, encouraging things to grow.”

Dolly Levi, The Matchmaker
Catholic Charities of Northern Kansas $10,000
To advance the agency’s mission to empower eligible permanent residents to naturalize by covering Naturalization Workshops in rural communities like Russell, WaKeeney, and Norton. Workshops provide a place where permanent residents can learn about citizenship, test their knowledge of English and civics, and use the Freedom of Information Act (FOIA) process to obtain their prior immigration documents.
www.ccnks.org

National Institute for Trial Advocacy $10,000
To provide a public services advocacy skills training program at no charge for public service attorneys in Kansas. The learning-by-doing program provides a setting for attorneys to develop trial advocacy skills.
www.nita.org

El Centro $5,000
To serve low-income immigrants during a critical time. The funding will be used for the Immigrant Assistance Clinic that provides legal resources and services in the Topeka and surrounding areas.
www.elcentrotopeka.org

KBA Law Related Education Committee $3,500
To provide Law Wise, a free, electronic resource for educators that provides lesson plans and information about civics, history, government, and the law.
www.ksbar.org/LawWise

Wichita Family Crisis Center $3,000
To increase access to the Civil Legal Assistance Program for survivors of domestic violence in South Central Kansas.
www.wichitafamilycrisiscenter.org

Safehome $3,000
To assist in providing information and advocacy for victims of domestic violence in the Johnson County area.

Kansas Bar Association Young Lawyer Section Mock Trial Program $2,500
To host regional and state mock trial competitions for Kansas high school students.

Kansas Institute for Peace and Conflict Resolution $2,500
In support of the KIPCOR Triage Program that provides dispute resolution services to divorcing/separating parents in Harvey and McPherson counties.

Community Redevelopment and Homeowners Assistance Grants
The Community Redevelopment and Homeowners Assistance Grant Review Committee selected four projects with Kansas Legal Services to recommend for funding by the Board of Trustees. In 2015, the Kansas Bar Foundation received $3,273,938.50 from a national settlement to be used for the sole purpose of providing funding to legal aid organizations in the State of Kansas. The focus is to provide legal services for foreclosure prevention and legal services for community redevelopment. The Board of Trustees approved the following CRHA grants for Kansas Legal Services:

$200,000
To fund direct legal assistance to the public for services involving legal assistance in foreclosure prevention and outreach/education for the public in housing stability issues that include foreclosure prevention, loan modification and working with lenders to implement reasonable payment plans. KLS will also provide assistance in the expungement process to persons facing barriers to stable housing and safe neighborhoods.

$75,000
To partner with the Johnson County Bar Association and legal services organizations in Pratt, Saline, and Ottawa counties to provide direct legal assistance to residents facing serious and persistent legal barriers to employment and homeownership. This includes services such as expungement and sealing of criminal records, driver’s license issues, occupational licensing issues, identity theft, credit repair, child support arrearages, and wage theft.

www.kansaslegalservices.org

About the Author
Susan Saidian attended Millsaps College and Washburn University, obtaining her bachelor’s degree in 1982. She graduated from Washburn University School of Law in 1988. She spent most of her years in private practice in the area of bankruptcy, working for both consumer and business debtors and creditors. Although she found all areas rewarding, she particularly enjoyed her work for consumer debtors. She is a member of the American Bar Association, Kansas Bar Association, Wichita Bar Association, Kansas Women Attorneys Association, and has served on the board of CASA of Sedgwick County. She has also served on the Kansas Bar Foundation’s IOLTA Committee. She is now in-house counsel at Line Medical, and lives in Wichita with her husband, David.
sgsaidian@gmail.com
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January 16, 2020 - Law Practice Management Webinar
February 7, 2020 - Appellate Section Webinar Series
March 13, 2020 - Appellate Section Webinar Series
April 3, 2020 - Bankruptcy CLE (Live and Webinar)
April 9, 2020 - Appellate Section Webinar Series

Live
January 21-22, 2020 - 20th Annual Slam Dunk CLE, Lawrence
March 6, 2020 - Oil Gas & Mineral CLE, Hays
April 3, 2020 - Bankruptcy CLE, Topeka (Live and Webinar)
April 17, 2020 - Solo and Small Firm Conference, Salina
April 24, 2020 - Family Law Conference, Lawrence

 SAVE THE DATE

Friday • April 17, 2020
Tony’s Convention Center
Salina, KS

SOLO & SMALL FIRM CONFERENCE

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2020

FAMILY LAW CLE

Friday • April 24, 2020
DoubleTree
Lawrence, KS
Help us grow Kay’s Garden

by Fawn Moser

As the late Kansas Supreme Court Chief Justice Kay E. McFarland entered her twilight years, she spent considerable time determining how she would leave her estate. She was inspired by the notion of a tranquil serene garden with a koi pond and a bridge. When she passed, her dream and legacy gift of a world-class Japanese garden in Topeka, Kansas, was put into motion.

Toward that vision, Chief Justice McFarland generously gifted the zoo with $4.4M of the $6.6M project, and established a permanent endowment fund to maintain the garden in perpetuity. The Friends of the Topeka Zoo is committed to raising the remaining $2.25 million to finalize construction.

Traditional Japanese gardens are formed based upon four elements: rocks, water, plants and ornaments. Each item in the garden is thoughtfully set in place to create a sense of peace, and of blending the elements into a holistic meadow. Japanese Garden Master Koji Morimoto is integral to the design and installation of the 2.5-acre garden currently under construction at the Topeka Zoo.

Inside this remarkable garden will be a Gallery & Event Venue located on its northwest edge. The event venue will house a gallery that will explain the Japanese garden concept through comparisons of Kansas landscapes. Combined with inspirational quotes, these comparisons will offer inspiration to one’s soul. The gallery will also feature recognition of the combined project’s donors including the lead gift from Chief Justice McFarland. The event venue will accommodate groups up to 320 people seated at round tables. It will support functions such as weddings, meetings and reunions. The event venue will also be a place to feature exhibits of art and collections. It will support performances of dance and theatre.

While the project is under construction, the remaining funding to complete the project is being raised. You can help grow this amazing garden. If you would like to arrange a meeting to learn more, call 785.506.3797 to set up a time to meet with Zoo Director Brendan Wiley. You can also visit the zoo’s website and join others in making a difference at http://topekazoo.org/kaysgarden/. Law firms, individuals and legal associations’ gifts that are over $1,000 will receive permanent recognition inside Kay’s Gallery.

Fawn Moser has spent her professional career of more than thirty years working at the Topeka Zoo and Conservation Center. Fawn had the privilege of working with Chief Justice McFarland on the concepts and benchmarking for the Garden project. Among other duties, Fawn is the Zoo’s Project Manager for Kay’s Garden.

fmoser@topeka.org
Help Us Grow | Donate to Kay’s Garden Venue

Donations can be made securely online at www.topekazoo.org/kaysgarden or by completing the following information.

To support the plans and needs of Kay’s Garden Venue, I/we hereby pledge a total of $_______ to the campaign. I/we wish to make payments as follows:

Printed Name: __________________________________________

Monthly payments of $___________ Beginning _____ / _____

Quarterly payments of $___________ Beginning _____ / _____

Annual payments of $___________ Beginning _____ / _____

☐ I would like more information regarding how a planned giving or estate gift can help Kay’s Garden Venue.

I/we wish to make a one-time gift at this time in the amount of:

$___________

☐ Check enclosed. Please make payments to FOTZ (Friends of the Topeka Zoo)

☐ Charge my ☐ Visa ☐ MasterCard ☐ Discover

Card Number __________________________________________

Exp. _____ V Code_____ Signature _________________________

Please print your name (s) exactly as you wish to be acknowledged:

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Address

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Phone Email

Naming Opportunity Requested _____________________________

(Please contact Brendan Wiley at (785)506-3797 or bwiley@topeka.org for naming opportunities and amounts)

THANK YOU

for supporting the Kay’s Garden Venue campaign.

Your gift is tax deductible to the full extent allowed by law. Please consult your personal tax advisor for guidance on deductibility of charitable gifts.
Where Does the Money Go?

Our designated charities for 2020 are:
• CASA (Johnson/Wyandotte Counties)
• Safehome and Hope House (domestic violence programs)
• Metropolitan Organization to Counter Sexual Assault (MOCSA)
• Kansas Bar Foundation
• FosterAdopt Connect
• In addition, we will fund Ethics for Good scholarships to each of the KU, Washburn and UMKC law schools and the Johnson County Community College paralegal program.

How Do We Sign Up for this Amazing, Funny and Informative Program?

For a mere $90, you get both the ethics and the good, the entire Ethics for Good – now in its 21st year!

To register for this program, complete the form below or register online at: www.ksbar.org/EthicsforGood

Who Are these Intrepid Presenters?

Stan Davis, Ethics for Good Elder Statesman
Jim Griffin, Scharnhorst Ast Kennard Griffin, P.C.
Mark Hinderks, Stinson LLP
Todd LaSala, Stinson LLP
Hon. Steve Leben, Kansas Court of Appeals
Jacy Hurst, Kutak Rock LLP
Todd Ruskamp, Shook, Hardy & Bacon L.L.P.
Hon. Melissa Standridge, Kansas Court of Appeals

Wednesday, June 24, 2020, 2:30 – 4:10 p.m.*
Polsky Theatre, JCCC Carlsen Center
12345 College Blvd. (College & Quivira)
Overland Park, Kan.
*Reception afterward sponsored by the JCCC Foundation

Friday, June 26, 2020, 2:30 – 4:10 p.m.
The Nelson-Atkins Museum of Art, Atkins Auditorium
4525 Oak St.
Kansas City, Mo.

Parking: $10 museum non-member parking fee; carpooling encouraged

Contact Deana Mead, KBA Associate Executive Director at:
dmead@ksbar.org* (Email) • 785-861-8839 (D) • 785-234-3813 (F) *

Send checks / credit card info* to:
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1200 SW Harrison St.
Topeka, KS 66612

*The Kansas Bar Foundation does not accept credit card information via email or fax. You may submit your form via email or fax without credit card information and then contact Deana Mead at 785-861-8839 to provide your credit card info.
Different dates hold different meanings for everyone. I earned my Juris Doctor degree in December 2007 from Washburn Law, and I felt stable, accomplished and firmly rooted. However, there were other world events occurring simultaneously, and December 2007 marked the beginning of the Great Recession, which would last until 2009. This recession affected countless people’s livelihoods, housing, jobs, and investments. Unfortunately, very few people went unaffected by the Great Recession. My initial feelings of being firmly rooted began to loosen as I, too, experienced a difficult job market. Although times were tough, I had a safety net. The reality is there are people who have no safety net, no person they can call in case of a crisis, and no stash of assets they can immediately access. Some of them may be your clients, your neighbors or even your family members.

Even though we are more than a decade removed from that time period, there are people falling on hard times every single day. Today, if a family is facing food insecurity, needs cash assistance, perhaps a family needs daycare, and/or has a disability that is preventing them from being gainfully employed, the Department for Children and Families (DCF) is the state agency responsible for determining eligibility, providing resources according to state and federal guidelines, and funding community partners to execute specific programs as well.

However, Kansans have not always had access to these resources. During another economic crisis in America’s history, DCF did not exist. Counties were typically responsible for administering “family aid” to Kansas families who were poor and in need of assistance.

It wasn’t until after the Great Depression that we started to see foundational safety net programs come into existence. This included the Agricultural Adjustment Act which provided the blueprint for the current Supplemental Nutrition
Assistance Program, commonly referred to as “food stamps”. The Social Security Act of 1935 paved the way for states to receive federal funding for child welfare and aid to dependent children, and the Rehabilitation Act of 1973 provided funds for vocational rehabilitation services.

The more visible areas of DCF are known as adult protective services and child welfare. The intent of Adult Protective Services is to protect the most vulnerable adults from harm while safeguarding their civil liberties. There are specific state statutes that define adult abuse and outline mandatory reporting requirements. What most people do not realize is a person calls the same phone number—1-800-922-5330—in order to report allegations of adult abuse and child abuse.

DCF is the state agency that investigates allegations of child abuse and neglect and maintains the child abuse and neglect reporting system as required by CAPTA.

CAPTA is a federal law originally enacted on Jan. 31, 1974, (P.L. 93-247). CAPTA provides federal funding and guidance to states in support of prevention, assessment, investigation, prosecution, and treatment activities, and provides grants to public agencies and nonprofit organizations, including Indian Tribes and tribal organizations, for demonstration programs and projects. Although there are Kansas definitions of child abuse and neglect, CAPTA also sets forth a federal definition of child abuse and neglect.

The federal funding element is vital to protect and empower families and ensure Kansas families have resources during times of need. However, so are the countless community and grassroots organizations in the past and present that faithfully help Kansas families who do not feel firmly rooted.

In 2020, you will be reading a series of articles written by various team members of DCF that cover a wide variety of topics to help you and the clients you serve to take full advantage of the Department for Children and Families and all it has to offer. People will write from different perspectives, but the purpose is the same: highlighting programs and practices within our agency and community that improve the lives of Kansans.

DCF is implementing new practice models, developing ways to engage more authentically with families, and streamlining our processes. It’s an exciting time to be a part of the agency, and it is in line with my personal belief that we should all strive to improve ourselves and those around us. We grow by the relationships we have with people, which then spills out into our community connections and ultimately to the organizations and systems to which we dedicate our time. The Department for Children and Families is firmly rooted in providing assistance, and we can’t wait to tell you all about it. ■

Shanelle Dupree is the Kansas City Regional Director of the Department for Children and Families. Before her appointment to this role, Shanelle was the Kansas state director for a child placing agency, served as a Guardian ad Litem, represented parents and children in child in need of care and juvenile court, and enjoyed her time teaching a child welfare class for parents whose children were in state custody. She graduated from Washburn Law in 2007 and married her law school sweetheart, Mark Dupree. They pastor a local church in Wyandotte County and have four beautiful and active children.

Shanelle.Dupree@ks.gov

About the Author

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Of Counsel to Fisher, Patterson, Sayler, & Smith, LLP
Spoofing on Caller ID: problems for you and your clients

by Larry Zimmerman

Caller ID Spoofing

“The original factory warranty on your vehicle has expired and this is a final courtesy call to activate your warranty.”

“This call is regarding your Social Security Number. We found some fraudulent activities under your name.”

“We have called to inform you about a lawsuit filed in your name and the Internal Revenue Service has issued an arrest warrant in your name.”

“Grandma, I got arrested and I need you to write down this case number to talk to my lawyer when he calls you soon. I need help with bail money. I love you grandma.”

Scammers & Spoofing

If you have not been on the receiving end of a scam call, then your phone is probably two soup cans on a string. Estimates show as many as one in 10 American adults has lost money in a phone scam each year for a total of almost $10 billion annually. Over 60 percent of those calls originate outside the U.S., but technology allows those callers to alter their caller ID to appear as a domestic call. Some brazenly spoof the caller ID of legitimate businesses, government entities, or even family of their intended victims. The caller ID spoofing tools scammers use are causing issues for lawyers in routine cases.

SpoofCard – Cheap & Easy

It helps first to have some familiarity with how an amateur accesses caller ID spoofing technology. SpoofCard is one of the more popular services because it is so simple and cheap.

• Step One: Go to spoofcard.com and create a login.
• Step Two: Pay as little as $7.95 for call time credits.
• Step Three: Enter the number you want to appear as your caller ID (e.g. Stan Hazlett’s office, the IRS, or Jenny at 867-5309).
• Step Four: Dial the spoofcard.com switchboard and enter your call PIN.
The process is that easy and is available from desktop or mobile app. You can try it yourself for free without an account; SpoofCard allows a 60-second trial. SpoofCard even allows a call to push direct to voicemail so you can make it appear to your mark that they missed a call from Rudy Giuliani.

Problems for Clients

Domestic lawyers are well aware of problems from caller ID spoofing technology. Angry partners use spoofing to get through to their victims by spoofing the caller ID of the victim’s parents, her children’s school, or even her lawyer. Harassers push obscene and threatening calls directly to voicemail even if the victim never picks up her phone. Lawyers report that this high-tech, low-cost psychological warfare helps to isolate their clients as they come to distrust any incoming calls including from family, trusted friends and counsel.

Some lawyers share another twist: instead of calling the victim, the harasser would use caller ID spoofing to fake calls from the victim. Harassers can generate a call log of repeated calls to their own phone making it appear as if they were the actual victim of harassing calls. Others would spoof the victim’s number to threaten the victim’s support network and children who might unwittingly give up information useful to enable continued harassment.

Domestic lawyers have discovered they often have to provide technological instruction and assistance to their clients ranging from replacing phones and numbers, enabling filtering in Android/iOS, and subscribing clients to defensive services like Trapcall. (Trapcall.com offers subscriptions for $4-7 per month and provide some tools that help unmask caller ID without picking up a call.)

While domestic lawyers might have the most experience with caller ID spoofing impacting their cases and clients, there is no forcefield protecting other practice areas. A variety of scams have targeted civil litigants using litigants’ lawyers’ caller ID to direct payments to scammers’ accounts. Parties themselves can also join the fun, spoofing their opponent’s lawyer and obtaining sensitive case information. A lawyer herself may even use caller ID spoofing to get a leg up on her case.

Problems for Lawyers

In May, 2019, the Kansas Board for Discipline of Attorneys decided a case in which a lawyer used caller ID spoofing in an attempt to collect a debt and repossess vehicles after consumers defaulted on a lease agreement. The lawyer called an individual she believed had the vehicles but used spoofing software to make her call appear to be from the individual’s wife. (For whatever reason, spoofing the caller ID of his wife did not prompt the individual to pick up, and the lawyer did leave a message with her real name.)

The Board found that the lawyer violated Rule 8.4(c) as use of the software constituted misrepresentation. The Board did not find a violation of Rule 4.4(a). After deciding that the lawyer’s use of the spoofing software was motivated by dishonesty, it unanimously recommended informal admonition. Lawyers dabbling with caller ID spoofing should beware of ethics ramifications of their conduct and be cognizant of exposure under federal laws including the Truth in Caller ID Act and, where applicable, the Fair Debt Collection Practices Act—each of which may expose a lawyer to financial penalties and fees.

While generally legal, caller ID spoofing presents a range of problems for lawyers. Our clients and cases can be impacted by other litigants and non-parties, while our own license and practice can be impacted if we decide a little misrepresentation might help our case.

About the Author

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

kslpm@larryzimmerman.com
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Technology is rapidly advancing us to a crucial juncture in humanity’s relationship with the law. In future disputes, machines may make life-and-death decisions all on their own. In 1970, the film “Colossus: The Forbin Project” brought to the theaters Dr. Charles A. Forbin’s creation—a super computer designed to oversee and control America’s huge military defense system. Not only will it control the nation’s nuclear tipped missiles but it has limitless potential due to the sentience and artificial intelligence that Forbin embedded within the system. After launching a nuclear tipped missile at a Soviet oil field to convey a lethal lesson, Colossus tells Forbin that the world, under its absolute control, is now freed from war.

Litigation, an only marginally less so form of Armageddon, has rampant inefficiencies that make it nearly impossible to obtain an expeditious, on the merits resolution of even the most straightforward lawsuits. One commentator has noted:

The recourse to legal actors and proceedings is costly, emotionally debilitating, and potentially counterproductive. The adversary system can be a hugely inefficient means of uncovering facts; its relentless formalities and ceaseless opportunities for splitting hairs are time consuming and expensive.²

Litigation is inefficient because it is ponderous and labored, which means that a client’s financial and personnel resources can be redirected for extended periods of time. A large pending case can require a client to set aside substantial financial resources to address the litigation, to preserve numerous documents and utilize electronic search tools to scan a staggering number of company documents. Moreover, the client will have to assign personnel to address the demands of the litigation instead of having them focus on their revenue-generating roles within the company.

Whatever your attitude toward artificial intelligence, lawyers should count on the idea that technology will continue to change our profession and particularly how we practice litigation. It is difficult to think of a single area of modern technology that has not penetrated the law firm. Even if some lawyers fought against facsimile machines and computers at first, technology has made society more efficient and ironically may have increased the volume of legal services as lawyers began drafting their own documents and sending their own correspondence by electronic mail. The idea that a solo practitioner could function without an accountant and legal assistant would have been unthinkable fifty years ago, but can be standard procedure today.

This article will discuss the expanding role of artificial intelligence in the legal profession and the current and future roles of artificial intelligence in our legal system. I draw comparisons with the U.S. military’s analysis of the role of artificial intelligence in war fighting. The basis for that comparison is that the Department of Defense is at the cutting edge of the development of this technology and highly ethical human judgment is critical to a morally acceptable outcome—just as with the legal profession. In addition, this article will discuss the prospect for using artificial intelligence in what might be considered the most hallowed roles within our legal system, that of the judge and jury, in their roles as the arbiters of justice.
Artificial Intelligence – Background and Projections

John McCarthy, a professor of computer science at Stanford, first conceived the term “artificial intelligence” in 1955. In 1956, McCarthy invited a group of researchers from a multitude of disciplines, including language simulation, neural networks and complexity theory, to a summer workshop, the Dartmouth Summer Research Project on Artificial Intelligence, to discuss what would ultimately become the field of artificial intelligence. It was evident many decades ago that electronic capacity and functionality were doubling approximately every eighteen months, and the rate of improvement showed no signs of slowing down. In fact, experts predict that spending on artificial intelligence by companies will grow from $37.5 billion in 2019 to nearly $98 billion in 2023, a compound annual growth rate of 28.4 percent during the period between 2018 and 2023.

The Dartmouth conference was one of the first serious attempts to consider the consequences of this exponential curve. Many attendees came away from the conference convinced that continued advancements in electronic speed, capacity, and software programming would lead to the point where computers would someday have the resources to be as intelligent as human beings.

Artificial intelligence is the science and engineering of making intelligent machines. It is not a single technology but is comprised of related and often-connected technologies that work together to supply “human-like” responses and reasoning. Also referred to as “cognitive technologies,” artificial intelligence comprises, among other things, the technologies of deep learning, natural language processing, machine vision, speech recognition and expert systems. Among these, deep learning is the most transformative and is the core of what is considered modern artificial intelligence. Deep learning utilizes neural networks, a computer system modeled after the human brain and nervous system, that learn from large amounts of data. This is akin to how we learn from experience. The deep learning algorithm would perform a task repeatedly, each time tweaking it a little to improve the outcome. We refer to “deep learning” because the neural networks have various (deep) layers that enable learning. “Just about any problem that requires ‘thought’ to figure out is a problem deep learning can learn to solve.”

It is estimated that every day we generate a mind-boggling 2.5 quintillion bytes with 90 percent of all data today created in the last two years. Since deep-learning algorithms require enormous amounts of data to learn from, this increase in data creation is one reason that deep learning capabilities have grown in recent years. In addition to more data creation, deep learning algorithms benefit from the more robust computing power that is available today. It is computing capacity that makes deep learning possible. The typical human brain is made of an estimated 86 billion interconnected brain cells, or neurons. To provide a sense of the advances that are being made in this area, in the summer of 2019 Intel made considerable progress toward a digital equivalent of the human brain by building a computer system with 8 million digital neurons and has the goal of reaching 100 million by late 2019.

Artificial neural networks seek to simulate these biological networks and get computers to act like interconnected brain cells, so that they can learn and make decisions in a more humanlike manner. Discrete areas of the human brain process information differently, and these parts of the brain are arranged in a hierarchical fashion. As information enters the brain, “each level of neurons processes the information, provides insight and passes the information to the next, more senior layer.”

With deep learning, the computer trains itself to process and learn from data. According to Ray Kurzweil, an American inventor, futurist and director of engineering at Google, by 2045, computers utilizing artificial intelligence will surpass human intelligence. He describes uploading as a process of “scanning all of the salient details (of a human brain) and then reinstating those details into a suitably powerful computational substrate. This process would capture a person’s entire personality, memory, skills and history.”

Deep learning is a method for software to learn by trial and error at a pace limited only by computer processing power and cloud storage. Using unstructured data (80 percent of all the data that exists is unstructured) and operating without the need for explicit, step-by-step instructions, deep learning systems iteratively generate solutions. The outcome from many deep learning iterations is a digital neural network considered comparable to how humans think, which establishes patterns, relationships and connections within data that is otherwise unstructured data.

Now, “new machine learning approaches literally have the machines learn on their own things that we don’t know how to explain.” The machines learn patterns, correlations and rules, sometimes the ones that humans use to accomplish the task but other times ones that humans cannot discern. Indeed, many times the programmer cannot account for how the machine came to a particular result, even if the result is correct. Tasks that were once impossible to automate are now on par with human experts, including not only facial recognition, but also skin cancer detection and some types of language translation. IBM’s Watson, for example, analyzed questions and content comprehensively and quickly and eventually won “Jeopardy!” against former champions. Reinforcement learning, a category of machine learning, entails experimentation. Reinforcement learning is already prevalent in some forms of artificial intelligence. A computer developed by a subsidiary of Alphabet learned and mastered Go, a notoriously complicated board game, and eventually
beat one of the world’s best human players. With reinforcement learning, “the neural network is reinforced for positive results, and punished for a negative result, forcing the neural network to learn over time.”

**Autonomous Weapon Systems and the U.S. Military**

While to some it may appear to be a non-analogous leap to commingle the discussion of artificial intelligence in a legal context with the discussion of the same technology in a military context, there are concerns that both systems face with the use of this technology, and in particular the military’s experience, struggles and constraints.

In the 115th Congress, thirty-nine bills included the phrase “artificial intelligence” in the text of the bill and incorporated an often-cited classification scheme that categorizes artificial intelligence systems as designed to think rationally, act rationally, think like humans, or act like humans. Several of these bills were enacted into law. These classifications were broadly incorporated into the first statutory definition of artificial intelligence, included in the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (P.L. 115-232). Section 238 provides that the term “artificial intelligence” includes:

1. Any artificial system that performs tasks under varying and unpredictable circumstances without significant human oversight, or that can learn from experience and improve performance when exposed to data sets.
2. An artificial system developed in computer software, physical hardware, or other context that solves tasks requiring human-like perception, cognition, planning, learning, communication or physical action.
3. An artificial system designed to think or act like a human, including cognitive architectures and neural networks.
4. A set of techniques, including machine learning, that is designed to approximate a cognitive task.
5. An artificial system designed to act rationally, including an intelligent software agent or embodied robot, that achieves goals using perception, planning, reasoning, learning, communicating, decision-making and acting.

Department of Defense (DOD) Directive 3000.09, Change 1, dated May 8, 2017, titled “Autonomy in Weapons Systems,” provides that autonomous and semi-autonomous weapon systems are to be designed to allow commanders and operators to exercise appropriate levels of human judgment over the use of force. Additionally, the DOD does not currently have an autonomous weapon system that can search for, identify, track, select and engage targets independent of a human operator’s input.

The DOD directive also stipulates that “autonomous and semi-autonomous weapon systems shall be designed to allow commanders and operators to exercise appropriate levels of human judgment over the use of force,” precluding the development of fully autonomous weapons systems. This reluctance to pursue fully autonomous weapons systems was further emphasized during 2017 testimony to the Senate Armed Services Committee, when then-Vice Chairman of the Joint Chiefs of Staff General Paul Selva stated, “I am an advocate for keeping the restriction, because we take our values to war… I do not think it is reasonable for us to put robots in charge of whether or not we take a human life.”

The standard for autonomous weapon systems’ compliance with the laws of war should arguably not be whether they are able to make unflawed decisions, but whether they are able to follow the principles of proportionality, military necessity and distinction, at least as well as human operators. “It must be emphasized that as a matter of law, more may not be asked of autonomous weapon systems than of human-operated systems.” With increasingly sophisticated sensors linked to advanced artificial intelligence, in the not too distant future, autonomous systems may be capable of distinguishing between civilians and combatants at a level comparable to a human operator in at least some battlefield environments. In that instant, it will be the responsibility of commanders to ensure that any autonomous weapon systems used is capable of distinguishing between civilians and combatants in the environment in which they are deployed.

Opponents also argue that human compassion and other emotions are necessary to ethical war-fighting. Human empathy, some argue, helps soldiers to assess the objectives of potential human targets to discern whether they really pose a threat. Machines may possibly never be programmable to effectively emulate empathy. On the other hand, proponents of such systems argue that human emotions—fear, anger and the instinct for self-preservation—may lead to adverse consequences on the battlefield. Robots, they posit, may not be subject to human errors or unlawful behavior induced by human emotions.

War fighters must be mindful of over-dependency upon situational data provided by an autonomous system in order to avoid excessive reliance by the combatants upon the “judgment” of the autonomous system rather than their own seasoned judgment. This type of over-reliance could lead to the phenomenon of “automation bias.” Taken to a logical conclusion, this reliance upon the assessment provided by the autonomous system can lead to a psychological detachment from the consequences of the delivery of weapons systems and make killing too remote for soldiers.
Any standardized position on the use of artificial intelligence for battlefield decisions should ultimately be informed by verifiable scientific data on the benefits and drawbacks of human as opposed to machine decision-makers.\(^5\) If it turns out that the machine is less prone to mistakes and less likely than humans to be influenced by, for example, fear or hatred, then the war fighter should be required to use artificial intelligence in decision-making in order to reduce harm to civilians.\(^5\) “Failure to use such technology may be regarded as failure to apply a reasonable precaution.”\(^5\)

When there are large gaps between the data gathering and analysis capacity of machines and humans, human control provides less value. Importantly, it is these gaps—which are bound to grow with the utilization of advanced and abundant battlefield sensing systems—that will lead humans away from being decision-makers in many war fighting situations and effectively being repositioned as a check on artificial intelligence decision-making power.\(^5\)

**Artificial Justice**

As with the military utilization detailed above, artificial intelligence is permeating numerous aspects of the practice of law. Much like the military, the U.S. legal system is wary of the prospect of turning over total control of adjudication to machines. Nonetheless, there is a steady erosion of tasks that at one time were considered too challenging for computational involvement. For example, many legal research services such as CARA, Clerk, EVA, and vLex now include brief-evaluation tools that use artificial intelligence to analyze a brief, whether for a client or from an opposing party.\(^5\)

These services look at factors such as the procedural posture of the case, the pattern of citations, and even which citations may be missing.\(^6\) They can evaluate strengths or weaknesses of a brief or pleading based on which claims are made or omitted. Researchers at LegalMation have created document-automation tools that ingest complaints and with artificial intelligence create the first draft of responsive pleadings, even though for a limited number of causes of action and in a small number of jurisdictions.\(^5\)

Artificial intelligence capabilities are growing and will undoubtedly be deployed into activities that are presently seen as the sole purview of the human jurist. The role of artificial intelligence systems in litigation includes a range of possibilities from the increasing use of technology in legal and judicial processes prior to trial to having some involvement in court proceedings. Even before a case is docketed, artificial intelligence may already affect how cases are prepared and presented to the court.\(^5\)

The very role of a trial in our modern American justice system is to provide a fair process in which to definitively resolve an otherwise intractable dispute. A basic premise of our legal system is that if the trial is procedurally fair, the outcome of the process is presumed to be correct. If people consider that they have been treated fairly, they are more likely to accept a decision and outcome.\(^5\) The presumption is intentionally designed to prevent the potential for endless re-litigation of cases. The American legal system does, of course, recognize the prospect of trial error, and includes a sophisticated appeals process to correct errors.

Importantly in this analysis, the Supreme Court has opined that jurors “are presumed to be fitted” for “[d]etermining the weight and credibility of witness testimony” by “their natural intelligence and their practical knowledge of men and the ways of men,”\(^6\) and that a “fundamental premise of our criminal trial system is that ‘the jury is the lie detector.’”\(^6\) But does the public necessarily believe in the jury’s ability to determine fabrications of the truth? The myth that “lie detecting is what our juries do best”\(^6\) may no longer be credible in the age of DNA-based convictions and exonerations. Nor are jurors particularly skilled at determining when witnesses are credible but mistaken, as empirical studies on eyewitness identification testimony have shown.\(^6\)

According to a study performed in 2000-2001 by Northwestern University statistician Dr. Bruce Spencer, juries wrongfully convict in about thirteen percent of cases.\(^6\) When they err, they do so more asymmetrically; they are more likely to convict an innocent person than to acquit a guilty person.\(^6\) It is only to be expected that any system relying exclusively on human judgment will make mistakes. The number of convicted felons who have been exonerated by improved DNA and other forensic tests is a disturbing reminder on the imperfections of our justice system and ourselves.

Juries are not only legal experts, but also have the advantage of becoming very familiar with the evidence that is presented in similar cases over an extended period. Juries on the other hand, have the benefit of pooling their education and experience, which maximizes their collective recollection and comprehension of the evidence and minimizes the possibility that biases held by any one juror will inappropriately skew the jury’s interpretation of evidence.

Enter artificial intelligence and the impacts of that technology. It may begin even with influencing which cases get before a judge, as predictive coding developments enable predictions to be made as to the outcome of litigation.\(^6\) In Mexico, the Expertius system is advising judges and clerks “upon the determination of whether the plaintiff is or is not eligible for granting him/her a pension.”\(^8\) In the United States, predictive coding has been used to help determine whether recidivism is more likely in criminal matters and to assist in making decisions about sentencing.\(^6\)
Judicial Temperament

“Judicial responsiveness requires judges to act from the perspective of conscious legal rationality and also with intuition, empathy and compassion.” The function of the human judge is not to crunch data. Some would undoubtedly argue that the attribute of the humaneness of the judge must be infused within the technology so that it plays a principled role in advancing a responsive justice system. At least one MIT professor of artificial intelligence has postulated that due to the interplay of the brain’s frontal lobe and limbic system (the subcortical areas that play a critical role in pattern recognition of sound, vision, and smell), our ability to reason and to weigh the value of information depends in part on our ability to feel emotion.

Many artificial intelligence experts believe the converse is true and see no merit in the role of emotion, preferring to build systems that rely solely on rules. Stanford computer science professor John McCarthy argues that emotion should not be a consideration in computing, that emotion is not essential to intelligence, and can be problematic. “The goal is to build machines that apply certain human values and principles in decision-making.” Computational cognitive modeling, for example in the area of contractual approach to ethics is being used to describe principles used in decision making and to determine how human minds apply those rules.

Affective Processing

Assuming argudo that emotional artificial intelligence is central to the transition to machine adjudication, is there a path forward or is it simply beyond the pale of human endeavor to infuse such capabilities into a machine? As noted above, we seek for our judges to act with intuition, empathy and compassion. Artificial intelligence and neuroscience researchers agree that artificial intelligence, at present, does not have its own emotions. Artificial intelligence, however, is rapidly evolving and advances in “affective processing”—a field of study and development of systems and devices that can recognize, interpret, process and simulate human affects—may yield a form of machine empathy. One critical challenge for researchers is to develop the ability to simulate empathy. Ideally, in a judicial setting, the machine should interpret the emotional state of the participants and adapt its behavior to them, giving an appropriate response to those emotions.

Building a machine that can perceive emotional signals is distinct from teaching a machine to interpret them. Expressing emotion is yet another separate task. “In a machine . . . you can decouple capabilities – train it to recognize anger but give it no feelings. And you can go pretty far with this, making it perceive or even express emotions but without the actual feelings.” The task of designing an integrated artificial moral decision-making system is complicated by our still-evolving understanding of how human moral decision-making actually works.

Selecting the morally critical features of a situation is a complex undertaking that may proceed largely unconsciously, and is likely supported by a combination of theoretical reasoning and emotional intelligence. Emotions also arguably provide important channels for acquiring information relevant to moral decision-making. Some would assert that the human ability to assess the emotional state of others is essential to our ability to respond in an appropriate manner.

Bias – Human and Machine

The growing use of artificial intelligence in sensitive areas, including for hiring, criminal justice, and healthcare, has stirred a debate about bias and fairness. “Some researchers have highlighted how judges’ decisions can be unconsciously influenced by their own personal characteristics.”

At least one author has argued that the motivating impulse which leads a judge to his decision is his “intuitive sense of what is right or wrong in the particular case.” Once the decision is rendered, the judge will work aggressively to justify his or her decision within his or her own mind and to withstand criticism from peers. The judicial hunch “is a composite reaction to a multitude of responses to the stimuli set up by witnesses—stimuli which encounter the judge’s biases, stereotypes, preconceptions and the like.” It appears that bias, whether human or algorithmic in nature is, and will continue to be, a source of concern.

In the world of artificial intelligence, it is generally the data as opposed to the algorithm itself that is most often the main source of the issue. Bad data can contain implicit racial, gender or ideological biases. “Models may be trained on data containing human decisions or on data that reflect second-order effects of societal or historical inequities.” As computer scientists work to develop artificial intelligence systems that can be trusted, it is critical to develop and train these systems with data that is unbiased, and to develop algorithms that can be easily explained. More than 180 human biases have been defined and classified, any one of which can affect how we make decisions.

There are two principal mechanisms by which bias shows up in training data. The first is that the data reflects existing prejudices and the second, it is unrepresentative of reality. The latter situation might occur, for example, if a deep-learning algorithm is fed more photos of dogs than cats. The resulting animal recognition system would understandably be less adept at recognizing cats.

The first path for introducing bias can be illustrated with Amazon’s efforts in 2014 to build a computer program to review job applicants’ resumes with the aim of mechanizing the search for exceptional talent. But by 2015, the company re-
recognized that the algorithm in concert with the data was not rating candidates for software developer jobs and other technical posts in a gender-neutral manner. Amazon's computer models were trained to screen applicants by observing historical patterns in resumes submitted to the company.\(^9\) Most of the resumes were provided by men which is a reflection of the male dominance within the tech industry.\(^9\) The Amazon system taught itself that male candidates were more desirable. It downgraded resumes that, for example, included the word “women,” as in “women’s chess club captain.”\(^9\)

It is also possible to introduce bias during the data preparation stage, which involves selecting which attributes the algorithm is to consider. In the case of modeling soil quality, for example, an “attribute” could be the concentration of certain nutrients, hydraulic conductivity or moisture content. In the case of Amazon's recruiting tool, an “attribute” could be the candidate’s gender, education level or years of experience. This is what is often referred to as the “art” of deep learning: choosing which attributes to consider or ignore can significantly influence the model’s prediction accuracy. But while its impact on accuracy is easy to measure, its impact on the model’s bias is not.

Bias can also arise based on the biases of the users driving the interaction. A clear example of this bias is Microsoft’s Tay (acronym for “thinking about you”), an artificial intelligence chatbot\(^9\) that was originally released by Microsoft via Twitter on March 23, 2016.\(^9\) Tay caused considerable controversy when the bot began to tweet all sorts of misogynistic and racist remarks, causing Microsoft to shut it down in less than 24 hours after its launch.\(^9\) According to Microsoft, this was caused when people tweeted the service and the bot made replies based on its interactions with the people on Twitter.\(^9\)

As intelligent systems are built that make decisions with and learn from human partners, the same sort of defect might arise in more problematic circumstances, including within the legal system. One solution may be to partner individuals with the intelligent system that can guide them over time. What was learned from the Tay experience was that such systems will infuse the biases of people interacting with the system, thereby reflecting the opinions of the people who train them.

Identifying, mitigating, and hopefully someday eliminating bias in artificial intelligence systems is essential to building trust between humans and machines that learn. IBM Researcher Francesca Rossi opines that “As AI systems find, understand and point out human inconsistencies in decision making, they could also reveal ways in which we demonstrate partial, parochial, and cognitive biases, leading us to adopt more impartial or egalitarian views.”\(^10\) “In the process of recognizing our bias and teaching machines about our common values, we may improve more than AI. We might just improve ourselves.”\(^10\)

In summary, there are many complicated hurdles to overcome with the development of artificial intelligence systems before they attain the capability of assuming the role of fair jurists. Nonetheless, it is this author’s opinion that with the passage of time, we shall see these systems advance into roles that today seem quite unimaginable.

### About the Author

**Bob Lambrechts** is a partner in the Overland Park office of Lathrop GPM, LLP, where he practices in the areas of patent and environmental law. He formerly served with the U.S. Environmental Protection Agency in the Clean Air Division and as a special assistant to the Regional Administrator. In addition to a law degree from St. Louis University, Mr. Lambrechts earned a Bachelor’s and Master’s Degree in Mechanical and Aerospace Engineering from the University of Missouri at Columbia and prior to practicing law, he served as a robotics engineer with the Bendix Corporation in Kansas City. As avocations, Mr. Lambrechts served as an Engineering Duty Officer in the U.S. Navy Reserves for 28 years and since 1993, as an adjunct faculty member for the University of Missouri at Kansas City Schools of Law and Engineering.

blambrechts@lathropgage.com

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1. “It is often said that *May it please the Court* is an obligatory phrase at the outset of an oral argument—and that any other opener suggests the oral advocate is unknowledgeable or inexperienced.” Bryan A. Garner, *What judges really think about the phrase ‘May it please the Court’?,* ABA Journal, Bryan Garner on Words, April 1, 2013, http://www.abajournal.com/magazine/article/what_judges_really_think_about_the_phrase_may_it_please_the_court.


5. In 1965, Gordon Moore, a scientist at Intel, made a prediction based on his observation that the number of transistors per square inch on integrated circuits had doubled every year since their invention. He predicted that the trend will continue, and growth in computer power will double roughly every two years while the cost of that computing power will go down. When coupled with the ever-lower cost of storing electronic data, you have the basis for the rapid rise in AI capabilities and availability.


10. Id.


14. Id.


16. Id.

17. Id.


20. Id.


22. Unstructured data is information that either does not have a predefined data model or is not organized in a predefined manner. Unstructured information is typically text-heavy, but may contain data such as dates, numbers, and facts as well.


27. Andreas Holzinger et al., *What Do We Need to Build Explainable AI Systems for the Medical Domain?*, ARXIV.ORG (2017), https://arxiv.org/pdf/1712.09923.pdf ("However, the central problem of such models is that they are regarded as black-box models and even if we understand the underlying mathematical principles of such models they lack an explicit declarative knowledge representation, hence we have difficulty in generating the underlying explanatory structures."")


35. Results of bill text only search on Congress.gov using the phrase “artificial intelligence” on November 13, 2019.


40. Id., p. 2.

41. Senate Committee on Armed Services, Hearing to Consider the Nomination of General Paul J. Selva, USAF, for Reappointment to the Grade of General and Reappointment to be Vice Chairman of the Joint Chiefs of Staff, 115th Congress, 1st Session, July 18, 2017.


43. Id. at 247.

44. Id. p. 252-53, 278.


47. Id.

48. Id.


50. Id.


52. Id.

53. Id.

54. Id.

may it please the algorithm

56. Id.
61. Id. at 313 (quoting United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973).
65. Id.
70. Tania Soudin and Richard Cornes, Do Judges Need to be Human? The Implications of Technology for Responsive Judging, 2018.
72. Id.
73. Id.
75. Computational cognitive modeling aims to understand behavioral data and the mind and brain, more generally, by building computational models of the cognitive processes that produce the data.
76. “Social contract theory says that people live together in society in accordance with an agreement that establishes moral and political rules of behavior. Some people believe that if we live according to a social contract, we can live morally by our own choice and not because a divine being requires it. . . Social contracts can be explicit, such as laws, or implicit, such as raising one’s hand in class to speak. The U.S. Constitution is often cited as an explicit example of part of America’s social contract. It sets out what the government can and cannot do. People who choose to live in America agree to be governed by the moral and political obligations outlined in the Constitution’s social contract.” Social Contract Theory, Ethics Unwrapped, McCombs School of Business, https://ethicsunwrapped.utexas.edu/glossary/social-contract-theory.
80. Id.
82. Id.
85. Id.
86. Id.
88. Id.
89. Id. Second-Order Effect refers to the idea that every action has a consequence, and each consequence has a subsequent consequence. In other words, this means that a single decision can initiate a series of cause-and-effects, something which we might not have knowledge or control of.
93. Id.
95. Id.
96. A chatbot is a computer program that simulates human conversation through voice commands or text chats or both. Chatbot, short for chatterbot, is an Artificial Intelligence (AI) feature that can be embedded and used through any major messaging application.
98. Id.
99. Id.
101. Id.
What is the Future of Title VII? KU Law Panel Weighs In

by Diana Stanley

This is the most important discrimination rights issue right now for LGBT people. Seventy-eight percent of respondents in the largest survey to date of transgender employees reported experiencing discrimination.¹

In Fall 2019, the KBA Diversity Committee sponsored a panel discussion with KU Law’s OUTLaws & Allies student group. The discussion topic was the oral arguments in the Title VII sexual orientation and transgender discrimination cases currently before the U.S. Supreme Court.² The panel featured Madeline Johnson, Attorney & Mid-America LGBT Chamber of Commerce Chair of Transgender Day of Visibility Programming; Kyle Velte, KU Associate Professor of Law; and Joyce Rosenberg, KU Clinical Associate Professor of Law. Johnson practices in LGBT rights and employment cases. Velte and Rosenberg teach Employment Discrimination and Employment Law.

The panelists shared the background of the party’s arguments, the impact of textualism and originalism on the case, and the state of affairs on the ground. For example, Johnson discussed how school districts in Kansas and Missouri are grappling with issues of gender identity. Among some of the law students’ questions:

What are your reactions to the oral arguments?

Velte: One thing I noticed is the framing of the question in R.G. & G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission. The plaintiffs in that case framed the question about transgender identity. When the Court accepted the petition for certiorari, it reframed the issue into “transgender status.” This seems like a deliberate rhetorical move by the Court and there is a fear that this might be a sign of the Court deciding against transgender protections. If you sever being transgender from a part of identity and connect it to “status,” it makes it easier to say being transgender is not an immutable characteristic.

Rosenberg: As a Lawyering professor, I thought that there were a couple good teaching moments in the advocacy. The lawyers for the employees began and ended on their strongest point—articulating why this was discrimination on the basis of sex. It was the first thing said in Bostock and the last thing said in Harris Funeral Homes. On the employers’ side, they had their own tough lawyering issue. The employee in Harris Funeral Home transitioned to being a woman. In the beginning, the defense counsel did not want to use feminine pronouns in their briefs. At some point they rejected pronouns altogether. If you read it, you’ll see their brief doesn’t use “they” or feminine pronouns.

Johnson: Aimee Stephens—the plaintiff in Harris Funeral Homes—was fired for identifying as a woman because she was assigned male at birth. Depending on how the Court rules on this “legal” sex assignment argument, it has some ramifications on birth certificates in these types of cases. Suddenly a birth certificate issued forty, sixty years ago becomes relevant. If the plaintiffs lose, what are the next steps and what does the future look like?

Velte: The nice thing about this problem is that this is a statutory provision and not a constitutional provision. I think
if the plaintiffs lose it could prompt massive social and political organizing and maybe we will get the Equality Act passed.

**Rosenberg:** Even if they lose on sexual orientation, there’s a case to more narrowly plead this as a stereotyping case. So that might be one way for plaintiffs going forward.

**Johnson:** My plan is to file more equal protection cases.

**Why was there so much discussion of bathrooms in the oral argument?**

**Velte:** I think an important point is that bathrooms were not an issue in any of these cases, but it came up repeatedly.

**Rosenberg:** You know, the City of Shawnee in Johnson County recently voted to adopt a LGBT anti-discrimination ordinance and it faced tremendous amount of opposition on the point of bathrooms. This is what people are purportedly worried about so it’s going to come up. It’s going to get litigated again.

After the discussion, second-year law student Alexis Pearson gave me her take:

“This presentation gave me hope about the future—that even if we lose the case, there are other ways that we can bring discrimination claims. I am also glad to see the work Madeline is doing on the ground. It was a very impactful, and my heart was warmed by the completely full room.”

**About the Author**

Diana Stanley is a third-year law student at the University of Kansas. She is an Articles Editor for the Kansas Law Review and the Co-Articles Chair of the KBA Diversity Committee.

Stanley_de@ku.edu

1. Kyle Velte, KU Associate Professor of Law.


Populist and Islamist Challenges for International Law
written by Amos Guiora & Paul Cliteur

Reviewed by L. Ali Khan

Populist and Islamist Challenges for International Law is less a book and more an assemblage of stand-alone ideas on “a complex and controversial topic,”1 recognize Amos Guiora and Paul Cliteur, the lead authors. “One of us lives in the Netherlands (Cliteur); one of us splits his time between the United States and Israel, with frequent visits in the Netherlands (Guiora).” Each portion of the book, including the introduction, seven chapters, and appendix, identifies the author/authors who wrote it. Except for the Preface, the lead authors write their chapters separately. They seem to disagree with each other’s positions. While the stand-alone chapters, previously published in law journals, are provocative, the book lacks a unifying theme.

The book carries marginal instruction in international law but proffers plenteous thoughts on “right-wing politics and Islamism.” One author comes down hard on the “domestic politics” of Prime Minister Netanyahu and President Trump, arguing that their policies are detrimental to liberal democracy. The other author accentuates the current perils of Islam to liberal democracy in the West by drawing parallels with the perils of Nazism and communism.

Despite its paltry contributions to international law, the book offers superb comparative law insights from which Kansas politicians, lawyers, and judges might benefit. Kansas, though a steady red state, has little taste for political extremism. Periodically, however, the state’s politics foment controversies over public school funding, voting identity, judicial activism, Shariah, immigrants, and refugees, the sorts of issues the book explores.

Right-wing ideologies oppose the rights of immigrants, racial and religious minorities, women, and non-heterosexual groups. Their definition of polity is exclusivist. They favor sameness over diversity, nativism over plurality, old over new. Fear of the foreigner determines their ethos. Extreme right-wingers are willing to use force to practice their ideologies. The Introduction opens with a reminder of the massacre of Muslims in a New Zealand mosque, lethal attack on Jews in a Pittsburgh synagogue, and white supremacist violence in Norway that “resulted in 85 deaths and over 200 wounded.”

Amos Guiora, who teaches law at the University of Utah, examines the rise of right-wing politics in Israel and its effects on the legal system. No right-wing government can gain power without commitment to expanding Jewish settlements in the West Bank. If forced to evacuate, the heavily armed settlers threaten to kill Palestinians, Israeli soldiers, and police. Thus, the law seems powerless to halt, let alone remove, settlements that roadblock peace negotiations with the Palestinians. This appraisal of settlements is commonplace among liberal Jews, although right-wingers condemn such criticisms as anti-Semitism.

Furthermore, says Guiora, the right-wing political parties are demanding to narrow the judicial review powers of the Israeli Supreme Court and limit the access of the Palestinians to the Court. The Court, structured in the common law tra-
diction of protecting individual rights, provides relief against state action. Limiting the powers of the Court to declare legislation unconstitutional, claims Guiora, would embolden those who hold right-wing ideologies to promote religious extremism, anti-Arab sentiment, and curtail the rights of women.

Right-wing rhetoric raises difficult issues regarding free speech and free association. Israeli laws do not prohibit hate speech. Mainly during elections, the politicians engage in hate-filled rhetoric against the Arab citizens (20 percent of the population), calling them “a threat to Israel’s security and culture” against African refugees, calling them “cancer” and “more detrimental to Israel than terrorists.” Most Israelis (66 percent) “support deporting African refugees to a third country.”

Hate-filled rhetoric, says Guiora, also permeates the Trump presidency. In America, the First Amendment protects hate speech. Trump’s characterization of Mexicans as “rapists and murderers” and African countries as “shitholes” demonstrates how politicians use oratory to shape public opinion and please their hardcore supporters. Even in Europe, where laws prohibit hate speech, right-wing politicians engage in anti-immigrant rhetoric. When punished by law, they complain that the system is overly protective of racial and religious minorities and that it ignores the interests of the majority. “Democracy, although by definition a majoritarian system, delegitimates itself when it fails to protect minorities,” replies Guiora.

The clash of ideas and ideologies is a core value of liberal democracy protected through freedoms of speech and association. Right-wing politics has been part of democracy. At least in America, with an unrelenting history of pernicious racism, hatred, and violence, right-wing policies are not Trump’s invention. However, says Guiora, what is most noteworthy is the fact that right-wingers are popular again and winning elections in liberal democracies. The proponents of liberal democracy hoped that Western civilization had inoculated itself against prejudice through the 20th-century crimes against vulnerable communities, such as the holocaust, Jim Crow, and apartheid. Not so, warns Guiora.

No secure solutions are available to safeguard liberal democracy against threats to its integrity. Laws can be put in place to curb hate speech that endangers the peace and safety of vulnerable communities, just as most nations of the world have done. However, suppression of hate speech may backfire and bolster support for the suppressed ideologies. Likewise, banning extremist political parties might alienate their supporters from electoral politics, weakening liberal democracy, a form of government that favors the broadening of suffrage. Nevertheless, on balance, limiting free speech and banning extremist political parties are necessary to preserve democracy, concludes Guiora. Very few Americans are likely to accept these solutions.

While Guiora is worried about minorities as targets of right-wing ideologies, Paul Cliteur highlights the threats that the minorities, particularly Muslim immigrants, pose to European culture. Cliteur, a Dutch professor of jurisprudence, is a feisty crusader for the rights of the majority. He criticizes the left-wing liberals who promote multiculturalism. Cliteur defends free speech, including burning Qur’ans, publishing the Prophet Muhammad’s cartoons, and portraying the Prophet as a pedophile.

The defense of hate speech as a form of free speech is within mainstream scholarship, especially in America, where some in the legal profession take the First Amendment as an absolute value. The arguments supporting free speech are familiar to the legal community, and Cliteur does not add any innovative analysis. He should know that Islamic law requires that Muslims living in Western nations submit to mandatory local laws.

However, Cliteur misses an important point. An overwhelming majority of Christians, Jews, and the followers of other denominations have no interest in burning holy books, drawing derogatory cartoons of prophets, or in the character assassination of Jesus, Mary, or Muhammad. Ironically, Cliteur, a proponent of the rights of the majority, comes down to defending a tiny minority that chooses to trash religions and religious icons.

Cliteur advocates “cultural counterterrorism” to fight Islamism, requiring Muslim immigrants to accept Western values. Skeptical of human rights, Cliteur proposes to revise the hate speech laws and laws against religious discrimination to compel the Europeanisation of Muslim communities. One
wonders whether Cliteur would approve the indoctrination camps where Uighur men, separated from families, are undergoing assimilation into communist China.

Both authors borrow the concept of militant democracy to argue their respective viewpoints. Guiora invokes militant democracy to subdue right-wing ideologies and their sponsors for the protection of vulnerable communities. Cliteur calls upon militant democracy to subdue Muslim communities and left-wing liberals for the protection of European pride and self-consciousness.

Militant democracy, a concept articulated in the 1930s, proposes to fight threats to its values and integrity. Nazism posed a substantive threat to the values of liberal democracy by its genocidal policies. Communism challenged the integrity of liberal democracy as a form of government. In hindsight, the argument goes, militant democracy should have opposed Nazism and communism. The book does not answer a more difficult question. How is militant democracy a practical device when a supermajority is determined to undo the values or structures of any system, including liberal democracy?

Guiora’s militant democracy is unworkable, as is the case in Israel. Settlements in the West Bank and hate speech against Israeli Arabs and African refugees will likely continue if voters support right-wing political parties. Cliteur’s militant democracy is arguably workable if a majority of voters, say in France, decide to change laws for the forcible assimilation or deportation of millions of Muslim immigrants. However, the price tag in terms of communal conflict, violence, and disruption seems staggering.

Finally, if militant democracy is a defensible philosophical concept, the conversation runs into aporia. What might distinguish militant democracy from militant Islam, a Taliban viewpoint to safeguard Afghanistan from American invasion, or militant Hindutva, a Hindu movement to safeguard Vedic pride and self-consciousness from Islamic and European colonization? The book does not answer the harder questions.

About the Author

L. Ali Khan is an emeritus professor of law at Washburn University School of Law and the founder of Legal Scholar Academy, a firm dedicated to the protection of civil rights and human liberties.

1. Unless otherwise indicated, the phrases and sentences in quotation marks are from the book.

Do you write poetry? Care to share?

- Seeking original works from our members to celebrate National Poetry Month in April 2020
- Selected poems will be shared in the April 2020 issue of The Journal of the KBA
- A special substantive piece on Poetry in the Law will appear in that issue of The Journal.

I decided that it was not wisdom that enabled poets to write their poetry, but a kind of instinct or inspiration, such as you find in seers and prophets who deliver all their sublime messages without knowing in the least what they mean.

-- Socrates
Members in the News

New Positions

Leonard Buddenbohm—Atchison, was hired to serve as a second city counsel for the city of Valley Falls. Rick Johnson—Valley Falls, will continue to represent the city in traffic court.

Christopher McHugh and Andrew (Drew) Goodwin have joined the Kansas law firm Joseph, Hollander & Craft LLC in its first Missouri office in downtown Kansas City. McHugh who earlier practiced in the firms Wichita and Topeka offices returns to the firm with experience in representing companies of all sizes in high-stakes litigation across Kansas and Missouri, with emphasis in the construction and transportation industries. He was most recently a partner with Seigfreid Bingham PC. Drew Goodwin is a seasoned litigator who has represented individuals and businesses in the transportation, financial, utility and manufacturing industries. He also provides general business counsel to small business clients, particularly in the areas of risk management and insurance coverage.

Chief Justice Marla Luckert was sworn into office on Tuesday, December 17th. Luckert succeeds Chief Justice Lawton R. Nuss whose final act as Chief was to swear-in his successor. Luckert was appointed the Kansas Supreme Court by Governor Bill Graves in 2002. She is the second woman in Kansas history to serve in that role, the first being Chief Justice Kay McFarland.
Megan Monsour has joined Hinkle Law Firm LLC in Wichita. Monsour is a family-building attorney with over a decade of experience in adoption, collaborative, reproduction and child permanency litigation. She is a fellow in the American Academy of Adoption and Assisted Reproduction Attorneys, a designation given by invitation only, based on criteria for excellence in the practice of adoption and collaborative reproduction law. A graduate of the University of Kansas School of Law, Megan is a member of the Wichita Bar Association, Wichita Women Attorneys Association and is a member of the KBA Board of Governors.

The Honorable Evelyn Wilson has been selected by Governor Laura Kelly to fill the vacancy on the Kansas Supreme Court that became available with the retirement of Chief Justice Lawton Nuss. Five judges and 12 lawyers applied for the opening.

New Locations

Joseph, Hollander & Craft LLC has opened a new office in downtown Kansas City, Missouri at 926 Cherry Street. As the firm grows, it is expanding its legal services to include services to the medical marijuana industry.

Name Change

Finch, Covington & Boyd, Chartered, of Ottawa, is changing its name to Harris Kelsey, Chartered, to reflect the firm’s historical partners. The firm is rebranding with the new name, a new logo and a new website. The year 2020 will be the firm’s 150th year serving the people of Ottawa, Franklin County and Kansas.

Notables

Matthew Bretz of Hutchinson has been appointed to the National Board of Directors for Mothers Against Drunk Driving (MADD). Bretz is a partner at personal injury law firm Bretz & Young. The firm works to prevent impaired drivers from getting behind the wheel in the first place, offering SafeRide during the holidays. This free service provided rides for anyone in Hutchinson unable to drive and was available from 8:00 p.m. to 2:00 a.m. on Fridays and Saturdays through the end of 2019, including New Year’s Eve. Those needing the service could call or text for a ride.

Tim Chambers, Reno County District Judge, announced he will not seek re-election and will retire from the bench after 20 years. Chambers received his law degree at Washburn University School of Law. He spent two years with a large Kansas City law firm before deciding to move back to central Kansas. He served as assistant Reno County attorney for three years and then ran for county attorney, winning a three-way race. He served in that role until being elected to the bench in 2001; he was re-elected four times.

Clinkscales Elder Law Practice, P.A., hosted a workshop focused on guiding families through the necessary estate planning steps to avoid probate and protect assets from the cost of long-term care. The workshop, held in Sylvan Grove, was free for attendees. Clinkscales is a law firm focused on elder care issues, helping families deal with chronic illness and aging. It is a founding member of the Life Care Planning Law Firms Association. Based in Hays, the firm has been practicing in the field of elder care for more than 15 years.

J. David Farris, Atchison, was honored with the Order of the Smiling Bull Award by the Leavenworth County Bar Association. Farris, who is retiring following 25 years as city attorney and 21 years as city prosecutor for Atchison, will continue to serve on the Atchison City Commission. Presentation of the Order of the Smiling Bull is prestigious but delivered with great irreverence.

The Kansas District Judges Association has elected officers for 2020. Judge Bruce Gatterman was elected president. He earned his J.D. from Washburn University School of Law. Other officers include: Judge Dan Creitz, president-elect; Judge Kim Cudney, secretary; and Judge Thomas Kelly Ryan, treasurer. The new officers were elected at a statewide continuing education conference for judges in Wichita. Senior Judge James Fleetwood, who retired in June in the 18th Judicial District, completed his term as president. He now serves as a senior judge, working on an as-needed basis in district and appellate courts.

Van Z. Hampton—Dodge City, and Kurt P. Kerns—Wichita, with Warrior Lawyers International, a specialty law firm representing persons accused of crimes, were both elected to serve on the membership committee of the Association of Defense Counsel Practicing before the International Courts and Tribunals. The committee has authority to make policies for admission and consider applications for membership in the ADC-ICT. Hampton and Kerns were elected during the annual convention of the ADC-ICT in The Hague. The ADC-ICT is comprised of more than 400 attorneys from all over the world, with only 24 from the U.S. Kerns will be involved in representing a defendant in international court in Arusha, Tanzania in 2020.

Sal Intagliata and Matt Gorney, both of Monnat & Spurrer Chartered, have been honored by Missouri & Kansas Super Lawyers: Sal Intagliata was honored for his sixth consecutive year and Matt Gorney was recognized as one of Super Lawyers’ “Rising Stars” for a second consecutive year. Intagliata is a shareholder in the firm and has practiced nearly 25 years, including 20 in private practice and 4 years as Sedgwick County Assistant District Attorney in the Gangs/Violent Crimes Division. His practice at Monnat & Spurrer focuses on criminal, white-collar criminal and DUI defense. He is licensed to practice before federal, state and municipal courts throughout Kansas as well as before the U.S. 10th Circuit Court of Appeals and the U.S. Supreme Court. He
is a graduate of KU and received his Juris Doctor from The University of Kansas School of Law. Intagliata also graduated from the National Criminal Defense College.

**Matt Gorney** is an associate with Monnat & Spurrier practicing in the areas of criminal defense, DUI defense and appellate work. Formerly a journalist, Gorney graduated from the University of Kansas School of Law where he earned certificates in both Advocacy Skills and Media, Law and Technology. He simultaneously earned a Master of Science Degree in Journalism from the William Allen White School of Journalism and Mass Communications.

**Lauber Municipal Law LLC**, a Lee’s Summit, Mo., law firm, has been retained by the city of Fort Scott to take on its city attorney duties. The position has grown to require full-time attention, and the part-time city attorney, Burton Harding, was not able to devote the time away from his full-time practice. The law firm will not take on the duties of the city prosecutor or the municipal court judge.

**JoAn Mattingly Lindfors** of Marquette, Kan., retired recently after nearly 45 years in criminal law practice. She attended Washburn University and taught in elementary school before returning to Washburn’s School of Law to earn her degree. While still a law student, Lindfors became a legal intern with the Shawnee County District Attorney’s office. She remained there, becoming the first woman ADA in Shawnee County. Gov. John Carlin appointed her to the Kansas Parole Board in 1983, and she served on that panel for five and a half years. She then served in the Kansas House of Representatives for two years until she seized the opportunity to run for Shawnee County District Attorney; she was the first woman elected to that role in Shawnee County, and the second in the state of Kansas. As JoAn Hamilton, she served eight years before being defeated in her race for a third term. She then returned to her hometown, continuing to serve in a variety of public service roles in the criminal defense area. Lindfors helped write and pass key legislation including the Rape Shield Law, Rape kits for child victims, Victim Notification of Pleas, on the Attorney General’s Victim Rights Commission, created a state model program of Accelerated Docket for Domestic Violence Victims and created a state model program for children of physical and sexual abuse—SAFETALK.

**District Court Judge James McCabria** was appointed to the chief judge position of the 7th Judicial District, succeeding Chief Judge Peggy Carr Kittel, who retired Dec. 31st. The 7th Judicial District is composed of Douglas County. McCabria graduated from the University of Tulsa School of Law and started his law practice that same year in Coffeyville. He then moved to Douglas County and opened his own law office and later served as an assistant attorney general for the Kansas Attorney General’s Office. Before becoming a judge in 2014, McCabria was an assistant district attorney for the Douglas County District Attorney’s Office.

**Dan Monnat** of Monnat & Spurrier, Chartered, has been named to the Top 10 list of Missouri & Kansas Super Lawyers for 2019; it is his second year being listed in the elite Top 10. Monnat has been on the Top 100 list overall for 15 years. With 45 years of practice in Wichita and across Kansas, Monnat concentrates on criminal defense, white-collar criminal defense, appellate defense and bet-the-company litigation. Monnat earned his Juris Doctor from Creighton University School of Law, is a graduate of Gerry Spence’s Trial Lawyer’s College. He is actively involved in the Kansas Trial Lawyers Association and is a Fellow of the ABA, the KBA, the American College of Trial Lawyers, the International Academy of Trial Lawyers and the American Board of Criminal Lawyers. He is also a Life Member and past Board Member of the National Association of Criminal Defense Lawyers and a two-term past president of the Kansas Association of Criminal Defense Lawyers.

**Kristie Remster Orme**, President of McDowell Rice Smith & Buchanan, has been named to Ingram’s List of 2019 Top Women Executives in Kansas City. Honorees were celebrated at a luncheon in November. Orme chairs McDowell Rice’s Banking & Financial Services practice area. She also practices in the Employment Law, and in Litigation & Dispute Resolution practice areas.

**Keith Schroeder**, Reno County District Attorney, announced he would retire on June 1, 2020, six months before his term expires. Schroeder has been in the D.A.’s office for 30 years, including nearly five terms as the District Attorney. He intends to run for the District Judge position being vacated by Judge Tim Chambers. Schroeder is a graduate of Washburn University School of Law. He was named Prosecutor of the Year by the Kansas County and District Attorneys Association in 2009. He is a past member of the State’s Child Death Review Board and was also appointed as a special assistant attorney general for sexually violent predator litigation.

**Wagstaff & Cartmell, LLP**, of Kansas City was chosen to represent the Manhattan-Ogden school board as it joins several other school districts across the nation in independent lawsuits against the e-cigarette manufacturer Juul. The lawsuit will be filed on contingency and seeks to hold Juul responsible for the effects of a vaping epidemic among the nation’s teenagers, arguing that school districts have had to divert education resources toward monitoring, investigating and disciplining vaping among students.
Obituaries


Gerald James Letourneau, 82, Topeka, passed away on December 13, 2019. He was born to Norbert and Marie (Rheault) Letourneau on March 27, 1937 in Aurora, Kansas. Gerald married Betty Jo Vaughn in 1960. She preceded him in death in 2005. After graduating high school, Gerald attended St. Benedict's College in Atchison, KS, where he played basketball and was President of the Student Body before graduating in 1959. In 1962, he graduated with honors from Washburn University School of Law where he was editor-in-chief of the Washburn Law Journal. Gerald was the editor of the New York University Intramural Law Review while working on his Masters in tax from NYU, graduating in 1963. Gerald began his Topeka law practice with Harry Colmery, who wrote the GI Bill of Rights at the very desk that Gerald spent many years working at after Harry passed away. Gerald later donated that desk to the Kansas State Historical Society. He practiced law in Topeka for more than 40 years. He was a senior member of Colmery, McClure, Letourneau, Merriam, and Stauffer, P.A. when that firm consolidated its practice with Goodell, Stratton, Edmonds & Palmer LLP in 1987. Gerald was a past President of the Topeka Bar Association, and Board of Trustees of Hayden Catholic High School. He was an active member of St. Mathew’s Catholic Church, where he was a Parish Council member. Gerald was also on the Board of Directors of Topeka Community Mental Health Association, a past Trustee for The Villages, Inc, and past chairman of the Washburn University Law Institute.

He is survived by his sons, Michael Letourneau (Beth Williams) and Edward Letourneau (Lisa Ludvig) of Topeka; grandchildren, Jared Letourneau (Krista Neske) of Topeka, Joshua Letourneau (Kali Huske) of Emporia, KS, Julia Letourneau of Topeka, Michelle Letourneau-Belock (Ryan Belock) of New York City, NY, and Steven Letourneau of Topeka; and great granddaughters, Chanel and Mia. Preceding him in death were his parents; wife, Betty Jo; daughter, Louise Letourneau-Pound; and son, Paul Letourneau.

Visitation was Friday, December 20, at Kevin Brennan Family Funeral Home, 2801 SW Urish Road, Topeka, Kan., where the rosary was also prayed. Mass of Christian Burial celebrated on Saturday, December 21, at St. Matthew Catholic Church, 2700 SE Virginia Avenue, Topeka, Kan.. Interment followed at Mount Calvary Cemetery.

Memorial contributions may be made to Hayden Catholic High School, sent in care of Kevin Brennan Family Funeral Home, 2801 SW Urish Rd, Topeka, KS 66614.
Ralph E. Skoog (12/17/1929 – 12/13/2019)

Ralph E. Skoog, 89, of Topeka, passed away peacefully at his home Friday, December 13, 2019, surrounded by his family.

He was born December 17, 1929, in Topeka, Kansas, to Ralph Oscar Skoog and Anna Catherine (Haley) Skoog. He attended Topeka High School, received a B.S. degree in Civil Engineering and Applied Geology from Kansas State University and a J.D. degree from Washburn University School of Law. Ralph met Beth Henry, of Virginia, while he was stationed at Fort Belvoir, VA. They married on November 19, 1953. Together, Ralph and Beth raised a large and loving family in Topeka, participating actively in their children’s schools and communities.

Returning from service in the U.S. Army Corps of Engineers in the Korean War as a 1st Lieutenant, he worked as a geologist-engineer with the firm of Cook Flatt and Skoog. He practiced law with the firm of Rooney, Dickinson, Praeger, Crow and Skoog, then entered private practice. He served three terms in the Kansas House of Representatives. A distinguished member of the legal community, he was a member of the Kansas Bar Association, and served as President of the Kansas Trial Lawyers Association and of the Topeka Bar Association. In retirement, he was an active member of the Sam A. Crow American Inn of Court.

He was active in professional and community affairs. He was a member of Central Congregational Church. He served on the Topeka-Shawnee County Riverfront Authority and the Topeka Planning Commission. He belonged to and supported a number of civic organizations including the Saturday Night Literary Club, American Legion, and Air Explorer Squadron 8. As a longtime member of the Shawnee County Historical Society, he was part of the push to restore and recognize the Ritchie House, Topeka’s oldest home.

He was an avid supporter of Kansas State University. As a student, he was a member of Phi Kappa Phi and SAE, and in 1968 was elected President of the K-State Alumni Association, helping raise funds to complete the football stadium.

Survivors include sisters Betty Bomar and Astrid Reed; sons and daughters-in-law Eric and Sandra Skoog of Longview, TX; Peter Skoog, DVM, of Alva, OK; Carl and Johanna Skoog of Libertyville, IL; Curt and Amy Skoog of Overland Park, KS; Edward Skoog and Jill Marquis of Portland, OR; eight grandchildren, Allison, Andrew, Austin, Chelsea, Hunter, Reed, Will, and Oscar; and four great-grandchildren, Piper, Townes, Ada, and Declan; many nieces and nephews; and his caring neighbors in Potwin Place. He was preceded in death by his parents, wife, and a brother, Richard O. Skoog.

Family received friends on Wednesday, December 18, 2019 at Penwell-Gabel Cremations, Funerals and Receptions, 1321 SW 10th Ave. Topeka, KS 66604. A funeral ceremony was held Thursday, December 19, 2019 at the funeral home. Burial followed at Highland Cemetery in Scranton, Kansas.

Memorial contributions may be made to Friends of the Topeka & Shawnee Co. Public Library 1515 SW 10th Topeka, KS 66604 or Shawnee County Historical Society, 1116-1118 SE Madison Avenue, P.O. Box 2201, Topeka, KS 66601.


Matthew James Spencer Born May 11, 1978 lost his battle with cancer on November 8, 2019. He fought a good fight up until the end. Matt was a man of many talents. He was a hard worker and loved his job at Spencer Fane law firm. He was also very well read and could talk about many subjects with great knowledge. He loved to socialize and had many friends. He was an Eagle Scout in the Tribe of Mic-O-Say. Matt’s great love was music. He loved his DJ gigs as “djsermatt.” He played keyboards in a band called “Attic Salt” up until his cancer diagnosis. He would listen to various styles of music from old country to rock and blues and especially electronic music. He leaves behind his sons Noah Spencer and Jason Locke, mother Carol Spencer, father James Spencer, sisters Sarah Spencer and Shelley Griffin (Darrin), niece Samantha Troyer and nephew Logan Troyer. Cremation is planned with private burial at Floral Hills Cemetery. Mass was said at Holy Spirit Catholic Church, Overland Park on Friday, November 15, 2019. A party to celebrate his life was held at one of his favorite places, Dr Sketchy’s, on Sunday, November 17, 2019. Memorial contributions can be sent to Midwest Music Foundation.
ATTORNEY DISCIPLINE

ONE-YEAR SUSPENSION, STAYED DURING AN EXTENDED PROBATION
IN RE ANDREW M. DELANEY
NO. 121,208—DECEMBER 6, 2019

FACTS: A hearing panel determined that Delaney violated KRCP 1.1 (competence); 1.3 (diligence); 1.4(a) (communication); and 1.7(a) (conflict of interest). Delaney was placed on probation in November 2014 and remained on probation at the time these matters arose. The allegations of new discipline involved Delaney’s representation of a client in a divorce action and his failure to free his client from debt on a vehicle retained by the ex-spouse. In addition, Delaney failed to properly negotiate a plea agreement on behalf of three other clients, none of whom were aware of the potential conflict of interest.

HEARING PANEL: The hearing panel found facts sufficient to sustain all alleged rule violations. The panel found several aggravating factors, including prior discipline. But there were also mitigating circumstances such as the absence of a dishonest motive and some mental health issues. The disciplinary administrator recommended a one-year suspension, with that suspension suspended so that Delaney’s probation could be extended for two years. This recommendation was joined by Delaney and his counsel, and the panel determined that the probation plan proposed by Delaney was workable and appropriate.

HELD: In the absence of any exceptions, the hearing panel’s findings of fact and conclusions were accepted. After hearing arguments, a majority of the court agreed that the probation plan proposed by the disciplinary administrator and Delaney was appropriate. Delaney’s license to practice law in Kansas was suspended for one year, with that suspension stayed in favor of a two-year term of probation. A minority of the court would have imposed a less severe sanction.

ORDER OF DISBARMENT
IN RE JOAN M. HAWKINS
NO. 121,064—DECEMBER 6, 2019

FACTS: After Hawkins failed to participate or appear, a hearing panel found that Hawkins violated KRPC 1.3 (diligence); 1.15(a) and (b) (safekeeping property); 1.16(d) (termination of representation); 8.1(b) (failure to respond to disciplinary authority); Rule 207(b) (failure to cooperate in disciplinary investigation); Rule 211(b) (failure to answer in disciplinary proceeding); and Rule 218(a) (failure to file motion to withdraw upon suspension). The allegations arose after Hawkins failed to file pleadings on behalf of clients. In addition, Hawkins was suspended but failed to withdraw or take the steps required of her during the suspension. In addition, Hawkins made deposits into her attorney trust account even after she was suspended, and she paid personal bills directly out of her trust account.

HEARING PANEL: Hawkins failed to appear or participate in the hearing panel process. This failure, combined with the evidence presented to the hearing panel, resulted in the disciplinary administrator seeking discipline of either indefinite suspension or disbarment. The hearing panel recommended that Hawkins be disbarred.

HELD: The Clerk of the Supreme Court made repeated efforts to serve Hawkins with the notice of hearing. All certified mail was returned unclaimed and an attempt to make personal service was similarly unsuccessful. The court found that adequate notice was given of both the formal complaint and the hearing. Because Hawkins did not participate, panel’s findings of fact and conclusions of law were deemed admitted. And in the absence of an appearance at the disciplinary hearing, the court adopted the disciplinary administrator’s recommendation that Hawkins be disbarred.
COURT REPORTER DISCIPLINE

PUBLIC REPRIMAND
IN RE APRIL C. SHEPARD
CCR NO. 1318 – DECEMBER 6, 2019

FACTS: April Shepard works as a court reporter in Wyandotte County. She previously served in that capacity in Shawnee County. In June 2018, the State Board of Examiners of Court Reporters filed a formal complaint against Shepard alleging a violation of Board Rule No. 9.F.9. The facts showed that Shepard worked as a court reporter on a high-profile murder trial. After the defendant's conviction was overturned on appeal, a newspaper article quoted from Facebook posts made by Shepard in which she opined that the defendant was guilty and would be convicted again. Shepard admitted that she made the posts but defended herself by claiming that she behaved in an impartial manner during the trial and noted that she no longer worked for Shawnee County.

BOARD: The Board’s disciplinary counsel asked that Shepard be subjected to public discipline, in order to provide transparency and increase public confidence in the profession. Shepard asked that any discipline be private, noting that she stipulated to the rule violation and arguing that her conduct was not severe enough to warrant public discipline. After considering arguments, the Board recommended that Shepard receive a public reprimand.

HELD: In the absence of objections, the Board’s findings and conclusions were adopted. The court found that Shepard’s conduct was egregious and damaging to the profession, but also noted that she cooperated with the investigation and admitted to wrongdoing. The court agreed that a public reprimand was the appropriate discipline.

CRIMINAL

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—MOTIONS—SENTENCES
STATE V. BRYANT
WYANDOTTE DISTRICT COURT—AFFIRMED
NO. 119,949—NOVEMBER 27, 2019

FACTS: Bryant was convicted in 2005 of first-degree murder and aggravated robbery. Sentence imposed included criminal history calculated using three 1981 Missouri convictions for second-degree burglary as person felonies. Bryant filed 2014 motion to correct an illegal sentence, challenging the classification of his 1981 Missouri burglaries as person crimes. District court denied the motion. Bryant appealed, arguing subsequent changes in the law rendered his sentence illegal, and the district judge unconstitutionally engaged in fact-finding when he designated the 1981 Missouri convictions as person felonies.

EMINENT DOMAIN—INVERSE CONDEMNATION—JURISDICTION
GFTLENEXA, LLC v. CITY OF LENEXA
JOHNSON DISTRICT COURT—AFFIRMED
NO. 119,278—DECEMBER 6, 2019

FACTS: Through a series of leases and subleases, GFTLenexa ended up as the landlord of a Bridgestone tire dealer. In October 2013, the City of Lenexa filed a condemnation action with the goal of making street improvements and creating a permanent public utility easement. The district court granted the condemnation request and paid appropriate compensation to affected parties; neither GFTLenexa nor Bridgestone participated and neither was awarded compensation. A year later, Bridgestone sought declaratory judgment against GFTLenexa claiming it was entitled to reduced rent because the property had been partially condemned. The district court dismissed the action on GFTLenexa’s motion for summary judgment on the theory that GFTLenexa did not receive any proceeds from the condemnation. The Court of Appeals reversed and remanded and on remand, the district court ordered GFTLenexa to both reduce Bridgestone’s monthly rent and refund past overpayments. This decision prompted GFTLenexa to file an inverse condemnation action against the City for a loss of its intangible property rights. The district court granted the City’s motion for summary judgment. GFTLenexa filed a notice of appeal to the Kansas Supreme Court.

ISSUES: (1) Jurisdiction; (2) need for inverse condemnation

HELD: Inverse condemnation actions are not creatures of statute. K.S.A. 2018 Supp. 26-504 requires that appeals in eminent domain cases go directly to the Kansas Supreme Court. Inverse condemnation actions are not eminent domain actions, and cases involving an inverse condemnation must be filed in the Court of Appeals. Even though the case was filed in the wrong court, the court exercises its power of concurrent jurisdiction to rule on the controversy before it rather than transfer it to the Court of appeals. The eminent domain petition did not name GFTLenexa as a party and GFTLenexa chose not to participate in the process. The City’s failure to name GFTLenexa is not determinative; GFTLenexa could have—and should have—sought to intervene in the condemnation. Requiring the City to pay again in an inverse condemnation action violates the undivided fee rule.

STATUTES: Kansas Constitution, Article 3, § 3; K.S.A. 2018 Supp. 26-504; K.S.A. 20-3018(a), 26-517, 60-2101(a), -2101(b)
ISSUE: (1) Motion to correct illegal sentence—out of state convictions

HELD: State v. Murdock, 309 Kan. 585 (2019)(Murdock II), forecloses Bryant’s argument that the sentence imposed is illegal due to subsequent changes in the law. Bryant failed to establish that his sentence was illegal at the time it was imposed, and he cannot use a motion to correct an illegal sentence to argue that his sentence is unconstitutional.

STATUTES: K.S.A. 2018 Supp. 21-6801 et seq., 22-3504(d)(1), -3504(3); K.S.A. 22-3504

CRIMINAL PROCEDURE—MOTIONS—SENTENCES—STATUTES
STATE V. CARPENTER
SEDGWICK DISTRICT COURT—AFFIRMED; COURT OF APPEALS—AFFIRMED
NO. 115,713—DECEMBER 6, 2019

FACTS: Complaint charged Carpenter of burglary, theft, and criminal damage to property. A separate complaint charged February 2008 offenses of aggravated indecent liberties with a child and criminal sodomy. Carpenter convicted on all charges. District court’s pronouncement stated a 55 month underlying sentence and 36 months of post-release supervision, but journal entry reflected lifetime postrelease supervision in case involving sexually violent offenses. Probation revoked two years later, with imposition of underlying sentence and lifetime postrelease supervision. Carpenter filed motion to correct illegal sentence by confirming the orally pronounced sentence of 36 months’ postrelease supervision, distinguishing postrelease for persons sent to prison versus those granted probation. State argued the lifetime postrelease supervision was mandatory and the 36-month supervision itself was illegal. District court agreed and denied the motion. Court of Appeals affirmed in unpublished opinion. Review granted. While appeal was pending, parties ordered to show cause why sole issue on review was not controlled by State v. Brook, 309 Kan. 780 (2019).

ISSUE: Lifetime postrelease supervision under K.S.A. 22-3717(d)(1)

HELD: District court and Court of Appeals are affirmed based on Brook. Due to nature and timing of his offenses, Carpenter is subject to lifetime postrelease supervision under K.S.A. 22-3717. For determining length of postrelease supervision, Legislature clearly distinguished between categories of sexually violent offenses in K.S.A. 22-3717(d)(1)(D) and (G) based on date of their commission, not by sentences of probation versus prison. K.S.A. 22-3717(d)(1)(G) applies to persons convicted of a sexually violent crime committed on or after July 1, 2006. There are no persons convicted of a sexually violent crime on or after that date to whom both subsection K.S.A. 22-3717(d)(1)(A) and subsection (d)(1)(G) apply. Construing the statute as a whole and giving effect to all subsections, there is no conflict or ambiguity in K.S.A. 22-3717(d)(1).


CRIMINAL LAW—CRIMINAL PROCEDURE—EVIDENCE—JURY INSTRUCTIONS
STATE V. CLAERHOUT
JOHNSON DISTRICT COURT—AFFIRMED; COURT OF APPEALS—AFFIRMED
NO. 115,227—DECEMBER 6, 2019

FACTS: Claerhout was convicted of reckless driving and second-degree murder for unintentional but reckless homicide. District court allowed State to introduce Claerhout’s prior diversion agreement for purpose under K.S.A. 60-455(b); allowed an officer to evaluate the relative speeds of the two vehicles at the time of collision; and denied Claerhout’s request for voluntary intoxication instruction. On appeal Claerhout challenged: (1) admission of the K.S.A. 60-455 evidence; (2) officer’s qualification to testify about scientific and mathematical conclusions; and (3) denial of the requested instruction. Court of appeals affirmed, 54 Kan.App. 2d 742 (2017). Review granted on all issues.

ISSUES: (1) Evidence of prior diversion agreement, (2) expert testimony, (3) voluntary intoxication instruction

HELD: Claerhout’s diversion agreement had probative value that outweighed its prejudicial effect. Statutory requirements and specific details outlined in a diversion for driving under the influence essentially serve the same purpose as a conviction in showing its relevance. In this case, any deficiency in district court’s abbreviated evaluation of possible prejudicial effect was harmless. No need at this time to decide how little or how much analysis a district count must display to satisfy due process mandates in State v. Boysaw, 309 Kan. 526 (2019), but courts are encouraged to state on the record the factors considered in weighing the admissibility of K.S.A. 60-455 evidence.

Kansas Supreme Court has not previously ruled on the degree to which an expert must be able to demonstrate knowledge of the principles underlying the expert’s expertise. It is not necessary that an expert witness demonstrate expertise in every theory, principle or scientific discipline underlying the knowledge, skill, experience, training or education that may qualify an expert witness to give testimony. Background of officer in this case sufficed to meet the statutory requirements for qualification as an expert witness.

The requested voluntary intoxication instruction was not factually appropriate. Voluntary intoxication is not a defense
to reckless second-degree murder. Claerhout’s theory, that evidence of his intoxication tends to show he could not attain a reckless state of mind because of impaired mental function, is rejected. Instead, cited cases show common thread of courts treating intoxication as evidence of recklessness.

STATUTES: K.S.A. 2018 Supp. 8-1567(i)(1), -1567(i)(6), 21-5403(a)(2), -5403(b)(2), 60-455(a), -455(b), -456(b); K.S.A. 2016 Supp. 60-455(b); K.S.A. 60-455

CRIMINAL PROCEDURE—MOTIONS—POST-CONVICTION REMEDIES—STATUTES STATE V. FOX
CHEROKEE DISTRICT COURT—AFFIRMED NO. 115,247—DECEMBER 6, 2019

FACTS: In 2013, Fox filed a K.S.A. 22-3210 motion to withdraw his 1982 guilty plea, arguing in part for equitable tolling of the limitation period. District court denied the motion as untimely filed with no showing of excusable neglect. Fox appealed, further arguing he had been imprisoned in Florida for several years without access to a phone or library materials about Kansas law. He also claimed manifest injustice, citing ineffective assistance of counsel, duplicitous charges, and jurisdictional claims.

ISSUE: Statue of limitations—excusable neglect

HELD: Grace period in 2009 amendment to K.S.A. 22-3210 allowed Fox until April 2010 to file his motion. District court did not abuse its discretion in finding Fox did not establish excusable neglect to permit his untimely filing. No facts support equitable tolling of the limitation period where Fox was held in a Kansas prison about seven years before the statute of limitations ran. No need to address whether Fox established manifest injustice.

STATUTES: K.S.A. 2018 Supp. 22-3210, -3210(d)(2), -3210(e)(1), -3210(e)(2), -3601(b); K.S.A. 60-1507

ATTORNEYS—CONSTITUTIONAL LAW—CRIMINAL LAW—EVIDENCE—JURY INSTRUCTIONS—STATUTES STATE V. HARRIS
LYON DISTRICT COURT—AFFIRMED; COURT OF APPEALS—AFFIRMED NO. 112,883—DECEMBER 13, 2019

FACTS: Harris held victim for two hours, repeatedly forcing her to move from room to room within small apartment while demanding money. Jury convicted him of robbery, kidnapping, and criminal threat. Harris appealed on claims of trial errors and ineffective assistance of counsel. Case remanded for Van Cleave hearing, with no relief granted. In unpublished opinion, Court of appeals affirmed, rejecting the ineffective assistance claim, and finding two trial errors which were harmless both individually and collectively. Review granted on adequately briefed issues. Harris claimed insufficient evidence supported the kidnapping conviction and reasserted his claims of cumulative error and ineffective assistance of counsel. For first time on appeal, he claimed district court erred in failing to instruct on criminal restraint as a lesser included offense and failing to give unanimity instruction for kidnapping and robbery.

ISSUES: (1) Sufficiency of evidence—kidnapping, (2) jury instructions—lesser included offense, (3) jury instructions—unanimity, (4) cumulative error, (5) ineffective assistance of counsel

HELD: Forcing victim from room-to-room within one-bedroom apartment constitutes a taking or confinement within kidnapping statute’s meaning under State v. Bugs, 219 Kan. 203 (1976), and Harris’ movements were not merely incidental to the robbery. No substantive basis for Harris’ claim that his two-hour holding of the victim was part of one continuous effort to get the victim’s money. Pursuant to State v. Haberlein, 296 Kan. 195 (2012), panel correctly rejected Harris’ alternative means claim that evidence failed to show he held victim with intent to facilitate flight.

State conceded a lesser included instruction was factually and legally appropriate, but panel correctly found no clear error on facts in this case.

Unanimity instruction on the kidnapping count would not have been appropriate because all of Harris’ actions were part of one unitary conduct. And no unanimity instruction was necessary on robbery count because State elected one of the two acts that could separately constitute the alleged robbery.

No reversal on cumulative effect of district court’s error of instructing on criminal restraint as an alternative crime rather than a lesser included offense, and omitting the specific crime the kidnapping was meant to facilitate.

Van Cleave court found counsel’s failure to challenge the sufficiency of the charging document within 14 days after trial deprived Harris of the more-strict standard of review under State v. Hall, 246 Kan. 728 (1990), but no prejudice occurred under the “post-Hall” common-sense rule. Panel affirmed on the prejudice prong, applying State v. Dunn, 304 Kan. 773 (2016), which overruled Hall. But issue for appeal late review was not the charging document’s sufficiency but whether Harris’ opportunity for a hearing under the pre-Hall standard was squandered. Following Ferguson v. State, 276 Kan. 428 (2003), the common-sense rule applies and record shows Harris suffered no prejudice.

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—JUDGES—TRIALS
STATE V. JOHNSON
SEDGWICK DISTRICT COURT—AFFIRMED IN PART, REVERSED IN PART
COURT OF APPEALS—REVERSED AND REMANDED
NO. 113,228—NOVEMBER 27, 2019

FACTS: Johnson convicted of criminal possession of a firearm, aggravated assault, and felony criminal discharge of a firearm. During afternoon recess once jury was seated, parties and the court agreed to Johnson’s evidentiary stipulation to a juvenile adjudication for an act that would constitute a felony if done by an adult. Trial began that same afternoon with the admission of exhibits and court rulings on objections. The next day, the trial judge acknowledged he had nodded off after State had begun its case-in-chief. Parties declined trial court’s invitation for motion to seek mistrial. On appeal, Johnson claimed in part the trial judge committed structural error and failed to obtain a valid jury waiver regarding Johnson’s stipulation. Court of Appeals, comparing a sleeping judge to one who was physically absent from the bench, reversed and found the trial judge committed structural error. Panel also found a jury waiver was unnecessary to Johnson’s stipulation to an element of the crimes charged. 53 Kan. App. 2d 734 (2017). Review granted on these panel decisions.

ISSUES: (1) Structural error, (2) jury waiver

HELD: An isolated incident of a trial judge nodding off during a portion of testimony where no objections were made does not create structural error requiring automatic reversal. While trial judge’s inattention in this case appears significant and serious, it is not reasonable to equate the judge’s nodding off to facts in cases involving a judge who physically left the bench. U.S. Supreme Court has not included a judge nodding off (or even a physically absent judge) in identifying the limited class of structural errors. And even in circumstances of actual judicial absence, some courts have refused to apply structural error. Case remanded to Court of Appeals to examine and rule upon the trial judge committed structural error. Panel also found a jury waiver was unnecessary to Johnson’s stipulation to an element of the crimes charged. 53 Kan. App. 2d 734 (2017). Review granted on these panel decisions.

ISSUES: (1) Structural error, (2) jury waiver

HELD: Even if error is assumed in district judge’s failure to give sua sponte two reckless homicide instructions, no reversible clear error on facts in this case.

District judge’s instructions to jury did not direct a verdict of conviction or prevent jury nullification, and were correct statements of the law and not erroneous under State v. Boothby, 310 Kan. 619 (2019).

Under facts in this case, district judge did not abuse his discretion in finding no fundamental failure due to jury misconduct occurred in defendant’s trial.

Errors found or assumed in this case did not cumulatively prejudice Pruitt and deprive him of a fair trial.

STATUTE: K.S.A. 2018 Supp. 21-5109(b)(1), -5202(c)
KANSAS COURT OF APPEALS

CIVIL

ADOPTION—PARENTAL RIGHTS
IN RE ADOPTION OF E.D.
JOHNSON DISTRICT COURT—AFFIRMED
NO. 120,797—NOVEMBER 22, 2019

FACTS: Mother met E.D. while doing field work in Africa. She obtained a six-month visa so that E.D. could receive medical care in the United States. Mother adopted E.D. in 2011. The next year, Mother arranged for a couple she knew (Guardians) to parent E.D. while Mother traveled for work. They became E.D.’s legal guardians. Mother kept in contact with E.D. until 2014, when her communications became concerning and the Guardians limited Mother’s contact with E.D. A court proceeding allowed Mother to have supervised visitation with E.D., but Mother only rarely exercised her visitation rights. The Guardians were concerned because E.D. was living in this country illegally. They attempted to work with Mother to start E.D.’s citizenship process but were unable to make any progress. The Guardians then filed a motion seeking the termination of Mother’s parental rights so that they could adopt E.D. The district court granted both requests, and Mother appeals.

ISSUES: (1) Jurisdiction for the district court to terminate rights, (2) sufficiency of the evidence

HELD: The Guardians filed a single petition which sought both the termination of Mother’s parental rights and permission to adopt E.D. The only issue identified in Mother’s notice of appeal was the termination of her parental rights so that they could adopt E.D. The district court granted both requests, and Mother appeals.

ISSUES: (1) Jurisdiction for the district court to terminate rights, (2) sufficiency of the evidence

HELD: The Guardians filed a single petition which sought both the termination of Mother’s parental rights and permission to adopt E.D. The only issue identified in Mother’s notice of appeal was the termination of her parental rights. There were no errors in the process related to the termination of rights and Mother’s complaints to the contrary are without merit. Because Mother’s notice of appeal was the termination of her parental rights, there was sufficient evidence to support the district court’s finding that Mother failed to assume a parental role in the two years prior to the adoption.

STATUTE: K.S.A. 2018 Supp. 59-2112(b), -2112(c), -2112(d), -2128(f), -2129(a), -2136(d)(1), -2136(h)(1), -2136(h)(2)

CONSUMER PROTECTION—CONTRACTS—FORUM SELECTION
KANSAS CITY GRILL CLEANERS, LLC V.
THE BBQ CLEANER, LLC
JOHNSON DISTRICT COURT—REVERSED AND REMANDED
NO. 118,687—DECEMBER 13, 2019

FACTS: Kansas City Grill Cleaners, LLC, and The BBQ Cleaner, LLC entered a contract for the purchase of outdoor grill cleaning equipment and supplies. The purchase agreement contained choice-of-law and forum-selection clauses which established that venue would exist only in Bergen County, New Jersey. In August 2016, KC Grill filed suit in Johnson County against BBQ Cleaner alleging a deceptive trade practice claim under the Kansas Consumer Protection Act. Relying on the forum-selection clause, BBQ Cleaner filed a motion to dismiss. The district court granted the motion, citing the forum-selection clause. KC Grill appealed.

ISSUE: (1) Enforcement of forum-selection clause

HELD: A forum-selection clause is unenforceable if the party resisting it shows that enforcement would be unreasonable under the circumstances. The KCPA contains a venue statute which is designed to allow Kansas consumers with certain prerogatives in prosecuting a consumer protection claim. A plain reading of that statute makes it clear the legislature intended to allow Kansas consumers to file suit against non-resident companies in Kansas. The district court erred when it found the forum-selection clause in this contract was enforceable.

STATUTE: K.S.A. 50-623(b), -625, -625(a), -625(c), -638(b)

HABEAS CORPUS—RETALIATORY CLAIMS
GRAMMER V. KANSAS DEPARTMENT
OF CORRECTIONS
ELLSWORTH DISTRICT COURT—AFFIRMED
NO. 120,909—NOVEMBER 27, 2019

FACTS: While Grammer was incarcerated, the Kansas Department of Corrections seized several personal magazines from him. Grammer filed multiple appeals of these seizures through the KDOC administrative process. Grammer was successful in several appeals, but by the time rulings were made, the magazines had been thrown away and couldn’t be returned to Grammer. Frustrated, Grammer sent a letter to the ACLU explaining about KDOC’s magazine-seizure policy. The ACLU responded and initiated a correspondence which lasted for a few months. During this same time period,
Grammer’s sister asked KDOC to transfer Grammer from Hutchinson to Lansing, so that his ill and elderly mother could visit him. That request was granted. Grammer was housed on an upper level of the facility, and he filed a grievance claiming that accessing his living space aggravated his knee injury. Shortly thereafter, Grammer was transferred again, to Ellsworth. Grammer filed another grievance in which he claimed that this transfer was in retaliation for his complaints about his living quarters and his communication with the ACLU. After his grievances were denied, Grammer filed a K.S.A. 60-1501 petition. After hearing arguments from the parties, the district court denied the petition, finding that Grammer failed to prove that his facility moves were in retaliation for his grievances. Grammer appealed.

ISSUE: (1) Whether petition showed a prima facie case of retaliation

HELD: Prison officials may not retaliate against an inmate based on an inmate’s exercise of protected rights. In this case, the district court correctly found that Grammer failed to prove that his transfers were made for retaliatory reasons. Although Grammer unquestionably engaged in a protected activity, there is no evidence that any of his facility transfers made it harder for him to engage in that activity. And although it was not required to do so, KDOC provided evidence of a legitimate reason for the transfers. For those reasons, the district court correctly denied Grammer’s petition.


Criminal Law—Civil Rights—Fourth Amendment—Evidence—Motions

MOLINA V. KANSAS DEPARTMENT OF REVENUE
FORD DISTRICT COURT—AFFIRMED
NO. 119,766—DECEMBER 13, 2019

FACTS: Deputy Scott stopped Molina after he was seen failing to maintain a single lane and changing lanes without signaling. After the stop, the officer noticed that Molina smelled like alcohol and had slurred speech. Molina failed a series of field sobriety tests and his preliminary breath test. Molina was arrested and transported to the sheriff’s office, where personnel administered the Intoxilyzer 9000 breath test after waiting the prescribed 20 minutes. Molina’s sample showed an alcohol level far exceeding the allowable amount, and Molina was given notice that his driving privileges were being suspended. Molina requested an administrative hearing and then review by the district court, claiming that Deputy Scott failed to substantially comply with the Intoxilyzer testing protocol. At the district court hearing, Molina’s counsel failed to subpoena Deputy Scott, so there was no testimony regarding compliance with the testing protocol. Nevertheless, Molina argued that his Intoxilyzer results were flawed because Deputy Scott did not wait the required 20 minutes before administering the test. The district court disagreed, and Molina appealed.

ISSUE: (1) Compliance with testing procedure

HELD: Substantial compliance is sufficient to satisfy the 20-minute wait requirement. There is absolutely no evidence to support Molina’s claim that his waiting period was improperly cut short. Molina failed to meet his burden to prove error. Moreover, substantial evidence proves that more than 20 minutes elapsed from the start of the waiting period to when Molina actually performed the test. The district court correctly rejected Molina’s claims to the contrary.

STATUTE: K.S.A. 2016 Supp. 8-259(a), -1020(h)(2)(F), -1020(q), 77-603(a), -621(a)(1), -621(c)(7), -621(d)

Constitutional Law—Civil Rights—Fourth Amendment—Evidence—Motions

STATE V. ELLIS
LYON DISTRICT COURT—REVERSED AND REMANDED
NO. 120,046—NOVEMBER 15, 2019

FACTS: Welfare check requested regarding woman (Ellis) who had been in a convenience store bathroom for a long time. Ellis reported she had been dealing with stomach problems, and complied with officer’s instruction to come out of stall and to hand over driver’s license for identification purposes. Officer found no medical assistance was needed, but held Ellis’ license to run a background check which resulted in her arrest on outstanding warrant. Officers then searched Ellis’ purse, finding methamphetamine and paraphernalia. Ellis was arrested and convicted on drug charges. District court denied motion to suppress, finding Ellis had voluntarily handed over license, and even if officer’s conduct was illegal, discovery of the outstanding warrant independently justified the arrest under Utah v. Strieff, 579 U.S. ___ (2016). Ellis appealed, arguing the officer exceeded the scope of the welfare check by retaining her license and checking for warrants after concluding she did not need assistance.

ISSUE: (1) Fourth Amendment - welfare check

HELD: Officer’s actions exceeded the scope of the authorized welfare check - the only constitutionally authorized encounter in this case. Ellis voluntarily providing identification did not relieve law enforcement of constitutional necessity of a reasonable and articulable suspicion before an investigation is permitted. Strieff is factually distinguished. No showing the attenuation doctrine applies in this case, and totality of circumstances warrant excluding evidence gained as a result of officer’s unlawful detention of Ellis.

STATUTES: None
CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—EVIDENCE—FOURTH AMENDMENT

STATE V. GONZALEZ

COFFEY DISTRICT COURT—REVERSED AND REMANDED

NO. 119,212—NOVEMBER 27, 2019

FACTS: Gonzalez stopped for speeding and given a warning. Officer then employed “Kansas two step” to continue questioning and obtain consent to search the vehicle. Gonzalez filed motions to suppress drug evidence discovered in the search, claiming the officer unlawfully extended the traffic stop and lacked reasonable cause to search. He also claimed he was stopped on the basis of his race and other bias-based policing. District court denied the motions and convicted Gonzalez of drug offenses. On appeal Gonzalez challenged the district court’s denial of motions to suppress.

ISSUE: (1) Search and seizure—traffic stop

HELD: District court erred in finding Gonzalez’ continued detention after conclusion of the lawful traffic stop was a consensual encounter. Under totality of circumstances test stated in State v. McGinnis, 290 Kan. 547 (2010), a reasonable person would not have felt free to refuse the request for additional information or otherwise end the encounter after the officer turned around and asked Gonzalez if he would answer a few more questions. Consensual indicators set forth in State v. Thompson, 284 Kan. 763 (2007), are stated and applied. Because evidence seized as a result of the illegal detention in this case must be suppressed, no need to address alternative claim that suppression is required because officer unlawfully used national origin as a basis to justify the traffic stop.

STATUTES: None

CRIMINAL LAW—EVIDENCE—STATUTES

STATE V. KANE

SEDGWICK DISTRICT COURT—AFFIRMED

NO. 119,749—NOVEMBER 27, 2019

FACTS: Kane robbed a restaurant by escorting an employee at gunpoint into the restaurant, and shooting the restaurant owner while leaving. Jury convicted him of aggravated robbery, aggravated burglary, aggravated battery, attempted first-degree murder, kidnapping, and criminal possession of a weapon. Kane appealed, arguing insufficient evidence supported two of his convictions because: (1) there was no credible evidence of premeditation, an element of attempted first-degree murder; and (2) his interactions with the employee forced at gunpoint from the dumpster into restaurant’s back door did not facilitate the robbery as required by K.S.A. 2018 Supp. 21-5408(a)(2).

ISSUES: (1) Sufficiency of the evidence—premeditation,
(2) sufficiency of the evidence—kidnapping

HELD: State presented both direct and circumstantial evi-

dence of Kane’s premeditation. Viewed in the light most fa-
vorable to the State, there was sufficient evidence presented at trial to support the attempted first-degree murder conviction.

Sufficient evidence supported Kane’s kidnapping conviction. State v. Buggs, 219 Kan. 203 (1976), interpreted what it meant to “facilitate” a crime under the kidnapping statute. Factors stated in Buggs, while not specifically articulated in the kidnapping statute, are binding. A court may find a taking or confinement has independent significance from another crime for purposes of the kidnapping statute not only when an act actually makes a crime substantially easier to commit but also when the act has the potential to do so, even if the defendant never received the anticipated benefit. It is the nature of the act, not its result, that is legally important. Here, moving the employee from a public alley to inside the restaurant substantially decreased the risk of detection. That the employee escaped almost immediately upon reentering the restaurant does not impact the significance of Kane’s actions.

Appellate Practice Reminders
From the Appellate Court Clerk's Office

2020 Vision For The New Year
(and other resolutions courtesy of the Appellate Court Clerk’s Office)

10. Be nice to those who help you in your practice—Clerks, Office Staff, Administrators.
9. Make your words soft and sweet ‘cause you never know when you’re gonna have to eat them.
8. Recognize when you or a colleague are struggling and need help. Use the Kansas Lawyers Assistance Program (www.kalap.com – 785-368-8275). It’s free. It’s confidential. It can save your life and your practice.
7. Connect or Reconnect with your colleagues and family.
6. Take a vacation or even a stay-cation.
5. Disconnect from social media for an afternoon, for a day, or even for a week.
4. Pay it forward to another lawyer – Get a mentor or Be a mentor.
3. Make sure you update your attorney address with attorney registration, including your email – the alternative is an e-filing emergency waiting to happen, let alone a violation of Supreme Court Rule 208.
2. For many of us who had the legendary Jim Concannon, we learned in law school to “Read the statute or rule.” I recently learned from Professor Concannon that he has added to this infamous plea – “Read the statute or rule… all the way to the end.” Sound advice for new and seasoned attorneys.
1. Have a Happy and Successful New Year!

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Part-Time Legal Assistant. A private law firm in Topeka has an immediate opening for a qualified Legal Assistant processing collections. Experience in general office administration required and legal office experience is preferred. Only applicants meeting specific criteria will be considered; please contact for duties and requirements. Please send resume and cover letter for consideration to the attn. of Alisia at info@probascolaw.com or via fax (785) 233-2384.

Wanted. Lawyer with a minimum of 3 years’ experience practice in estate and business law with a desire to become the owner of a central Kansas firm that has a very predictable gross revenue. The firm limits its practice to estate planning, probate, trust settlement and business planning. Please send your resume to ks lawyer recruit2019@gmail.com.

Wichita Law Firm Seeks Associate Attorney. Downtown Wichita law firm seeks to hire an associate attorney to work on all aspects of family law cases. The associate may be given an opportunity to develop a practice outside of the family law area. Interested candidates are asked to send their resume and cover letter to tlegrand@slwlc.com.

Workers Compensation Administrative Law Judge. The Kansas Department of Labor is accepting applications for a Workers Compensation Administrative Law Judge position in Topeka. Applicants are required to be an attorney regularly admitted to practice law in the State of Kansas, have at least 5 years’ experience as an attorney and must have at least one year of experience practicing law in the area of workers compensation. To apply, please go to www.jobs.ks.gov Job ID Number 193714.

Contract Services

Contract brief and motion writing: research. Experienced attorney (25+ yrs.), with superior writing skills, successful track record, and excellent work history (small and large firm), available to assist on a contract basis preparing dispositive motions, other motions, trial court and appellate briefs, pleadings, probate/estate planning documents; also available to assist with legal research. Quality work; flexible. Experience includes litigation, will/trusts, probate, debt collection, bankruptcy, contracts, domestic. Contact Paula McMullen at paulaamcmullen@gmail.com, or (913) 940-4521 to discuss.

Contract brief and motion writing: research. Experienced attorney with superior writing skills, successful track record, and excellent work history (small and large firm), available to assist on a contract basis preparing dispositive motions, other motions, trial court and appellate briefs, pleadings, probate/estate planning documents; also available to assist with legal research. Quality work; flexible. Experience includes litigation, will/trusts, probate, debt collection, bankruptcy, contracts, domestic. Contact Paula McMullen at paulaamcmullen@gmail.com, or (913) 940-4521 to discuss.

Contract brief writing. Former federal law clerk and Court of Appeals staff attorney available to handle appeals and motions. Attorney has briefed numerous appeals in both the Kansas and federal appellate courts. Contact me if you need a quality brief. Michael Jilka, (785) 218-2999 or email mjilka@jilkalaw.com.
David P. Mudrick, Topeka, is now practicing as Mudrick Arbitration & Mediation, LLC • 785-554-1570 • dmudrick@hotmail.com Mudrick is AV-rated with over 35 years’ experience in employment and labor law. He is approved by the State of Kansas as a Civil Mediator and Teacher Due Process Hearing Officer. Mudrick is past president of KBA Employment Law Section. Named 2019 Labor Management Topeka Lawyer of the year and 2020 Employment Law Management Topeka Lawyer of the Year. Selected for Best Lawyers in America in Labor Law Management, Labor and Employment Litigation.


QDRO Drafting. I am a Kansas attorney and former pension plan administrator with years of experience in employee benefit law. My services are available to draft your QDROs, communicate with the retirement plans, and assist with qualification of your DROs or other retirement plan matters. Let me help you and your client through this technically difficult process. For more information call Curtis G. Barnhill at (785) 856-1628 or email cgb@barnhill-morse.law.

Security Expert Witness. Board Certified Protection Professional and former Senior Police Commander providing forensic consulting to both plaintiff and defense counsel in all areas/venues of security negligence. A comprehensive CV, impeccable reputation and both criminal and civil experience equate to expert litigation support. Michael S. D’Angelo, CPP, Secure Direction Consulting, L.L.C. www.securedirection.net. (786) 444-1109, expert@securedirection.net

Social Security Disability Services. Your clients that are dealing with serious injuries or illness may have a claim for Social Security disability. We have lots of experience, get good results, and we are ready to help and to augment your reputation. If you have questions, let’s talk. Our practice is limited to Social Security disability. We can travel anywhere in Kansas, Missouri, Nebraska or Colorado. Contact: Pat Donahue at Western Law (785) 832-8521 or phd@wpa-legal.org.

Veterans Services. Do you want to better serve your veteran clients without going to the trouble of dealing with the VA? I am a VA-accredited attorney with extensive experience applying for various VA benefits, including Improved Pension. I regularly consult with attorneys (and their clients) about the various services attorneys can offer their clients to help qualify veterans and their families for various VA programs. As soon as a client is in position to qualify, I can further assist by handling the entire application to the VA for you. For more information about my various consultation and application services, please contact the Law Office of Scott W. Sexton P.A. at (785) 409-5228.

Office Space Available

Large Office Space now available at One Hallbrook Place in Leawood, KS. Two conference rooms, kitchen, high-speed internet, postage services, copier/fax all included. For more information or to schedule a viewing, contact Blyson Cloon at (913) 323-4500

Manhattan Office Space for Rent. Located in the Colony Square office building in downtown Manhattan. One minute from the Riley County Courthouse. The available space consists of two offices and an area for a secretary/paralegal. Large reception area and kitchen. High speed internet. Open to either office sharing or “Of Counsel” arrangement. For more information, all 785-539-9300 or email to office@jrlclaw.com

Office Space Available on Ward Parkway in south Kansas City, Missouri. This is a great location for attorneys licensed in MO & KS. Large suite with 12 offices with two conferences rooms. There are 3 available offices. Full services provided, including phones answered, internet, supplies, and copier. Contact Kevin Hoop at 816-519-9600 or k hoop@kevinhooplaw.com.

Office for Lease, Corporate Woods. Approximately 400 sf office space available within a working law firm. Convenient location to meet with clients, with access to conference rooms if needed. Comes with all the amenities of a working law firm; witnesses, notaries, fax/copy machine, internet, phone, etc. On the top floor of a building with a fantastic view. Please contact Tim Winkler at 913-890-4428 or tim@kcelderlaw.com.

Ottawa, KS Office Space for Rent- 950 sq. ft. for business office. Reception area, conference room, 4 private rooms, large area for storage, kitchenette, back storage area, restroom, $600/month Please call (785) 893-0494 for more information. The location is 110 W 3rd St, Ottawa, Kansas. Pictures available upon request.

Overland Park- Offices for Rent. Law offices located in Old Downtown Overland Park, in remodeled historic building. Includes: free parking, reception area, kitchen, conference room, fax, scanner, copier, phones, voicemail, and high speed internet access. The offices are in walking distance of coffee shops, restaurants and retail stores. More than fifteen highly respected attorneys in an office-sharing/networking arrangement. For more information contact James Shtelar at 913-648-3220.

Professional Office Space for lease. The available space consists of one to two offices and an administrative staff bay, in a larger office building. No cost use of reception area, conference rooms, and high-speed internet. Located in southwest Topeka. Competitive rent. For more information, call 785-235-5367 or write Law Office, P.O. Box 67689, Topeka, KS 66667.

Seeking Office Space: Bilingual Immigration attorney with over 10 years of experience, looking to rent a conference room or office once or twice a month in Garden City, Kansas. No services needed other than a place to meet clients. We have served the immigrant community in Western Kansas for 9 years and have an ample client base. Our office is a great source of referrals for a family or criminal attorney as we only practice immigration. Please reply to: erika.juradograham@gmail.com.

WYCO Office Suite Available at 134 N. Nettleton, Bonner Springs, KS 66012. 1100-2000 sf. Waiting area, receptionist area, break room, conference room, large and small offices, private parking, ADA Accessible. 1.25/sf/mo. Utilities included. For more information, call (913) 422-1620.

Other

Due to retirement, will sell complete set of Kansas Reports and Kansas Appellate Reports. Price negotiable. Will deliver in KC area. Call 620-215-0236 or email: danielfmeara2@gmail.com

One of a kind walnut 4x8 conference table/desk/Board of Directors table. Four drawers each side and embossed leather top. Priced to sell $575 by retiring lawyer. Topeka location. 785.760.2084.

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