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The Journal Board of Editors is responsible for the selection and editing of all substantive legal articles that appear in The Journal of the Kansas Bar Association. The board reviews all article submissions during its quarterly meetings (January, April, July, and October). If an attorney would like to submit an article for consideration, please send a draft or outline to Meg Wickham, Director of Member and Communications Services, at mwickham@ksbar.org.

Let your VOICE be Heard!

2015-16
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The Journal of the Kansas Bar Association (ISSN 0022-8486) is published monthly with combined issues for July/August and November/December for a total of 10 issues a year. Periodical Postage Rates paid at Topeka, Kan., and at additional mailing offices. The Journal of the Kansas Bar Association is published by the Kansas Bar Association, 1200 SW Harrison St., Topeka, KS 66612-1806; Phone: (785) 234-5696; Fax: (785) 234-3813. Member subscription rate is $45 a year. Nonmember subscription is $25 a year, which is included in annual dues. Publication of advertisements is not to be deemed an endorsement of any product or service advertised unless otherwise indicated.

The Kansas Bar Association is dedicated to advancing the professionalism and legal skills of lawyers, providing services to its members, serving the community through advocacy of public policy issues, encouraging public understanding of the law, and promoting the effective administration of our system of justice.
KBA Officers & Board of Governors Elections

It’s not too early to start thinking about KBA leadership positions for the 2016-17 leadership year.

The KBA Nominating Committee, chaired by Gerald L. Green, of Hutchinson, is seeking individuals who are interested in serving in the positions of Vice President, Secretary-Treasurer, and KBA Delegate to the ABA House of Delegates.

Officers

- **President**: Natalie G. Haag, 2015-16; Stephen N. Six, 2016-17
- **President-elect**: Stephen N. Six, 2015-16; Gregory P. Goheen, 2016-17
- **Vice President**: Gregory P. Goheen, 2015-16; Bruce W. Kent, 2016-17, and nominations/ petitions welcome
- **Secretary-Treasurer**: Bruce W. Kent, 2015-16; open
- **KBA Delegate to the ABA House of Delegates**: Linda S. Parks; open

Interested candidates should send detailed information to Jordan Yochim, KBA Executive Director, at 1200 SW Harrison St., Topeka, KS 66612-1806, or at jeyochim@ksbar.org by **Friday, January 15**, for distribution to the Nominating Committee. Candidates seeking an officer position may be nominated by petition bearing 50 signatures of regular members of the KBA, with at least one signature from each governor district.

Board of Governors

Candidates seeking a position on the Board of Governors must file a nominating petition, signed by at least 25 KBA members from that district, with Jordan Yochim by **Friday, February 19**. If no one files a petition, the Nominating Committee will reconvene and nominate one or more candidates for open positions. The five KBA districts with seats up for election in 2016 are:

- **District 1**: Incumbent Christi L. Bright is eligible for re-election. Johnson County.
- **District 2**: Incumbent Hon. Sally D. Pokorny is eligible for re-election. Atchison, Brown, Doniphan, Douglas, Franklin, Jackson, Jefferson, Leavenworth, Miami, Nemaha, Osage, Pottawatomie, and Wabaunsee counties.
- **District 5**: Incumbent Dennis D. Depew is not eligible for re-election. Shawnee County.
- **District 7**: Incumbent J. Michael Kennalley is not eligible for re-election. Sedgwick County.
- **Young Lawyer Delegate to ABA**: Term expires in 2017.

*A new Governors seat created by the growth in membership in District 5.*

For more information

To obtain a petition for the Board of Governors, please contact Jordan Yochim at the KBA office at (785) 234-5696 or via email at jeyochim@ksbar.org. If you have any questions about the KBA nominating or election process or about serving as an officer or member of the Board of Governors, please contact Gerald L. Green at (620) 662-0537 or via email at ggreen@ksbar.org, or Jordan Yochim at (785) 234-5696 or via email at jeyochim@ksbar.org.
Speaking as Your Client- Please Protect My Data

One of the unique facets of working as in-house counsel is the opportunity to be the user of legal services. I get to see first-hand the client perspective of engaging the services of a law firm or an individual lawyer. Regulators and non-lawyers often suggest that a contract with strict performance standards, confidentiality requirements and security provisions is necessary before sharing information with the outside lawyers. I’ve often argued that the professional responsibility obligations of the lawyer will provide the incentives necessary for the law firm to maintain sufficient safeguards in all these areas.

However, as the bad actors become more sophisticated in their cyberattacks, the questions of whether lawyers are protecting their client’s information continues to make news. Are you ready to address your client’s cybersecurity concerns? As your potential client, let me share some common questions that businesses ask vendors, including lawyers, before granting those vendors access to confidential information:

1. Where do you store client information? Are any of those cloud based storage services? Is any of the information stored off-shore?
2. Do you comply with the privacy obligations of the Gramm Leach Bliley Act (GLBA)?
3. Do you perform a SSAE16/SOC 2 Type II or equivalent evaluation on at least an annual basis? Will you provide me with a copy of that evaluation?
4. Will you indemnify me for any costs, including litigation expenses, associated with a breach of security that results in the unauthorized access to confidential information, as defined by GLBA?
5. What training do you provide your employees about social engineering?
6. Will you provide the following:
   a. Data center name and location;
   b. Business continuity and disaster recovery plans and test results;
   c. Audit reports for controls and/or security environments;
   d. Audited financials;
   e. Key suppliers’ vendor due diligence confirmation/report; and
   f. Key sub-contractor’s vendor due diligence confirmation/report.

This list evidences that as your potential client I am worried about the adequacy of your security, your plans for managing a problem and the stability of your business should a problem arise. I’m also concerned about whether your vendors and sub-contractors can protect my confidential information. As we know from the Target breach, vendors can be a conduit into the company’s systems.

In addition, research establishes that employees are the primary target for gaining access to your secure systems. A “helpful” employee clicking on the wrong attachment can infect your system and set you up for a data breach. Training is the key to identifying social engineering attacks. As a client, I want to know that you are managing these concerns.

As you know, there is a growing list of ethics opinions across the country dealing with the lawyer’s obligations arising out of data breaches. The Code of Professional Responsibility requires diligence and knowledge in the area of protecting electronic data, including the duty of confidentiality (Rule 1.6(a)), the duty of competence (Rule 1.1) and the duty to supervise staff and third parties (Rule 5.1 and 5.3).

This is not new to you and certainly not something you haven’t considered. As your client I am also worried. Unfortunately, I don’t have the magic bullet for avoiding a data breach. In fact, staying completely ahead of the bad actors may not be possible. However, it does appear we have ethical obligations to consider and it is important to give all these issues thoughtful consideration and planning.

Legislative Summit—No cheerful news

The 8th Annual KBA Fall Legislative Conference included a discussion about judicial funding and the financial status of the state of Kansas. The state’s consensus revenue estimating process did not provide a rosy picture for the 2016 session. Stay tuned for more information from Joe Molina. Thanks to Chief Judge Daniel Creitz and Chris Courtwright, Principal Economist for the Kansas Legislative Research Department, for their insightful presentations (photographs on page 7). We also enjoyed hearing from several lawyer legislators.

About the KBA President

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

nhaag@ksbar.org
Photos: Chris Courtright, principal economist for the Kansas Legislative Research Department (left) and Chief Judge Daniel Creitz (right) giving presentations at the 8th Annual KBA Fall Legislative Conference.
The Lawyer and the New Year

It’s that time of the year again. Most of us make resolutions for the new year, lament not sticking with the previous year’s resolution, and promise ourselves this is the year that I will get in shape, eat better, go sky-diving, etc. I was inspired to write this article from a Jurispage.com post that stated:

Most of the time we come up with goals that we can’t measure – “I want to go to the gym more,” “I want to spend more time with my family,” “I want to travel more.” These are all good goals, but they often fail for a few reasons, namely accountability and lack of specificity. Unless your goals are incredibly specific and measurable, it’s all wishful thinking.

The article then went on to outline a way to actually create such a goal; first off identify areas of your life that are important, (family, career). Then create a high level goal such as “going to the gym more.” Follow that by creating a specific, measurable goal, such as a resolution to hire a trainer and work out 4 days a week, for 45 minutes.

We can all resolve to eat better, but what can we resolve to do professionally? What can we do to help make our lives easier professionally, to help us continue to improve our ability to practice law?

I thought why not compile a list of resolutions for the busy lawyer, since likely you won’t have time to compile your own. Ok…here goes:

1. Hire a paralegal or administrative assistant.
   a. Are you a sole practitioner buried under papers and unreturned calls? Even part-time help can make your life much more manageable.

2. Build a website, or hire someone to do so.
   a. In the age of technology that we live in, your website many times is the first thing potential clients will see.

3. Get your CLE’s done before June 29th, trust me on this one…it makes life a lot easier.

4. Volunteer your time
   a. We are all busy, but we can always find time to help others. Whether it’s pro bono work, or simply serving a meal at a shelter once a month, it will enhance not only the lives of the people you are helping, but also your own.

5. Exercise
   a. Resolve to get to the gym 3 days a week for 30 minutes, and then build from there.

6. Eat better
   a. Pack a lunch every day with healthy foods. If you have a lunch meeting, opt for the vegetables instead of the fries, then build from there.

7. Reconnect with someone you have lost contact with.
   a. A friend from law school, an old college buddy. With the advent of social media, it’s easier now than any other time in history to connect with people. Find that person, say hello, and go for it.

8. Slow down
   a. Our lives are crazy, but we can all find time, if even for 10 minutes to just stop and enjoy what we have, take that time to just be thankful for what you have, and the mere fact you are working, and supporting yourself and your family.

May 2016 be the best year of your life. Sure the world seems like a violent, angry place. Resolve to look for the good in it every day; it’s there, sometimes we just have to look.

About the YLS President

Justin Ferrell serves as in-house counsel/risk manager for the Kansas Counties Association Multi-Line Pool in Topeka. He currently serves on both the TBA Young Lawyers and KBA Young Lawyers in many capacities.

jferrell@ksbar.org
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Save the date!

Pending approval in Kansas
Knowing Your Audience In An Ever-Changing Social Media World

“The true test of a man’s character is what he does when no one is watching.” — John Wooden

K
ow your audience—it’s one of the first concepts covered with first-year law students. Who will be reading your work, a client, a partner, a judge, or opposing counsel? What we say and the way we say it depends to whom we’re speaking. As lawyers we communicate for many purposes—advising a client, informing a partner, persuading a judge, placating opposing counsel. Of course, we socialize with other attorneys too, sometimes expressing frustrations about a client or those we work with. It used to be easy to know who the audience was and communicate appropriately for the situation. But with rise of social media, we don’t always know our audience, even if we think we do.

Social media has become an effective tool for marketing, networking, fact investigation, and keeping current on the law and practice. As social media has expanded, the purpose of the various social media tools has expanded as well. Sites, such as LinkedIn, that were once seen as tools for professional networking are now also used for personal social interaction and tools that were originally focused on personal networking, like Facebook, are now used for marketing, advertising, and other professional uses. As these tools have gained popularity, the number of users has greatly increased, enlarging the audience.

The ever-increasing uses of these social media tools make it more difficult to keep one’s professional and personal worlds separate. Many attorneys have a professional Facebook account, often through their firm, and a separate personal Facebook account. However, creating separate accounts doesn’t ensure that these worlds won’t collide.

Using social media raises many issues for attorneys:

- Advertising
- Holding yourself out as an expert or specialist
- Prohibited solicitation
- Disclosing, even if inadvertently, privileged or confidential information, including the identities of current or former clients
- Communicating with represented parties
- Communicating with unrepresented third parties
- Inadvertently creating attorney-client relationships
- Becoming “friends” with judges
- Potential unauthorized practice violations
- Judge posting mid-trial updates on Facebook

Those issues may implicate our Rules of Professional Conduct and carry professional consequences. But even when social media use doesn’t raise ethical concerns, it may be contrary to the Pillars of Professionalism. The Pillars aren’t rules that carry professional consequences, but they are a set of ideals—civility and professionalism—that “no regulatory rules or prosecutorial schemes can enforce”; the “fundamental principles” inherent in the practice of law.

Those fundamental principles may be called into question by social media posts that may seem innocuous in the heat of the moment: posting pictures with a judge after a favorable ruling, posting complaints about opposing counsel and clients, or posting cheeky, disparaging comments about elected officials.

The Pillars remind us that we aren’t merely attorneys; we are representatives of law and justice in our communities, even when we’re “off duty.” Practicing law is a privilege, carrying with it obligations and duties “to exemplify professionalism in every act and deed.” As our professional and personal worlds increasingly intersect, we must be mindful that many people will see our actions as private citizens as actions by members of the legal profession. When it comes to professionalism, we are never really “off duty.”

This responsibility can be complicated in the new social media world where posts are rewarded—through forwards, likes, and comments—for being contentious, controversial, and even unkind. It can be hard to keep up in a virtual world where many members don’t have professions with the same ideals. But the legal system can’t afford for us to neglect our duty of professionalism—on duty, off duty, online, or offline.

The Pillars caution us:

Be mindful of how technology could result in unanticipated consequences. A lawyer’s comments and actions can be broadcast to a large and potentially unanticipated audience.

No matter in which world, professional or personal, we intend to post comments, our comments may reach a large, unforeseen audience. For instance, when is a Facebook post a personal post and when is it a professional post? There is no real way to know. We may intend for a post to be a private communication, but it isn’t actually private. Even if a comment is posted to a closed group or the user has his or her setting on “private,” posts may reach a much wider audience than intended, having serious consequences.

A high-school teacher shared with me that her students were looking through her profile pictures in class and, laughingly, teasing her. She was mortified, not because of the pictures but because she had set her Facebook settings to private. Facebook had changed the setting options, as it does periodically, and her pictures were no longer private under the new settings. Because she strives to be professional in everything she does, it wasn’t a problem, but it was unforeseen.

Keeping up with the privacy settings and having private groups isn’t enough. Users are still at risk. Like the attorney whose client’s family brought clothes for him to wear to court. She snapped a photo of his leopard-print underwear during a security inspection, set her Facebook settings to private. Facebook had changed the settings, and her pictures were no longer private under the new settings. Because she strives to be professional in everything she does, it wasn’t a problem, but it was unforeseen.

One of her “friends” reported it to the presiding judge.

Posts grumbling about clients or other attorneys without naming names aren’t any less risky. In a small legal community, the location, date, and time of a post; who the poster saw in court that day; or the description of the situation can inadvertently give away the target of complaints. These posts are counterproductive. They may generate views, but they harm the profession. Will potential clients hire an attorney who complains about her clients or one who disparages his
colleagues? What will our colleagues think if they see our complaints about judges, opposing counsel, and clients?

The larger social media audience may view posts differently than the author, who may see them as inoffensive or unconnected to work. Even if social media communications don’t lead to mistrials or legal sanctions, they can be embarrassing and end employment: A New Jersey law clerk resigned after posting controversial comments about a police officer’s death on Facebook;12 a district attorney was tagged in a photo where she posed with evidence.13

Clearly, the lines between our professional and personal worlds are blurred. But as professionals we need to proceed as if every comment will be viewed as a comment made by the legal profession. As the infamous website Above the Law warns us, “If you wouldn’t say it in a staff meeting, don’t say it online.”14

We must continue to remember our audience even when we think we are in a private online social setting, heeding the final Pillar:15

In all your activities, act in a manner which, if published, would reflect well on the legal profession.

“The true test of a man’s character is what he does when no one is watching.” In this new social media world, our character is always under scrutiny; everyone is watching everything we do. But we have the Pillars to guide us; “[b]e courteous, respectful, and considerate” to everyone all the time.16

About the Author

Chelsi Hayden is an clinical associate professor at the University of Kansas School of Law. Prior to joining KU, she served as chambers counsel to the Hon. Carlos Murguia, U.S. District Court for the District of Kansas, and practiced business litigation at Shook, Hardy & Bacon LLP. Hayden graduated from KU Law in 2001, Order of the Coif, and was a member of the Kansas Law Review.

Footnotes


2. Fairley, supra, note 1.


5. The Pillars of Professionalism (Pillars) were developed by the Kansas Bar Association to serve as a guide for attorneys with respect to our duty of professionalism. The Kansas Supreme Court and the United States District Court for the District of Kansas adopted the Pillars to guide lawyers in their pursuit of civility, professionalism, and service to the public. For more information on the Pillars, see the following: Kan. Bar Ass’n, Pillars of Professionalism, http://www.ksbar.org/?page=pillars (last visited Nov. 29, 2015); Badgerow, infra, note 6, at 22–32; Timothy M. O’Brien, Pillars of Professionalism: A Fitting Tribute to a True Professional, J. Kan. Bar Ass’n, Nov.–Dec. 2012, at 26–27.


7. Id.

8. Id., at 31.

9. Pillars, supra note 5, regarding respect to the profession and the public, no. 7.


11. Id.


15. Pillars, supra note 5, regarding respect to the profession and the public, no. 8.

16. Id., regarding clients, courts, and opposing parties.
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16th Annual CLE Slam-Dunk

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Many KBA members give their time and energy to programs and projects that benefit other attorneys and the public. Over 600 Kansas attorneys have committed to giving the KBF $1,000 to support programs that provide law related education and access to justice. They do this by pledging $1,000 to become a Fellow of the Kansas Bar Foundation. It is an individual commitment done the way you want to do it. The process may take ten years or one, it is whatever is right for you.

Every piece of the universe, even the tiniest little snow crystal, matters somehow. I have a place in the pattern, and so do you.
— T.A. Barron, Author

“We are hoping to increase the number of Fellows this year so that we can also increase our outreach in Kansas communities,” explained Laura Ice, President, Kansas Bar Foundation. “Our KBF Long-range Planning Committee is hard at work in examining future plans for the KBF, and we hope more people will see the impact of our Foundation work.”

In 2016 the Foundation will award 10 IOLTA grants (see below) to Kansas organizations and scholarships to several Kansas law students. In 2015, the Foundation was honored to be selected by Thomas V. Murray to establish a new scholarship in honor of Frank M. Rice, a long-time Topeka attorney. When Mr. Murray established the Frank M. Rice Scholarship he reflected upon the many years he and Mr. Rice had been friends. They met in the late 1970s when a bank Mr. Murray represented had a transactional matter with one of Mr. Rice’s clients. Mr. Murray worked with Mr. Rice on a number of other matters, culminating in their successful joint representation of a large client in multi-state litigation that lasted for well over a decade. Mr. Murray and Mr. Rice also got to know each other as they both served for over ten years on the Kansas Board of Law Examiners. The first Frank M. Rice Scholarship will be awarded in 2017. Another new scholarship for 2015 is the Kansas Bar Foundation Diversity Scholarship. The scholarship was designed by members of the KBA Diversity Committee and will provide scholarships for two third-year law students over the next six years. It is funded by the Kansas Bar Foundation and the Capitol Federal Foundation.

One of the joys of being a Fellow is being part of the annual Kansas Bar Foundation Dinner. This year, it will be in Wichita on June 16. This is a dinner when Fellows gather to enjoy an evening of celebrating the work of the Foundation and recognizing individual donors for reaching new levels. This is also when Fellows award the Robert K. Weary Award to an attorney who exemplifies giving back. We would love to have you at the table too.

You can learn more about becoming a Fellow by visiting www.ksbar.org/donations/ or by contacting Anne Woods awoods@ksbar.org who will provide you with detailed information about becoming a Fellow of the Kansas Bar Foundation.

**2016 Kansas Bar Foundation IOLTA Grant Recipients**

**Kansas Legal Services**
$14,300
To provide legal services to low income victims of domestic violence throughout the state.

**Kansas CASA Association**
$12,500
To provide funding to assist local CASA programs with capacity building by increasing the number of trained CASA volunteers in the state.

**KBA Law Related Education Committee**
$10,960
To provide programs that focus on providing Kansans with resources and information about law-related matters of interest that affect educators, students, and the public.

**National Institute for Trial Advocacy**
$11,000
To host an intense three-day NITA program in Kansas focusing on the need of specialized public service attorneys, offered tuition free.

**KBA YLS Mock Trial Program**
$7,500
To provide funding to organize and run two regional competitions and a state competition for Kansas high school students. To facilitate travel to the national competition.

**Western Professionals/Immigrations Professionals**
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To provide low-income immigrants access to quality legal services.

**Kansas Coalition Against Sexual & Domestic Violence**
$5,500
To provide a statewide seminar on responding to campus sexual assault, domestic violence and stalking.
... serving the citizens of Kansas and the legal profession through funding charitable and educational projects that foster the welfare, honor, and integrity of the legal system by improving its accessibility, equality, and uniformity, and by enhancing public opinion of the role of lawyers in our society.

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Catholic Charities of Northeast Kansas
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To provide legal services to refugees resettled by the Catholic Charities and individuals from the community who are predominantly Hispanic.

Cy Pres and Bank of America Grants
Two additional grants were awarded to Kansas Legal Services from Cy Pres residual grant funds and a Bank of America fund for foreclosure prevention.

$35,700 Cy Pres funds to provide legal services to low income victims of domestic violence throughout the state.

$50,000 Bank of America Foreclosure Prevention funds to provide direct legal assistance to persons facing foreclosure proceedings, including legal advice and individual representation.

About the Author
Anne Woods serves as the public services manager at the Kansas Bar Association in Topeka. She manages the daily administrative needs of the KBF, in addition to administering projects such as the IOLTA program, pro bono programs, and the KBA’s law-related education efforts.

awoods@ksbar.org

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2016 Legislative Outlook

The 2016 Kansas Legislative Session begins on the 2nd Monday of January. This year the Capitol will begin receiving legislators on January 11, 2016. That same week, on January 13th, Gov. Sam Brownback will address the legislature and Kansas in the State of the State Address. Gov. Brownback will detail his vision for the state and how we are still on a “glide path to zero.” The state has experienced low unemployment (4.1% in Nov.), and a growing number of small business filings that coincided with an increase in take home pay. The state has made smaller government. Unfortunately, even with all of these accomplishments the state continues to suffer a budget crisis.

In early November the Consensus Revenue Estimating Group (CREG) indicated the state would be short $159 million for the remainder of FY 16. Cuts were immediately made to bring FY 16 budget above water. The Governor made $123.8 million in target cuts or allotments including another transfer from KDOT ($47.9 million), and $9 million from the Children’s Initiative Fund Encumbrance change. After those budget adjustments the state will be left with an ending balance of $5.6 million. Not much for a state that hopes to bring in over $6 BILLION in revenue.

The outlook for FY 17 is even worse. The CERG projected a budget shortfall nearing $194 million. Particularly troubling was the lowering of the sales tax receipts by $91 million. To continue the glide path to zero the state needs a stable sales tax revenue stream. Should sales tax revenue continue to underperform, legislators will need to look for other sources of revenue. As such, the opportunity to close the business exemption loophole would appear to be possible. However, Gov. Brownback has made public comments concerning the need to raise taxes, and he is not a fan.

It seems unlikely that the Governor would reverse course on his flagship tax policy that exempted over 330,000 LLC’s, partnerships, sole proprietorships and farm income. That means that the Governor, who cannot run for reelection, must convince legislators, who face voters this fall, to stay the course. How quickly this issue can be resolved will determine how long the session runs.

Piling on to the current budget challenges is the school finance case that could add hundreds of millions to the shortfall, an odd tax appeal case that has a $40 million price tag, and the possibility of removing some sale tax exemptions.

Not all debate next year is likely to involve declining state revenues. For the past several years, Kansas hospitals and other health care providers have encouraged legislators to expand Medicaid coverage under the Affordable Care Act (Obamacare) to help provide health care to those not otherwise eligible for Medicaid coverage. The Federal Government will initially finance 100% of those made eligible for coverage and reduce the reimbursement to states to 90% by 2020 and beyond. Opposition from the governor and some members of the Kansas legislature is two-fold: 1) The State is concerned federal financial support could be reduced at some point in time, leaving states with a tremendous financial burden; and, 2) The Affordable Care Act remains very unpopular with a majority of Kansas legislators, or at least those controlling the agenda.

Legislative leaders have worked hard to keep this issue tamped down in spite of continued pressure from various constituencies, including Kansas hospitals. The recently announced closure of a hospital in Independence, Kansas, has served as a flash point to proponents who suggest expanded Medicaid might have saved the hospital and, without expansion, more hospitals are destined to close. Most recently, the speaker of the House changed up several of his committee assignments, which was seen as a maneuver to help the chairs better control the debate over bills held for hearings in their committees next year. Included in the list of changes were three supporters for the expansion of Medicaid who were removed from the House Public Health and Welfare Committee.

The Kansas Bar Association will again engage on issues related to judicial selection, judicial retention and changes to fundamental court operations. A number of those bills were introduced last session and have carried over to 2016. Below is a list of the bills to help refresh your recollection.

**Judicial Selection**

The Kansas House is responsible for all of the proposals to alter the method for selecting Kansas Supreme Court justices. Two measures were passed out of the House Judiciary Committee. They include HCR 5004, partisan election, introduced by Rep. Mark Kahrs (R-Wichita) and HCR 5005, Gov. Appoint, introduced by Rep. Travis Couture-Lovelady (R-Palco). To move forward in the legislative process the Kansas House of Representatives would need a super-majority to approve.

**HCR 5003** A PROPOSITION to amend section 3 of article 4 of the constitution of the state of Kansas, relating to the judiciary and recall elections.

**HCR 5004** A PROPOSITION for the direct partisan election of supreme court justices and court of appeals judges, abolishing the supreme court nominating commission

**HCR 5005** Constitutional amendment revising article 3, relating to the judiciary; allowing the governor to appoint supreme court justices and court of appeals judges, subject to senate confirmation; abolishing the supreme court nominating commission

**HCR 5012** Constitutional amendment; abolishing the supreme court nominating commission; supreme court justices appointed by the governor from nominees submitted by the House judiciary committee

**HCR 5006** Constitutional amendment revising article 3, relating to the judiciary; allowing the governor to appoint supreme court justices and court of appeals judges, subject to senate confirmation; lifetime appointment, subject to removal for cause; retaining the supreme court nominating commission, membership amended.
Court Operations

In addition to altering the method of selection of judges/justices, the Legislature introduced a number of bills aimed at changing how judges/justices maintain their position. Two methods to increase the percentages necessary to survive a retention election were proposed. The proposals deserve added attention this session because a number of Kansas Supreme Court justices and Kansas Court of Appeal judges stand for retention in November. During the last election cycle (2014) Justice Rosen and Justice Johnson were retained by the smallest margin in history. Many anticipate an organized campaign to oust the justices/judges up for retention in 2016.

The proposal to lower the retirement age for judges/justices did get some traction because it would be the easiest, statutory (63 votes) change rather than constitutional (84 votes), and have the largest impact (five Court of Appeals judges and two Supreme Court justices would age out during this administration). However, it remains unlikely that the proposal will find its way to the governor’s desk.

Finally, the Senate introduced a bill that would make the Supreme Court nominating commission a public body governed by the Kansas Open Meetings and Open Records Act. The goal of the proposal is to require the SCNC members’ votes be open to the public. The bill stalled due to an amendment on the House floor requiring the governor to provide a list of all applicants who apply for the Kansas Court of Appeals.

HCR 5009  Constitutional amendment, 33% vote against retention of a supreme court justice would result in open position
HB 2073  Changing the mandatory retirement age for judges and justices
HB 2344  Retention rates for Kansas Court of Appeals (70%)
SB 197  Applying open meeting requirements to supreme court nominating commission

In addition, the KBA will also engage on several other issues that have a direct impact on the practice of law. For instance, the KBA will reintroduce a bill aimed at clarifying when a transfer on death deed lapses. The KBA will review several proposals outlined by the Kansas Judicial Council. Finally, the KBA will work with the judicial branch to maintain Access to Justice Standards.

For those interested in the legislative process, I cannot stress the importance of contacting your legislator. Far too often citizens fail to realize the impact a simple phone call or email can have on a legislator faced with a difficult decision. I can assure you that you will not agree with your legislator 100% of the time, but they do value contacts from their home district and they are concerned about their constituents.

I encourage you to contact your legislator and visit with them about things you consider important or provide them with information they might find useful. You are all experts in your field of law and that information and/or experience is quite valuable.

You can find information on how to contact your legislator on the KBA website by visiting http://www.ksbar.org/?legislative. There you will be able to find your legislator, review the bill-tracking chart, determine who is a law-trained legislator and read the weekly KBA Advocate.

For more information on the legislature or state government the official state website for the Kansas Legislature is: www.kslegislature.org

From that site, you can find information on the House and Senate members and contact information, calendars, bill introductions, committee activity, minutes of committees, committee memberships and virtually anything related to the Kansas Legislature.

Governor Sam Brownback
The website for Governor Sam Brownback and Lt. Governor Jeff Colyer is http://www.kansas.gov/

Attorney General Derek Schmidt
The website for Attorney General Derek Schmidt is http://ag.ks.gov/

About the Author

Joseph N. Molina III serves as the director of legislative services for the Kansas Bar Association. Prior to joining the KBA, he was chief legal counsel for the Topeka Metropolitan Transit Authority and served as assistant attorney general, acting as chief of the Kansas No-Call Act. Molina earned a B.A. in political science, philosophy, and economics from Eastern Oregon University and a J.D. from Washburn University School of Law.

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2016 Tech Trends

Gartner tries to predict what trends will blow up and change the landscape of technology and business annually and they are at it again for 2016. The full, buzzword-addled list of 2016’s top strategic technology trends is available at: http://www.gartner.com/newsroom/id/3143521.

Most trends identified by Gartner are essentially carry-overs from prior years. They represent ideas that continue to percolate but which are coalescing around products and services which should be popping on lawyers’ radar.

The Device Mesh

Sophisticated sensors are being embedded in countless devices. The average smart phone has sensors for:

- proximity (detects distance from face to phone),
- accelerometer and gyroscope (manages device orientation),
- ambient light (adjusts screen brightness to environment),
- moisture sensor (indicates water damage),
- compass (provides directional detection), and
- GPS (reports precise position on Earth).

Those and myriad other sensors also show up in fitness trackers, watches, medical devices, clothing, appliances, furniture, and vehicles. They are everywhere, and most people love them because they provide us with more and better information to improve interfaces, trouble-shoot problems, and statistically predict the future.

Device meshes arise when those sensors share their data with each other. For example, your fitness band could tell your thermostat to drop a few degrees while you are exercising. Either could kick on a timer in an on-demand water heater readying a post-workout shower. Tiles in the shower log your current weight and the smart toilet collects urinalysis data. Sensors in the mirror do a quick check of blood pressure, thyroid health, BMI, and melanoma. Those sensors then adjust the items on your grocery shopping list and refill prescriptions to help meet health goals and manage various conditions. Meet your health goal and sensors unlock a special Netflix queue and the ice cream maker as a reward.

Ambient User Experience and Autonomous Agents

Gartner refers to such an environment as an Ambient User Experience – our tools and toys automatically and invisibly organize our world managing details, big and small, in the background. Ultimately, the interface becomes autonomous predicting and responding to need.

Consider the mesh of sensors feeding the interface to a Tesla Model S car. The car interface downloads software updates that unlock new capabilities in the background. The extreme end of this is the Tesla’s autopilot feature. The driving interface is enhanced by an autonomous agent that acts faster, better, and more safely than you can. Pack enough sensors pushing massive amounts of data at lightning speed and a car available RIGHT NOW can prevent a head-on collision before the driver can even recognize the oncoming threat. Watch the video here: https://youtu.be/9X-5fKzmy38.

Internet of Things and Information of Everything

The device mesh, ambient user experiences, and autonomous agents currently require an umbilical to the Internet. The devices, in most cases, do not have the horsepower to crunch the data produced by their sensors. That data needs to be fed up to a provider. Smart phone agents like Siri or Cortana, for example, are not self-contained on the phone hardware/software. Questions feed up to the cloud and are processed and answered there before being pushed back to the user. The little sensors in our fitness trackers generate mounds of data, but that data needs to be fed up to the Internet to be crunched for tracking and viewing. Our local devices simply manage data collection and transmission while “big iron” servers elsewhere turn that data into meaningful, desirable products and services.

The Dark Side

The companies collecting all the data from all those interconnected sensors create a treasure trove of data that becomes very interesting from multiple legal perspectives. Just a few:

- Security – All that data linked to specific consumers provides a tantalizing target for thieves and adversaries. While Gartner predicts that Adaptive Security Architecture that can anticipate and respond to attacks is a trend to watch in 2016, the present reality is that security is a mess. One of 2015’s biggest breaches impacted the VTech toy company. It exposed 4.8 million adult accounts and 6.3 million children’s data including photos and chats from Internet-enabled toys.
- Discovery – The mountain of data is interesting in a variety of legal claims. Data from Fitbit fitness trackers has already started appearing in litigation after subpoena from both plaintiffs and defendants. Interconnected data-gathering devices can paint a seemingly more complete picture of a person for a judge or jury just as easily as they provide a clearer picture for service providers and advertisers.
- Ethics – The collected data from all our devices can make day-to-day life easier and safer. However,
the data also provides opportunity for abuse. Facebook ran unsanctioned and unethical psychological experiments on 700,000 users in 2012 and the data now available to corporations leads Gartner to predict that over one half of business ethics breaches will be related to improper use of data analytics by 2018.

Some contend we can somehow put the technology genie politely back into the bottle. That is wrong-headed. All indications are that consumers want these trends to continue and to broaden. The consumer does not want to surrender their autonomous Teslas, smart phones, fitness trackers, or any other gizmo. Instead, they would like to reap the enjoyment of those tools while also expecting lawyers and law-makers to take some efforts to contain the negative effects. Technology is our opportunity to prove our continued relevance to maintaining a civilized society even when data-driven, semi-autonomous machines are part of it.

About the Author

Larry N. Zimmerman is a partner at Zimmerman & Zimmerman P.A. in Topeka and an 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
WHERE DOES THE MONEY GO?

Our designated charities for 2016 are:
- CASA (Johnson/Wyandotte Counties)
- Safehome and Hope House (domestic violence programs)
- Metropolitan Organization to Counter Sexual Assault (MOCSA)
- Kansas Bar Foundation
- Midwest Foster Care and Adoption Association
- 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.

WHO ARE THESE INTREPID PRESENTERS?

Stan Davis, Legal humorist, consultant and gadfly
Jim Griffin, Scharnhorst Ast Kennard Griffin, P.C.
Mark Hinderks, Stinson Leonard Street L.L.P.
Todd LaSala, Stinson Leonard Street L.L.P.
Hon. Steve Leben, Kansas Court of Appeals
Jacy Hurst Moneymaker, Swope Health Services
Todd Ruskamp, Shook, Hardy & Bacon L.L.P.
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*Reception afterward sponsored by the JCCC Foundation

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QUESTIONS?

Contact Deana Mead, KBA Associate Executive Director, at dmead@ksbar.org or at (785) 234-5696.

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Getting Dirty In Law School

Do you know the difference between being a successful law student and being a successful lawyer? Gunners, put your hands down.

It is May 16th, the night after the last final of your first semester in law school. You have arrived at a bar, or a hastily cleaned apartment, for a gathering of your most tolerable fellow students known as The Great Catharsis, the hyper-analytical and post-traumatic unwinding of all the psychic rubber bands from their frayed and tortured condition. Slowly prognosticators forecast certain doom, others confidently explain “I’ve got this.” The wary and weary 2L and 3L veterans sitting within earshot will confirm that no one here knows what they are talking about. Help is on the way, however, for anyone who wants to get a little dirt under the nails.

Everyone present is a little bit shell shocked; all fall somewhere along a soon to be familiar continuum, ranging from students who have thrived upon affirmations of purely academic competition to merely bright people who may not necessarily love the classroom, but have committed to the idea of becoming a “lawyer,” whatever that may be.

Basic training is over for these inductees; each has learned how to be a law student, a few have even started to speak in “irac.” Many students emerge from the first semester with a wounded pride, desperately trying to reconcile the antithetical concepts of a C+ and continued existence. Many have scrambled to the familiar safety of clubs within the school; some of those standing on the diving board contemplate law school is abstract and theoretical; it occurs within a vacuum. This academic insulation is comforting while within the bubble of straight academics.

There is an inherent, unavoidable, myopia that sets in for the survivors of the first semester, or first year. Both the over-confident gunners and thoroughly rattled majority will have lost their bearings along the way. How to get them back again? There are two essential steps for each student to take from being a successful student to a successful lawyer.

First, take a breath and think about what having some balance might feel like. Sunlight exists. It is possible to make friends with people who are not in law school. Chipotle does not cover all your nutritional requirements. Test these hypotheses; go to the gym.

While much has been said about maintaining a balance while in school, the importance of acquiring an accurate perspective about what comes next, the actual practice of law, has been understated. Law school is abstract and theoretical; it occurs within a vacuum. This academic insulation is comforting to some and highly distressing to many others; both camps need to come up for air as soon as possible.

Time is at a premium for every law student. Each activity needs to be of consequence; no one wants to waste time simultaneously working in opposite directions. Getting real world work experience through pro bono work, volunteering for law clinics, or any externship possibilities where real work product is expected should parallel any course of study, at the earliest possible instance.

To begin with, the immediate change in working environments is a welcome relief from the large classes. Pro bono work comes with a mentor. The one-on-one relationship presents a fantastic opportunity to learn. The reluctance, born of classroom scrutiny and fear, dissipates. Working at your own pace means that you can keep working if you understand a concept or stop if you don't.

Law students are highly educated and highly intelligent; we figure out ways to build better mousetraps in the same manner that we discovered how to write “I will not talk in class” faster each time we missed recess as kids. We become numbed to the premise of answering questions “right” or worse, weighing several right answers; we still want to go to recess as soon as possible.

The real world work experiences of pro bono work, volunteering, or externships revolve around real people and real consequences; there are no work arounds. We emphasize discrete partitions between areas of study within the curriculum. Real world clients present problems that ignore these artificial demarcations; we are reminded that we are, first and foremost, problem solvers. We distill solutions from the ether around us, articulate a range of solutions to our client, and do it on time. The risks and rewards are much more primal when the outcomes matter to more than one person.

Navigating the vagaries of class-rank and essay techniques are simple tasks when compared to the challenges of finding the needle in the haystack within a 4,000 page file or simply making a phone call to a client who cannot communicate clearly. There is a sense of urgency that can only be approximated while within the bubble of straight academics.

The takeaway in reflection, however, is the truly essential piece. When you can see a pathway from a client walking in the door for the first time to a solution to a problem you became the owner of your work. That ownership will give every student a sorely needed perspective. Some students will become better-rounded, abandoning a reliance upon test taking skills in favor of human skills. Other students may emerge from the first semester uncertain of ever being of use to a client; the confidence that comes from a real world puts more wind back into the sails of a student than any amount of external encouragement.

This process of getting dirty, getting away from the library and into people's lives humanizes both clients and students. A career in the law begins to seem much less abstract or doubtful with each morsel of work experience. There are a litany of reasons why students would want to attend law school, but it is only with some experience that anyone can tell you why they want to stay in law school.

About the Author

John Nichols is a 3L at Washburn University School of Law. He looks forward to practicing transactional and regulatory compliance healthcare law. He spends his spare time composing and recording music.

John.Nichols1@washburn.edu
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Members in the News

Changing Positions

Jesse A. Burris has joined Rick Hodge, Attorney at Law, L.C., Wichita.

Trent Byquist has joined Foulston Siefkin LLP as an associate, Wichita.

Kelsey N. Frobisher has joined Foulston Siefkin LLP as an associate, Wichita.

Casey O. Housley has joined Sanders Warren & Russell LLP as a partner, Overland Park.

Ashlyn B. Lindsdog joins Martin, Pringle, Oliver, Wallace & Bauer as an associate attorney, Wichita.

Norbert C. Marek Jr. named Second District Court Judge, Jackson County

Matthew McAnarney has joined Bever Dye, LC, Wichita.

Jason G. McIlrath has joined Cameron Law Office, P.A., Wichita.

Katherine E. Malotte has joined Joseph, Hollander & Craft LLC, Wichita.

Ann M. Parkins has joined the McPherson Law Firm as a partner, McPherson.

Benjamin J. Simon has joined Foulston Siefkin LLP as an associate, Wichita.

Doug Stone has joined Lewis Rice, Kansas City, Mo., as a member.

Jessica L. Stoppel, has joined Clark, Mize & Linville, Salina, as an associate.

Nickolas C. Templin has joined Sanders Warren & Russell LLP as an associate, Overland Park.

Changing Locations

Collins & Jones, P.C. has moved to 101 West Foxwood Dr., Raymore, Mo., 64083.

Lara M. Owens has joined Owens Law Firm, 9393 W. 110th St., Ste. 500, Overland Park, Kan., 66210.

Samuel D. Ritchie has joined Ritchie Development, 8100 E. 22nd St. N., Bldg. 1000, Wichita, Kan., 67226.

Obituaries

Warren Andreas

Warren Dale Andreas, 84, passed away Nov. 23, 2015, at his home surrounded by his loving family.


Warren graduated from Abilene High School, received a combined bachelor of arts/bachelor of law degree from the University of Kansas and then graduated from KU Law School with his Juris Doctor degree.

He had many professional accomplishments, including being an attorney for the City of Winfield for 20 years and for the USD 465 Board of Education for 27 years. He served on the Board of Governors of the Kansas Bar Association for 10 years and received the KBA’s “Professionalism Award” in 2000. Warren was also admitted to practice before the United States Supreme Court and Kansas federal and state courts.

He took his civic duty seriously and was a substantial contributor to many boards and organizations, including the Winfield Public Library, Cumbernauld Village, Salvation Army, Legacy Community Foundation, Winfield Arts and Humanities Council, Southwestern College, Camp Horizon, Winfield Rotary Club, Winfield Lions Club and Winfield Recreation Commission. Warren was an active member of the First United Methodist Church and served on numerous committees.

He enjoyed golf, tennis and traveling around the world. He had been to more than 73 foreign countries on six continents. Warren was a cast member in more than 35 Winfield Community Theatre productions and the author of “Winfield Community Theatre –1968-2005.” Warren enjoyed KU basketball and football games with his family.

Surviving to honor Warren in memory are his beloved wife Colleen; sons David Andreas and wife Teri SpenglerAndreas and Eric Andreas and wife Wanda, and daughter Alisyn Edwards and husband Brad. He is also survived by his chosen children, Jerry Gatti and companion Lowelle Childers, Linda Briggs, Nancy GattiSage and husband Tim and Darryl Gatti and wife Dana. Warren has nine grandchildren, and 11 great-grandchildren.

Ronald Broun

Ronald, ‘Ron’ Broun, 75, Lawrence, died Tuesday, Oct. 20, 2015 at Lawrence memorial Hospital.

He was born Dec. 30, 1939, in Phillipsburg, Kan., the son of Diran T. “Bud” and Winfred Winship “Winnie” Broun. Ron graduated from Phillipsburg High School, and later earned

Miscellaneous

Kevin Berens, St. Francis, was appointed to the Sentencing Commission by the governor.

Jan Hamilton, Topeka, has been selected by the Kansas Continuing Legal Education Commission as the recipient of the 2015 Robert L. Gernon Award.

David J. Rebein, Dodge City, has been certified as a member of the Million Dollar Advocates Forum, a limited membership to trial attorneys who have won million- and multimillion-dollar verdicts, awards and settlements.

Rebein Bangerter Rebein PA, Dodge City, was recently ranked “Best Law Firm” for professional excellence with persistently impressive ratings from clients and peers.

Attorney General Derek L. Schmidt, Topeka, was recently named “Criminal Justice Professional of the Year” by the Wichita Crime Commission.

Clyde W. Toland, Iola, and his wife, Nancy, have been named the 2015 Farm-City Days city marshals.

Doug Wells, Topeka, has been selected by his peers for inclusion in the 2016 edition of The Best Lawyers in America in the practice area of DUI/DWI Defense. His law firm also received a Tier 1 ranking in Topeka for DUI/DWI defense by U.S. News & World Report and Best Lawyers in America.

Tim Whelan, Joplin, Missouri, has been selected as an honoree for the Joplin Regional Business Journal’s 2015 class of Regional Men of Distinction.

Editor’s note: It is the policy of The Journal of the Kansas Bar Association to include only persons who are members of the Kansas Bar Association in its Members in the News section.
Theodore "Ted" Branine Ice

Theodore Branine Ice ("Ted"), 81, a third generation Kansas lawyer and former Kansas 9th Judicial District Judge, passed away on Monday morning, November 23, 2015 at the Newton Medical Center. Ted was born June 30, 1934, in Newton, KS, to C. Fred and Mildred Ice.

He graduated from Newton High School in 1952 and from the University of Kansas in 1956. During his college years he completed the N.R.O.T.C. program, and following his KU graduation, he served for three years in the U.S. Navy as an officer in the Supply Corps. He served on two ships during his time in the Navy, making two trips on the U.S.S. Evans to conduct naval duties in the Western Pacific and Far East. Upon his discharge from the Navy in May, 1959, he entered the University of Kansas Law School, graduating with a J.D. degree in 1961.

He and Sue Harper Ice met as students at KU and were married in her hometown, Winchester, Illinois, in August, 1957. Ted returned to Newton and practiced with the firm Ice, Turner and Ice for 26 years, being admitted to practice in the State Courts of Kansas, the 10th Circuit Court of Appeals, the United States District Court for Kansas and the Supreme Court of the United States of Kansas. He was elected Harvey County Attorney in 1965 until 1969. He was a member of the Harvey County Bar Association, The Kansas Bar Association and the American Bar Association. He was appointed Kansas district judge in 1987 and served until he retired in June, 2002. He served on the Board of Governors of the University of Kansas School of Law and the Board of Editors of the Kansas Bar Journal. He was a member of the Kansas Judicial Qualifications Commission, the commission responsible for disciplining judges, for many years until 2012. He was a Fellow of the Kansas Bar Foundation and a Fellow of the American Bar Foundation.

While a judge, he was instrumental in beginning the Court Appointed Special Advocate (C.A.S.A) program in his District and the Citizens Review Board (C.R.B.). He was the first board member of Heart to Heart, an organization which serves child victims of abuse.

Ted was an Elder of the First Presbyterian Church in Newton and served several terms on the Session. His community involvements included: Newton Jaycees 1961-64, Newton Chamber of Commerce Board of Directors, 1964-75, president, 1973-74, Chairman of the Harvey County Republican Central Committee 1968-78, Delegate from Kansas to the Republican National Convention, 1972, Board of Directors of Bank of America (formerly Kansas State Bank), 1972-87, President of the Newton Rotary Club, Board of Directors of Newton Community Theatre, 1973-83, Harvey County United Way Board of Directors, 1976-79, president 1978-79, Bethel College Advisory Committee chairman, 1984-87, chair of Bethel Builders Campaign 1975, Newton High School Centennial Steering Committee, 1984, Bethel Deaconess Hospital Board of Directors, 1979-87, secretary, 1982, BethelAxtell Merger Study Committee chairman, 1982-83. He was a member of the Kansas Native Sons and Daughters from 1991-95 and president in 1995. He was a member of the Newton Medical Center Board of Trustees and he served for many years until 2011 on the Board of Trustees of the Presbyterian Manors of MidAmerica.

In 1997, Ted was honored as Outstanding Citizen of the Year by the Newton Chamber of Commerce.

Survivors are his wife, Sue, of the home and his 3 children, Laura Lynn Ice, Wichita, Nancy Ice Schlup (and Ken), Newton, Evan Harper Ice (and Jill), Lawrence, three grandchildren: Erin Ice, Alexis Ice and Emily Ice, Lawrence.

Joe Allen Lang

Joe Allen Lang, 71, retired Chief Deputy Attorney for the City of Wichita, passed away Thursday, November 5, 2015. Joe was born October 7, 1944, in Memphis, Tennessee, to Taylor Scott Lowry and Eula Fern Deyoe Lowry. He grew up in Jetmore, Kansas, and was a graduate of Jetmore High School, Sterling College, Emporia State University and Washburn University School of Law. Joe served in the United States Army 6th/27th Infantry Division and was a veteran of the Vietnam War. He was an elder and deacon at Wichita First Presbyterian Church, a member of Wichita North Optimist Club and Sterling College Board of Trustees and Alumni Council, a Sedgwick County Extension Master Gardener, 4H photography leader, and a member of both the Wichita and Kansas Bar Associations. Joe was preceded in death by his mother, Eula Fern Deyoe Lang; father, Harry Lang; brother, Roger Dennis Lang; and brother-in-law, Phillip Burnside. Survivors: loving wife, Teresa Ann Richards Lang of the home; daughter, Elizabeth "Liz" Ann Lang of New York, NY; sisters, Judy Lang Semenuk of Maryland, Anita Lang of Missouri, Laura Lang Burnside of Florida, Connie Lang Joe (Tom) of Emporia, KS, Barbara Thomas (Bob) of Virginia.

James T. Newsom

James T. Newsom, 71, of Leawood, Kansas passed away on November 30, 2015 following a lengthy illness. Born October 6, 1944 in Carrollton, Missouri, Jim spent his childhood years in Boisworth, Missouri and graduated from Boisworth High School as its valedictorian in 1962. Upon graduation, he attended the University of Missouri and the University of Missouri Columbia School of Law. He received his J.D. Degree in 1968.

Following law school, Jim entered the U.S. Navy and served in the military’s Officer Induction, Naval Justice, and Judge Advocate General’s schools. He was stationed in Washington, D.C. where he served as a military judge in the JAG Corps following his admittance to the U.S. Court of Military Appeals.

Upon his discharge from the Navy in 1972, he joined the law firm of Shook, Hardy & Bacon of Kansas City, MO, where he became a partner in 1976. Specializing in the areas of Business Litigation, Global Product Liability, Commercial Litigation and Toxic Torts, Jim acquired extensive experience in international products liability and commercial litigation as national counsel for the Lorillard Tobacco Company. In 1990, he moved to London, England with his family to direct the activities of the firm’s UK office, returning to Kansas City in 1993.

In 2011, he joined the New York law firm of Hughes Hubbard & Reed and served as Counsel in the firm’s litigation department. At the time of his illness, his practice concentrated on national products liability litigation in the state and federal courts.

Newsom is survived by his mother, the former Hazel L. (Mitchell) Newsom of Carrollton, MO, his loving wife of 30 years, Sherry, of Leawood, KS, children Ben and Holly Bawden, of New York, NY, sister Nancy, and brother-in-law Mick Whipkins of Carrollton, MO.
Glee S. Smith Jr.

Glee S. Smith Jr., 94, former Kansas state senator, longtime Larned & Lawrence lawyer, died Nov. 16, 2015 in Lawrence. He was born in Rozel, April 29, 1921, the son of Glee S. Smith, Sr. and Bernice Augustine Smith. He was married to Geraldine Buhler at Trinity Episcopal Church in Lawrence, Dec. 14, 1943. They lived in Larned from 1947-1991, when they moved to Lawrence. He is survived by his wife, of the home, sons, G. Sid Smith, III, of Alexandria, Virginia, Dr. Stephen (Laurie) B. Smith, of Omaha, Nebraska, a daughter, Dr. Susan (Dr. James Moeser) K. Moeser; three grandchildren, Courtney (Graham) Smith Duncan of New York City, Jacob (Kim) B. Smith of Phoenix, Arizona, Dr. Kylie (John) Galfione of Houston, Texas, and their mother, Cheryl C. Smith; 6 great grandchildren and 3 great grandsons.

Glee graduated from KU in 1943 with a degree in journalism, and in 1947 with a Juris Doctorate. He was a member of Delta Tau Delta social fraternity, Sigma Delta Chi journalism fraternity, Phi Delta Phi legal fraternity, and Order of the Coif, honorary legal fraternity. He served in WWII as a 1st Lieutenant aerial navigator in the Army Air Corps. Smith devoted his life to a 3-part career in the practice of law, public service and political action. He had been admitted to the practice of law in all courts from local Kansas courts through the Kansas Supreme Court, the federal courts, the US Supreme Court, and the Court of Military Appeals, Washington, D.C. His practice in Larned was first in partnership (1947) with the late Judge Maurice A. Wildgen, since 1958 with Donald L. Burnett, and since 1975, with both Burnett and Jerry G. Larson. Also of counsel from 1991-2014 with the Lawrence law firm of Barber, Emerson, Springer, Zinn and Murray. L.C. He had leadership positions at various levels of service that included national participation such as service as 1 of the 5 Kansas Commissioners on Uniform State Laws since 1963, and National Legislative Chairman and member of the National Executive Committee of that Conference for 12 years; 1 of 3 Kansas lawyers in the House of Delegates of the American Bar Association for 10 years, and the only representative for 4 mid-western states on the Board of Governors of the American Bar Association for 3 years, where he served on the National Executive Committee and chaired the Operations Committee. He also was a fellow of the American College of Probate Counsel and Kansas Chairman, as well as a Fellow of the American Bar Foundation. He was a 67 year member of the Kansas Bar Association and served on its legislative committee since 1963, and was a 20-year member of the KBA Board of Governors From 1975 to 1979, he served as one of the 9 original members appointed by President Gerald Ford as the First Board of Directors of the National Legal Services Corporation. Glee’s service at the state level included 16 years in the Kansas State Senate, 1957-1973, and the last 8 of those as president of the Senate. During his service as senator, he was the 1st chairman of the Kansas Legislative Coordinating Council, which he had helped to create, chairman of the Senate Judiciary Committee, and Chairman of the Ways and Means Committee. He served for 8 years, 1975-1983, as a member of the Kansas Board of Regents, including 2 years as chairman. He was a past president and member of the Board of the Kansas State Historical Society, and a past chairman and member of the Board of Trustees of the Kansas 4-H Foundation, Inc. Other state offices and honors include: President, KU Alumni Association, 1991-1992, member of its Board of Directors and Executive Committee, 1990-1996. He and his wife, Geraldine have been Life Members of the KU Alumni Association since 1952. Member, Board of Directors of the KU Endowment Association, and chairman of 1 of its 3 major operating committees. Board of Governors of the KU Law Society and past chairman of its Board of Governors. Past president, KS Day Club and Past President, Native Sons and Daughters of KS. Member, Lawrence Rotary Club, President, Board of Governors of the KU School of Religion. Member of the Board of Directors, KS Center for Research, Inc. First recipient of Higher Education Leadership Prize, awarded by all students in all state universities in 1973. Recipient of various awards from the KS 4-H Foundation, and a recipient of the Pawnee County Friends of 4-H Citation: KS Regents Leadership Award, KS Bar Association Award, K.U. School of Law Distinguished Service Award, the KU Distinguished Service Citation (1984) the Fred Ellsworth Medallion of K.U.A.A. in 1989. In 2005, he was awarded the James Woods Green Medallion, an honorary award from the KU Law School. Served as past chairman of the Board of Governors of the Kansas Bar Association and Board of Directors of Kansas Association of Defense Counsel. Board of Directors and member of the Kansas Chamber of Commerce and Industry. Served for 12 years as Trustee of Sterling College. Fellow of the Kansas Bar Foundation. He also served as president of the Southwest Kansas Bar Association and as a Chairman of the First Congressional District Republicans. He was a longtime member of the board of Kanza Council of the Boy Scouts, and was a recipient of the Silver Beaver Award. He served as Pawnee County Attorney, and president of the Kansas County Attorney’s Association. Past district commander of the American Legion. In Larned, Glee served in many ways as a community leader, including: member of the First Presbyterian Church, ordained elder, former trustee and Sunday School teacher, 12 year member and past president of the Larned Board of Education. One of the organizers of the Fort Larned Historical Society in 1957, and a member of its Board of Trustees since its inception. Board of Directors, Larned Chamber of Commerce, for 9 years, including service as president. Recipient of the Chamber’s Outstanding Citizen Award in 1990. Longtime member, past president and past district lieutenant governor of Kiwanis Club. Longtime member and past master of Larned Masonic Lodge, member of Chapter and Commandery in Larned, Eastern Star Lawrence, Consistory and Shrine in Wichita, with all memberships transferred to Lawrence in 1996. He was chairman of the advisory board of the Jordaan Foundation and President of Jordaan Foundation, Inc. He was creator and longtime director, of the Larned Community Development Corporation. Glee was a member of the board of directors of the Lawrence Arts Center. In addition to the foregoing positions of responsibility, Glee served in a number of professional and honorary fraternal organizations and Board of Directors of business organizations, such as banks and insurance companies. These included the First State Bank and Trust Company of Larned, the Lawrence National Bank in Lawrence, The First National Bank of Lawrence, the Mercantile Bank of Lawrence, the Manhattan Mutual Life Insurance Company in Manhattan, the State Mutual Insurance Company of Rome, Georgia and Life of Kansas in Wichita.

Ellen Meador Tracy

Ellen Meador Tracy, 79, Lawrence, passed away Friday, October 2, 2015 at Lawrence Memorial Hospital.

Ellen was born October 5, 1935 in Cameron, MO, the daughter of Harry D. and Marjorie L. (Bentley) Meador. She graduated from Belton High School in Belton, MO in 1953. She attended the University of Kansas, and later attended Wichita State University where she received her BA degree in English, and Washburn University, where she received her Juris Doctor with honors.

She was a member of the PEO, Alpha Chi Omega alumni, Kansas University Women, and the KU Alumni Association. She also served as Senior Warden of Trinity Episcopal Church in Lawrence, KS.

Ellen was an attorney who retired from Martin, Pringle et al in Wichita, KS. She married Terry A. Tracy on August 17, 1957 in
Belton, MO. He survives of the home. Other survivors include her son, Kent A. Tracy, Kansas City, MO; daughters Alison R. Tracy, Wichita, KS; and Barbara J. Brown (Robert), Norwich, NE; grandsons Matthew A. Mar (Cassie), Shawnee, KS; Taylor D. Brown, Wichita, KS; Austin J. Tracy, Wichita, KS; granddaughter Anna C. Tracy, Wichita, KS; brother Harry D. Meador, Jr., Omaha, NE; and sister Nellie M. Miller, Fort Worth, TX.

**Keith R. Willoughby**

Keith R. Willoughby, 91, formerly of Colby, Kan. and living in Basehor, Kan., passed away Monday at his home October 26th, surrounded by loved ones.

He is survived by wife Patricia, daughter Gina Palmgren of Liberal, Kan. and sons Keith Willoughby Jr. of Bucyrus, Kan. and Jim Willoughby of South Jordan, Utah. He is also survived by his brother, Rodney Willoughby, of Sedgewick, Kan. Beloved granddad to Staci, Erica, Elizabeth, Jennie, Jamie, Ashley, Laurel, Dylan, Hannah, Sarah, Nicole and greatgrandfather to 13.

Keith was born Mar. 18, 1924, in Augusta, Kan., to Claude and Neva Willoughby, and enlisted in the Army Air Corps shortly after high school graduation in 1942. He trained as a B24 pilot, and he flew 35 missions over Europe. Following military service, he married Betty June Erdman in Walla Walla, Washington and they moved to Kansas. He graduated from Wichita University and the University of Kansas Law School, receiving his law degree in 1951. He moved his young family to Colby, Kan., and began practicing law. He served as county attorney, attorney for Colby Community College and city attorney at various times. In January 1978, Keith was appointed district judge for the 15th Judicial District, which covered Cheyenne, Sherman, Wallace, Rawlins, Thomas, Logan and Sheridan Counties in Northwest Kansas. He served as administrative judge for those counties until his retirement in 1993. In 1990, Keith married Patricia Fogo of Colby, KS. They moved to Basehor, KS in 2009.

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**BERKOWITZ, COOK, GONDRING AND DRISKELL, LLC., HAS A NEWS FLASH:**

The announcement of the retirement of Gail Berkowitz has been greatly exaggerated.

Gail is NOT retired and has no present intention to retire. She is actively and fully engaged in the practice of matrimonial law in both Kansas and Missouri. Gail continues to provide aggressive, competent, and successful representation to our clients.

As Gail’s partners, we are excited to share this news with our fellow lawyers and members of the public.

Proudly proclaimed,

www.berkowitz-cook.com
2016 Appellate & Administrative Law CLE

Friday, February 19, 2016
Kansas Law Center, Topeka

Topics include:
- E-Filing
- Kansas Department of Children and Families (DCF) Appeals
- Waiver and Preserving Issues for Appeal
- Kansas Open Records Act (KORA) Update
- Kansas Office of Administrative Hearings Panel
- You Are What You Write! The Ethical Implications of Everyday Legal Writing

Hosted by KBA Appellate & Administrative Law sections. Members of these sections receive a $30 discount off their registration.

Register at http://www.ksbar.org/event/2016_Appellate/Admin_CLE

The Durable Power of Attorney for Finances. The Must Have Kansas Law Terms and Avoiding Pitfalls for Agents Serving!

Tuesday, January 26, 2016
Noon – 1 p.m. CST
Comfort of your home/office

Topics include:
- The requirements to have an agent be authorized to sell the home
- Why the spouse must consent
- Avoiding placing too high a burden on a serving agent
- What provisions can outlast death
- What HIPPA provisions should be included.

Register at www.ksbar.org/event/01-26-16_Webinar_POA_for_Finances

The Health Care Power of Attorney and the Living Will. Updates Needed Under HIPPA and Affordable Health Care Act

Wednesday, January 27, 2016
Noon – 1 p.m. CST
Comfort of your home/office

Topics include:
- Giving the Spouse the authority to override the terms of the Living Will
- Why using the bare boned forms in the statute short changes your client
- What language in needed regarding pain management
- Is it clear that family can override third parties controlling medical decisions?

Register at www.ksbar.org/event/01-27-16_Webinar_POA_Health_Living_Wills

Pending non-traditional credit in Kansas
The KBA Awards Committee is seeking nominations for award recipients for the 2016 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 found on the next page. 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 4.

**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.

**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.

- The 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.
- The award is only given 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.

**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.

**Outstanding Service Awards.** 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.

- A total of 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 be given to 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.** 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. 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.

**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.** This award recognizes 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 mandatory quotas on traffic offenses. This award will be given only in those years when it is determined that there is a worthy recipient.

**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 disablement.

The award will be given only in those years when it is determined there is a worthy recipient.
KBA Awards Nomination Form

Nominee’s Name

☐ Phil Lewis Medal of Distinction
☒ Outstanding Service Award
☐ Outstanding Young Lawyer Award
☐ Distinguished Government Service Award
☐ Distinguished Service Award

☐ Diversity Award
☐ Professionalism Award
☐ Pro Bono Award/Certificates
☐ Courageous Attorney Award

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

_______________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________________

Nominator’s Name ____________________________
Address ____________________________
Phone ____________________________ Email ____________________________

Return Nomination Form by Friday, March 4, 2016, to:
KBA Awards Committee
1200 SW Harrison St.
Topeka, KS 66612-1806
Winds of Change: What the Supreme Court's Same-Sex Marriage Ruling Means for Kansas Employers and Employees

By Teresa Shulda & Jason Lacey
In June 2015 the Supreme Court issued the anxiously awaited decision in Obergefell v. Hodges.\(^1\) In a five-four ruling, the Court held that state bans on same-sex marriage are unconstitutional. Now, same-sex couples can legally wed in all 50 states, and presumably will be entitled to the same federal and state marriage-related rights and benefits that opposite-sex married couples enjoy.

Several months later, we’ve been able to witness some of the impact of that case, perhaps most notably with the Kim Davis episode in Kentucky. Davis, a state county clerk, was ultimately jailed for contempt of court after she refused to issue marriage licenses in the wake of Obergefell, arguing that requiring her to issue same-sex marriage licenses violates her religious beliefs. The Davis case brought the interplay between religious freedoms and gay rights to discussions around dinner tables and water coolers across the nation.

Many employers may soon be facing similar issues, if they aren’t already. Obergefell was not an employment case and did not directly address any employment law issues; it clarified the patchwork of state laws regarding the validity of same-sex marriage. But, as this article will discuss, the legal ramifications of Obergefell directly impact a number of employment and employee benefit issues, and also raise additional questions regarding the scope of legal protections afforded to employees based on their sexual orientation.

II. The Obergefell Ruling

The Obergefell case before the Supreme Court actually consisted of several cases from Michigan, Kentucky, Ohio, and Tennessee, each of which had state laws banning same-sex marriage. In all, the petitioners were 14 same-sex couples and two men whose same-sex partners were deceased. Each petitioner challenged their respective state’s ban on same-sex marriage, and each won their case at the district court level. The Sixth Circuit consolidated the cases and reversed the judgments of the district courts, holding that a state has no constitutional obligation to license same-sex marriage or to recognize same-sex marriages lawfully performed in another state.\(^2\)

The Supreme Court held that the Fourteenth Amendment requires states to issue marriage licenses to same-sex couples, as well as recognize same-sex marriages lawfully performed in other states.\(^3\) In what many have described as an emotionally charged opinion, Justice Kennedy, writing for a majority that included Justices Ginsburg, Breyer, Sotomayor, and Kagan, recited the importance of marriage in all corners of human society, noting “[t]he centrality of marriage to the human condition....”\(^4\) After acknowledging that the historical understanding of marriage is a union between a man and a woman, the Court went on to dispel each of the reasons the respondent states proposed for limiting marriage to opposite-sex couples, explaining that even among opposite-sex couples, marriage has evolved over time.\(^5\)

The Court stated that Supreme Court precedent has found that the Due Process Clause of the Fourteenth Amendment guarantees the liberty to make “certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”\(^6\) The Court acknowledged its long-held decision establishing the right to marry, citing Loving v. Virginia,\(^7\) which invalidated bans on interracial marriages, holding that such laws were unconstitutional.\(^8\) The Court then recounted the many times since the Loving decision that it has upheld the “fundamental right to marry,” including decisions which overturned laws that restricted the right to marry, including laws prohibiting fathers who were delinquent on child support from marrying and laws limiting the right of prison inmates to marry.\(^9\) Though those prior decisions all involved opposite-sex marriages, the Court cited four principles and traditions in the history of its jurisprudence which required extending the right to marry to same-sex couples.\(^10\) First, the right to make personal choices regarding marriage is inherent in the long-recognized concept of individual autonomy. The Constitution protects an individual’s right of privacy regarding matters of family and life, including decisions regarding contraception, family relationships, procreation, and child-rearing. The Court believed

(Continued on Page 32)
that it would be contradictory to recognize a right to privacy regarding these decisions and not extend that same right to the choice to marry.10

Second, marriage creates a two-person union like no other in terms of its importance. The personal satisfaction one receives through the benefit of marriage cannot be denied to same-sex couples.11

Third, marriage safeguards children and families. If same-sex couples were denied the right of marriage, their children would suffer because of the stigma of living in a family that is “somehow lesser” in the eyes of the law than families led by opposite-sex couples.12

Fourth, marriage “is a keystone of our social order.” The privileges of having a “married” status extend to taxes, inheritance, property rights, medical decision making, adoption rights, survivor benefits, workers’ compensation benefits, child custody, visitation, etc. According to the Court, excluding same-sex couples from those benefits results in material burdens and instability for such couples.13

For many of the same reasons, the Court also held that the Equal Protection Clause of the Fourteenth Amendment is a second basis for extending the right to marry to same-sex couples.14 Citing to precedent which invalidated restrictions on marriage under the Due Process and Equal Protection Clauses, the Court held that the Equal Protection Clause, like the Due Process Clause, “prohibits [the] unjustified infringement of the fundamental right to marry.”15

The Court further held that states must recognize same-sex marriages that were lawfully performed in another state. To hold otherwise, the Court said, would maintain and promote instability and uncertainty in the law of domestic relations, and risk inflicting substantial and continuing harm on same-sex couples. Moreover, in light of the ruling that all states must license same-sex marriages, there was no justification for allowing states to refuse to recognize those marriages performed elsewhere.16

Justice Kennedy gave a poetic closing to the majority opinion:

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.17

Each of the four dissenting Justices, Alito, Roberts, Scalia, and Thomas, wrote separate opinions harshly criticizing the majority’s reasoning. Justice Roberts opined that the issue of same-sex marriage is one that should be left to the states, arguing the Supreme Court does not have the authority to force a state to change its definition of marriage, and referring to the majority as engaged in “judicial policymaking.”18 Justice Scalia wielded several colorful zingers about the majority decision. He referred to the opinion’s “nummery and straining-to-be-memorable passages,”19 and stated that he would “hide his head in a bag” if he had to join a decision written the way Justice Kennedy started the opinion.20 Like Justice Roberts, Justice Scalia chastised the majority for exercising legislative power and doing so in an area of law reserved to the states.21 Justices Alito’s and Thomas’ dissents were in a similar vein.22 All of the dissenting Justices lamented that the majority short-circuited the democratic process by displacing the will of the people with the opinion of “five lawyers.”

II. Obergefell’s Impact on Kansas Employers and Employees

Now that same-sex couples can legally marry, what implications must employers consider? Are employers required to extend health and other fringe benefits to employees’ same-sex spouses? What if an employee asks for leave to care for her same-sex spouse who has fallen ill? What if the employer has a religious objection to homosexuality and does not want to employ lesbian, gay, bisexual, or transgender (“LGBT”) people? Does it matter whether that employer is a faith-based organization? Some of those questions are still unsettled in Kansas, but there are guidelines that can help employers maneuver through the issues until they are finally decided by the legislatures or courts.

A. Employee Benefit Plans

For employee benefit plans, the Supreme Court’s Windsor decision in 201323 was arguably a more-significant case than Obergefell. That is because Windsor recognized same-sex marriages for purposes of federal law, and many benefit plan issues are governed by federal law. Thus, for example, as a result of Windsor, same-sex spouses became eligible for tax-free coverage under health and cafeteria plans and became entitled to spousal rights under qualified retirement plans.24

But Obergefell will impact employee benefit plans. In many cases the impact will be less direct than in Windsor, because the legal effect of the decision (recognition of a constitutional right to same-sex marriage) won’t directly affect all benefit plans, particularly those sponsored by private sector employers. The impact will also differ depending on the type of plan and employer.

1. Insured Plans

For employee benefits provided through insurance policies, state insurance law may now require uniform treatment of same-sex spouse and opposite-sex spouses on the grounds that Obergefell compels a state’s insurance laws to ensure equal treatment for same-sex marriages and opposite-sex marriages. That may make it easier for same-sex spouses to obtain coverage under health insurance policies (such as spousal coverage under health insurance policies) or receive spousal rights under insurance policies (such as through default beneficiary provisions under life insurance policies).

2. Self-Insured Plans

For employee benefits provided through self-insured plans, particularly self-insured health plans, the impact will vary depending on the nature of the plan and plan sponsor. For plans sponsored by state and local governmental entities, Obergefell...
**B. Family and Medical Leave Act**

The Family and Medical Leave Act (FMLA) allows employees of employers (who have 50 or more employees) to take up to 12 weeks of unpaid leave for various family and medical situations, including care for a spouse with a serious health condition. Until recently, the regulations governing the FMLA defined “spouse” as “a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides.” So, if employees could be legally married in the state where they reside, they could take FMLA leave to care for their same-sex spouse. In Kansas, which banned same-sex marriage, that meant employers were not required to grant FMLA leave to employees living in Kansas to care for a same-sex spouse.

But after the *Windsor* decision, the Department of Labor revised its regulations to define spouse as a husband or wife, as recognized in the state where the marriage was entered into. That meant that Kansas employers had to grant employees FMLA leave to care for a same-sex spouse so long as the same-sex marriage was legal in the state where it was celebrated. The DOL’s “place of celebration” regulation went into effect on March 27, 2015. Just months later, the *Obergefell* decision made that regulation superfluous since same-sex marriage is now legal in all 50 states. Employers are now required to grant FMLA leave to employees to care for same-sex spouses across the board.

**C. Anti-Discrimination Laws**

1. **Kansas Act Against Discrimination (KAAD)**

The Kansas Act Against Discrimination (which applies to employers with four or more employees) prohibits employment discrimination on the basis of race, color, national origin, ancestry, sex, disability, and genetic information. But the law is silent as to sexual orientation and gender identity. In 2007, Governor Kathleen Sebelius issued an Executive Order banning discrimination in state employment on the basis of sexual orientation or gender identity. But in February 2015, Governor Sam Brownback rescinded that order.

As it stands currently, there is no Kansas law that expressly prohibits employment discrimination on the basis of sexual orientation or gender identity. However, two municipalities, Lawrence and Roeland Park, have ordinances prohibiting private employers from discriminating against employees on the basis of sexual orientation or gender identity.

2. **Title VII**

Like the KAAD, Title VII of the Civil Rights Act of 1964 (which applies to employers with 15 or more employees) prohibits discrimination on the basis of an employee’s sex. While that law does not mention sexual orientation or gender identity as protected categories, the Equal Employment Opportunity Commission (EEOC), which administers Title VII, takes a broad view of what exactly “discrimination on the basis of sex” means.

The EEOC takes the position that discriminating against a transgender person (or based on a person’s gender identity) is discrimination “because of sex” and is therefore covered under...
Title VII. And the EEOC and some courts have taken the position that discriminating against employees based on “sex-stereotyping” (for example, discriminating against a woman because she’s not stereotypically feminine, or against a man because he’s not stereotypically masculine) also violates Title VII. Thus, some LGBT employees have found relief under Title VII with those types of claims.

Less than a month after the Obergefell decision, the EEOC issued a decision that seemed to close any gap the agency may have had between sex discrimination and sexual orientation discrimination. In July 2015, the EEOC decided an administrative case, Baldwin v. Foxx, concluding that a federal employer violates Title VII by discriminating against gay employees because of their sexual orientation. That case involved a federal employee who brought a sex discrimination claim against his employer, the Department of Transportation. Baldwin claimed he was not selected for a position because he is gay. To support his claim, Baldwin presented evidence that a decision-maker in the selection process made several negative comments about Baldwin’s sexual orientation.

Title VII’s mandates regarding federal employment are parallel to the law’s requirements for private employers in that sex discrimination is prohibited, but sexual orientation is not mentioned as among the protected classes. But the EEOC found that the existing Title VII protections against sex discrimination extended to sexual orientation discrimination. The EEOC stated, “[s]exual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee’s sex.” The EEOC gave the example of an employer who discriminates against a gay woman for displaying a photo of her wife, but not against a straight man who does the same, arguing that the employer commits sex discrimination when it makes such sex-based distinctions.

The EEOC also likened its decision to associational discrimination based on race, noting that Title VII prohibits employers from discriminating against employees for being in an interracial marriage. The EEOC reasoned that because Title VII prohibits discrimination on the basis of sex, employers likewise cannot discriminate against employees for being in a same-sex marriage.

The Baldwin decision puts the EEOC squarely in the camp that existing Title VII law—which does not include the words “sexual orientation”—protects federal employees from sexual orientation discrimination. But the EEOC’s decisions are not binding on federal courts, and to date, the Federal Appeals Courts, including the Tenth Circuit, have consistently held that Title VII does not prohibit discrimination based on sexual orientation.

Baldwin is trying to change that precedent. On October 13, 2015, Baldwin filed suit in the District Court for the Southern District of Florida claiming he was discriminated against on the basis of his sex in violation of Title VII because he was not promoted due to his sexual orientation. Baldwin also alleges that he was retaliated against after complaining about harassment at work due to his sexual orientation. By bringing suit in federal court rather than continuing to seek relief through administrative agency channels, Baldwin seeks to extend the EEOC’s ruling that sexual orientation discrimination is encompassed in existing Title VII protections against sex discrimination to private-sector employment. Employment lawyers will need to keep an eye on that case as it progresses through the legal system, and very likely to the Eleventh Circuit (which covers Florida).

3. Laws of Other States

Kansas employers that operate facilities and employ individuals in other states need to make sure they know the laws in those other states. Twenty-two states and the District of Columbia have passed laws prohibiting discrimination against employees on the basis of sexual orientation and gender identity. The Office of Federal Contract Compliance Programs (OFCCP) issued regulations, effective April 8, 2015, which mandate that federal contractors and subcontractors with federal government contracts of $10,000 or more treat applicants and employees without regard to sexual orientation or gender identity.

5. Federal Government Employment

Federal law also protects LGBT employees in the federal employment context. The Civil Service Reform Act of 1978 prohibits discrimination against federal employees and applicants on the basis of race, color, national origin, religion, sex, age, or disability, and prohibits personnel actions that are based on attributes that are unrelated to employee performance. The Office of Personnel and Management (OPM) has interpreted the prohibition to include a requirement not to discriminate on the basis of sexual orientation or gender identity. And, like the EEOC, the OPM gives “sex discrimination” a broad construction.

D. Non-ERISA-Plan Benefits

It should be noted that the EEOC’s Baldwin decision addressed a situation involving “direct” employment discrimination based on sexual orientation. With those types of claims, the employer has made some decision—e.g., hiring, firing, or a failure to promote—that is directed at an employee because the employee is gay and/or does not conform to gender stereotypes. And the Supreme Court ruled long ago that same-sex sexual harassment, whether based on an employee’s actual or perceived sexual orientation or gender stereotyping, is actionable under Title VII.

But one big unknown after Obergefell is whether private employers can still discriminate on the basis of same-sex marriage with respect to non-ERISA-covered fringe benefits. For example, many employers offer benefits such as paid bereavement leave or family leave beyond the FMLA. Those policies do not fall within the types of employee benefit plans that Windsor addressed. But many of those policies often define for themselves which family relationships are eligible for the benefit, including spouses. Can Kansas employers lawfully draft such policies to explicitly exclude same-sex spouses? Obergefell does not answer that question. But the EEOC likely would answer “no.”
E. Religious Organizations

Perhaps the most hotly anticipated issue of contention is how religious objections to homosexuality will be handled with regard to any law addressing LGBT employment rights. The majority opinion in Obergefell specifically addressed such religious objections to same-sex marriage:

[I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

In the context of private, for-profit employers, we can expect a vigorous movement by LGBT advocates to urge federal and state lawmakers to change anti-discrimination laws to include sexual orientation and gender identity. But what about religious or faith-based organizations? Will they be required to employ LGBT employees despite religious objections to homosexuality if such a law is passed?

The Supreme Court addressed a related issue three years ago in Hosanna-Tabor v. EEOC. In that case, a Lutheran school that offered “Christ-centered” education fired a teacher after she complained that she was being discriminated against on the basis of her disability. The school employed two types of teachers: “lay” teachers, who were not required to receive religious training or even be Lutheran; and “called” teachers, who were regarded as having been called to their vocation by God through a congregation. Called teachers had to receive religious training, and received a formal title of “Minister of Religion, Commissioned.”

Cheryl Perich was a called teacher. After she became ill from a chronic medical condition, the school asked her to resign. When she refused, the school said it would likely fire Perich. Perich responded that she had spoken to an attorney and intended to assert her legal rights. The school then promptly terminated Perich specifically citing her threat to take legal action as one of the reasons for her termination.

Perich filed a complaint with the EEOC which sued the school on Perich’s behalf under the Americans With Disabilities Act, claiming her termination was retaliation for asserting her rights under the ADA. Indeed, the school’s stated reason for her termination seems like direct evidence that it made its termination decision because of her protected conduct in asserting her legal rights. But the school claimed that Perich’s claim was barred by the “ministerial exception.”

That exception is grounded in the First Amendment’s guarantee that the government “shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.” For decades, the federal appellate courts have uniformly recognized a ministerial exception that precludes the application of the employment discrimination laws with regard to the employment relationship between a religious institution and its ministers. In Hosanna-Tabor, the Supreme Court agreed with those lower courts. In Perich’s case, the ministerial exception meant that her claim was barred because the religious school was free to make employment decisions about called teachers (who are ministers) and without regard to the employment discrimination laws.

The Hosanna-Tabor decision may indicate what the Supreme Court might do if confronted with the same issue in the context of a religious organization accused of discrimination on the basis of sexual orientation. It seems likely that, so long as the employee in question falls within a ministerial position, a religious organization will be allowed to make employment decisions regardless of any employment laws that might protect an individual against discrimination based on sexual orientation.

F. Closely Held Business Organizations

The Supreme Court’s Hobby Lobby decision from 2014 places yet another wrinkle in this question of how far Obergefell may be extended in favor of prohibiting an employer from discriminating against employees on the basis of sexual orientation. In Hobby Lobby, the Supreme Court held that a closely held, for-profit business organization whose owners had sincerely held religious beliefs and had organized and operated their business in a way that reflected their religious beliefs was protected by the Religious Freedom Restoration Act of 1993 from being compelled to comply with a federal law that contravened those sincerely held religious beliefs. It remains to be seen how far that protection will be extended for business organizations like Hobby Lobby. But we can anticipate that an organization like Hobby Lobby might argue that its sincerely held religious beliefs against recognition of same-sex marriage protect it from liability for a claim of discrimination based on sexual orientation.

III. A Look Ahead

The rapid pace regarding changes to LGBT rights will surely continue in the upcoming months and years. Kansas employers may see more cities adopting local ordinances that prohibit discrimination against applicants and employees based on sexual orientation and gender identity. In 2015, a bill was introduced into the Kansas house that would have amended the Kansas Act Against Discrimination to include protection from discrimination on the basis of sexual orientation and gender identity. The bill incorporated the existing exception in the law for religious or private fraternal and benevolent associations. The Kansas House referred the bill to the Committee on the Judiciary, and the bill was still pending before that committee at the close of the 2015 legislative session.

At the federal level, expect to see a resurgence of activity surrounding the Employment Non-Discrimination Act (ENDA). ENDA, if passed, would prohibit employment discrimination on the basis of an individual’s sexual orientation
or gender identity. As proposed, the law, like Title VII, would apply to all employers with 15 or more employees. The bill was first proposed in 1994, and a version has been reintroduced in most years since then. However, the bill has never been able to garner enough votes to pass through the House and Senate to the President. After Obergefell, we can expect LGBT-rights activists to reignite the discussion over ENDA.

Also expect the EEOC and private litigants to continue to push cases arguing for an expansive interpretation of Title VII’s prohibition of discrimination based on “sex” to include sexual orientation and gender identity. Kansas lawyers who practice in the areas of employment and employee benefits will need to stay tuned on all of these issues.

ENDNOTES
2. Id., 135 S. Ct. at 2593.
3. Id. at 2604-05 and 2607-08.
4. Id. at 2594.
5. Id. at 2594-95.
6. Id. at 2597.
7. 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967).
8. Obergefell, 135 S. Ct. at 2598.
9. Id. at 2598-99.
10. Id. at 2599.
11. Id. at 2599-2600.
12. Id. at 2600-01.
13. Id. at 2601.
14. Id. at 2602-03.
15. Id. at 2604.
16. Id. at 2607-08.
17. Id. at 2608.
18. Id. at 2611-26.
19. Id. at 2628.
20. Id. at 2630 n. 22.
21. Id. at 2631-36.
22. Id. at 2631-43.
26. See also Roe v. Empire Blue Cross Blue Shield, No. 7-12-cv-04788-NSR, 58 E.B.C. 1077 (S.D.N.Y. 2014) (no mandate under ERISA to cover same-sex spouses), aff’d, 589 Fed. Appx. 8 (2d Cir. 2014) (unpublished).
27. 42 U.S.C. § 2000e et seq.
29. Compare Hall v. BNSF Railway Co., No. C13-2160 RSM (W.D. Wash. Sept. 22, 2014) (claim for gender discrimination under Title VII based on exclusion of same-sex spouses from benefit eligibility survives a motion to dismiss) with Vickers v. Fairfield Med. Ctr., 453 F.3d 757 (6th Cir. 2006) (“a gender stereotypical claim should not be used to bootstrap protection for sexual orientation into Title VII”) (quoting Dawson v. Bumble & Bumble, 598 F.3d 211 (2d Cir. 2003)) and DeSantis v. Pac. Tel. & Tel. Co., Inc., 608 F.2d 327 (9th Cir. 1979) (“Title VII’s prohibition of ‘sex’ discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality.”) (citing Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977)).
32. 29 U.S.C. 2601, et seq.
34. 29 C.F.R. 825.122(b).
38. Lawrence City Code, 10-101 et seq.
39. Roeland Park City Code, 5-101 et seq.
40. 42 U.S.C. 2000e et seq.
43. Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397640 (July 15, 2015). Baldwin filed an Equal Employment Opportunity complaint with the Department of Transportation. The DOT investigated and subsequently issued a Final Agency Decision dismissing the claim on the basis that it was not timely filed. Baldwin appealed that decision to the EEOC, which then issued the administrative decision re-manding the case back to the DOT for further processing consistent with the EEOC’s findings. See generally, 29 C.F.R. 1614.101 et seq. (regarding federal agency EEO program). Baldwin subsequently filed suit in federal court. See infra, note at 51.
44. 2015 EEOUPLEXIS 1905, at *3-4.
45. 42 U.S.C. 2000e-16a et seq.
47. Id. at *14.
48. Id. at *14-15.
49. Id. at *17-19.
51. Baldwin v. Foxx, S. D. Fla. No. 1:15-cv-23825, complaint filed
52. See http://www.lgbtmap.org/equality-maps/non_discrimination_laws.
53. 79 FR 42971.
54. 41 C.F.R. 60-1 et seq.
55. 5 U.S.C. § 2302.
58. Obergefell, 135 S. Ct. at 2607.
60. Id. at 699-700.
61. Id. at 700.
62. Id. at 701.
63. Id.
64. Id. at 705-07.
65. Id. at 709.
2015 Outstanding Speakers Recognition

The Kansas Bar Association would like to extend a special thank you to and recognition of the following individuals who gave so generously of their time and expertise in speaking at our Continuing Legal Education seminars from July through December 2015. Your commitment and invaluable contribution is truly appreciated.

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Tad Anderson, Post Anderson Layton Lindstrom, LLP, Overland Park Charles J. Andres, Law Office of Charles J. Andres, Olathe
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David Zimmerman, Clerk of the Bankruptcy Court, District of Kansas, Wichita
ATTORNEY DISCIPLINE

ORIGINAL PROCEEDING IN DISCIPLINE
IN THE MATTER OF GARY RIEBSCHLAGER
NO. 114,098 – NOVEMBER 20, 2015

INDEFINITE PROHIBITION FROM APPEARING PRO HAC VICE BEFORE ANY KANSAS COURT, ADMINISTRATIVE TRIBUNAL, OR AGENCY.

FACTS: This is an attorney discipline proceeding against Gary Riebschlagr of Houston, Texas. Respondent is not licensed to practice law in Kansas. Through local counsel, Respondent filed a verified application for admission pro hac vice in the District Court of Wyandotte County. However, he had been sanctioned by the State Bar of Texas by a partially probated suspension. In denying the application, the district court concluded that the respondent’s attorney disciplinary record was contrary to the information he included in the verified petition for admission pro hac vice.

DISCIPLINARY ADMINISTRATOR: On January 14, 2015, the Disciplinary Administrator’s office filed a formal complaint against respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC). Respondent filed an answer on March 2, 2015. The parties entered into a joint factual stipulation and agreed to a suggested disposition on March 30, 2015.

HEARING PANEL: A panel of the Kansas Board for Discipline of Attorneys held a hearing on April 1, 2015, at which the respondent appeared personally and was represented by counsel. The hearing panel concluded that the evidence was not presented to establish that he knowingly made a false statement of material fact. Rather, the hearing panel concluded that the evidence supported a conclusion that the respondent failed to disclose a fact necessary to correct a misapprehension known by the respondent in violation of KRPC 8.1(b) (2014 Kan. Ct. R. Annot. 670).

HELD: The disciplinary administrator and the respondent jointly recommended (and hearing panel unanimously recommended) that the respondent be indefinitely prohibited from appearing in any Kansas court, administrative tribunal, or agency of the state, pro hac vice. Court, after careful consideration, agreed with the recommendations and held that respondent be indefinitely prohibited from appearing pro hac vice before any Kansas court, administrative tribunal, or agency. See In re Franco, 275 Kan. 571, 579, 66 P.3d 805 (2003) (Missouri attorney indefinitely prohibited from appearing in Kansas pro hac vice).

ORDER OF DISBARMENT
IN THE MATTER OF JIMMIE E. ALLEN, JR.
NO. 18439 – NOVEMBER 5, 2015


HELD: Court, having examined the files of the office of the Disciplinary Administrator, found that the surrender of the respondent’s license should be accepted and that the respondent should be disbarred.

ORDER OF DISBARMENT
IN THE MATTER OF ALAN B. GALLAS
NO. 12619 – NOVEMBER 4, 2015

FACTS: In a letter signed October 21, 2015, addressed to the Clerk of the Appellate Courts, respondent Alan B. Gallas, an attorney admitted to practice law in Kansas, voluntarily surrendered his license to practice law in Kansas. At the time the respondent surrendered his license, a complaint had been docketed by the Office of the Disciplinary Administrator for investigation. The complaint alleged that the respondent violated Kansas Rules of Professional Conduct 1.15 (2014 Kan. Ct. R. Annot. 567) (safekeeping property) and 8.4(b) and (c) (2014 Kan. Ct. R. Annot. 680) (misconduct). The allegations involved conversion of client funds.

HELD: This court, having examined the files of the office of the Disciplinary Administrator, found that the surrender of the respondent’s license should be accepted and that the respondent should be disbarred.

CIVIL

CIVIL: STATUTES - EQUAL PROTECTION - WORKERS COMPENSATION
HOESLI V. TRIPLETT, INC.
WORKERS COMPENSATION BOARD: AFFIRMED ON ISSUE SUBJECT TO REVIEW
COURT OF APPEALS - REVERSED ON ISSUE SUBJECT TO REVIEW
NO. 109448 - NOVEMBER 20, 2015

FACTS: Hoelsi was injured in workplace accident for which he was entitled to workers compensation. Prior to that injury he was receiving social security retirement benefits and earning additional savings. He filed a petition for admission pro hac vice in the District Court of Wyandotte County. However, he had been sanctioned by the State Bar of Texas by a partially probated suspension. In denying the application, the district court concluded that the respondent’s attorney disciplinary record was contrary to the information he included in the verified petition for admission pro hac vice.

HELD: This court, having examined the files of the office of the Disciplinary Administrator, found that the surrender of the respondent’s license should be accepted and that the respondent should be disbarred.
employment income without reduction in social security because he had reached full retirement age. Based on K.S.A. 2010 Supp. 44-510(h), the ALJ used Hoelsi’s social security benefits to offset the workers compensation award. Workers Compensation Board affirmed. Hoelsi appealed, based on *Dickens v. Pizza Co., Inc.*, 266 Kan. 1066 (1999), which limited statutory offset and permitted already-retired claimants, working simply to supplement social security at time of injury, full workers compensation. Hoelsi also argued the offset violated the Equal Protection Clause. Relying on *Dickens*, Court of Appeals in part reversed the Board’s offset. 49 Kan.App.2d 1011 (2014). Review granted on offset issue.

**ISSUES:** (1) Statutory Offset of Workers Compensation Benefits, (2) Equal Protection Clause

**HELD:** *Dickens* and subsequent cases which carved out exceptions to plain and unambiguous statutory language in K.S.A. 2010 Supp. 44-501(h) were overruled. *Dickens* erroneously engaged maxims of statutory construction without discerning any uncertainty in the text, thereby giving effect to a perceived legislative purpose underlying K.S.A. 2010 Supp. 44-501(h) that is contrary to statutory text’s clearly expressed meaning. Doctrine of stare decisis must yield to maintain consistency with statutory interpretation case law.

K.S.A. 2010 Supp. 44-501(h) does not violate Equal Protection Clause. Social security retirement benefits did not lose essential character as benefits to protect recipients from loss of wages due to advanced age simply because 2000 amendments permit those who qualify for benefits on account of age to receive them in full while still earning wage income. Statute’s purpose is to avoid duplication of wage-loss benefits and its provisions satisfy the applicable rational basis test. Court of Appeals judgment following Dickens and progeny was reversed. Board’s decision is affirmed.


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**CRIMINAL**

**CRIMES AND PUNISHMENTS – JURY TRIAL – DEATH PENALTY – PROSECUTORS – EVIDENCE - VENUE STATE V. ROBINSON JOHNSON DISTRICT COURT - AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, REMANDED NO. 90196 - NOVEMBER 6, 2015**

**FACTS and ISSUES:** Robinson was convicted of aggravated kidnapping of Trouten (Count I), capital murder of Trouten and Lewicka (Counts II and III) as part of common scheme or course of conduct that included premeditated murders of Bonner, S. Faith, D. Faith, and Stasi, theft of Neufeld’s property (Count IV), first degree premeditated murder of Stasi (Count V), and aggravated interference with Stasi’s parental custody (Count VI). In sentencing phase, State raised “multiple murders” aggravating circumstance. Defense raised several mitigating circumstances. District court imposed death sentence on each capital murder conviction, and prison terms for remaining convictions. Sentencing journal entry also designated Robinson as a sex offender. Robinson’s appeal raised numerous constitutional and/or statutory challenges on issues organized by the court as challenging: (1) venue, (2) denial of motions for continuances, (3) denial of motions to suppress evidence, (4) jury selection process, (5) sufficiency of the evidence of common scheme or course of conduct, (6) multiplicitous capital murder convictions, (7) jurisdictionally deficient complaint, (8) admission of specific evidence, (9) sufficiency of evidence for Counts I and IV, (10) prosecutorial misconduct during guilt phase, (11) instructional error in guilt phase, (12) cumulative error in guilt phase, (13) juror misconduct in penalty phase, (14) sufficiency of evidence supporting aggravating circumstance, (15) prosecutorial misconduct in penalty phase, (16) challenges to penalty phase instructions, (17) sentencing under allegedly void law, (18) cumulative error in penalty phase, and (19) designation of Robinson as sex offender. State abandoned cross-appeal regarding victim impact evidence because issue was decided by *State v. Scott*, 286 Kan. 54 (2008).

**HELD:** 397 page opinion resolved issues and subissues on extensively detailed facts of this case. Claims resolved in Robinson’s favor include multiplicitous convictions and designation as sex offender.

There was no abuse of discretion, statutory violations, or constitutional error in district court’s refusal to transfer venue, or in the denial of motions for continuances.

There was no error in the denial of motions to suppress evidence that included evidence obtained pursuant to pen registers, wiretaps, search warrants, and warrantless trash searches. There was no merit to arguments regarding jurisdiction to issue extraterritorial search warrants, officers exceeding their territorial jurisdiction, expectation of privacy in trash, and the showing of necessity for wiretap orders.

There was no error in challenges to jury selection process. Issues included curtailing voir dire questioning, denial of defense challenges for cause, disparate rulings on similar cause challenges, not striking small group panel exposed to inflammatory remarks, retention of panelists with alleged juror-specific bias, excusing juror opposed to death penalty, alleged prosecutorial misconduct, and lawfulness of jury selection process that identified jurors only by numbers.

Sufficient evidence supported capital murder convictions in Counts II and III. Meaning of common scheme or course of conduct in capital murder under K.S.A. 21-3439(a)(6) is examined, finding sufficient evidence for jurors to find all murders were related to one another in some way, therefore were part of a common scheme or course of conduct. Murders committed after enactment of capital murder statute were the last act or event to trigger application of common scheme or course of conduct element in capital murder statute, thus prospective application of K.S.A. 21-3439(a)(6) included pre-enactment murders.

Robinson’s capital murder convictions were multiplicitous. All murders in Counts II and III were tied by the same common scheme or course of conduct, thus constituted unitary conduct under K.S.A. 21-3439(a)(6). Count III capital murder conviction was reversed and sentence for that conviction was vacated. Murder conviction in Count V was predicate killing for the capital murder conviction, thus following *Scott* the Count V murder conviction is unconstitutionally multiplicitous. Count V conviction was reversed and sentence was vacated.

There was no merit to claim the Fourth Amended Complaint was too poorly drafted to confer jurisdiction over capital murder and aggravated interference with parental custody counts.

Court rejected challenges to trial court’s admission of evidence including emails, and alleged K.S.A. 60-455 violations.

Sufficient evidence supported aggravated kidnapping conviction in Count I. There was no need to address sufficiency of evidence for murder conviction in Count V which was reversed as multiplicitous.

Prosecutorial misconduct allegations during guilt phase were discussed in detail. Three isolated improper remarks during voir dire and trial were identified: exceeding scope of the evidence to suggest a child witnessed her mother’s death, and to remark that Stasi’s baby was ripped from her arms; and discussing a letter not admitted into evidence. Those remarks were not gross and flagrant, or motivated by ill will, and of little weight, given overwhelming evidence against Robinson. Cumulative effect of those remarks did not prejudice Robinson’s right to fair trial.

There was no error in not instructing jury on definition of “Common Scheme” or “Course of Conduct.” Those terms are not uncon-
institutionally vague. Venue instruction was erroneous, but not clear error.

Reversal of multiplicitious capital murder and first-degree murder convictions cured any prejudice. Cumulative effect of all other errors in guilt phase did not deny Robinson a fair trial.

Based on state’s concession, court presumes but does not decide that juror’s use of Bible was misconduct in this case, but error was harmless beyond a reasonable doubt.

Sufficient evidence supported state’s “multiple murders” aggravating circumstance.

Prosecutorial misconduct allegations during penalty phase were discussed in detail. Prosecutor’s remarks on Robinson crying on one occasion during trial, comment that “families of victims would not agree” with defense witness’ assessment of Robinson’s propensity toward violence in prison, and suggestion that prosecutor felt one defense argument was “insulting and astounding,” were improper but harmless error. All other allegations of prosecutorial misconduct lacked merit.

No error was found in challenges to penalty phase instructions in this case. Bar is cautioned that instructions similar to Instruct No. 12 should conform with statutory language in K.S.A. 21-4624(e), to avoid error under different facts.

Sentencing schemes in Kleypas and Marsh were discussed. Court rejected novel argument that Marsh requires death sentence imposed under invalidated Kleypas interpretation of weighing equation be vacated and replaced by life sentence with mandatory minimum.

Cumulative effect of errors found in penalty phase did not deny Robinson a fair penalty phase proceeding.

Designation of Robinson as sex offender was vacated. District judge’s sentence from bench made no findings that Robinson’s convictions were sexually motivated. Sentencing judge thus lacked jurisdiction to make that designation sua sponte in journal entry. Remanded for a corrected journal entry.

HELD:

CONCURRENCE (Malone, J.): Wrote separately to address majority’s holding that prosecutor’s closing argument comments on his observation of when Robinson cried and did not cry during trial was beyond scope of penalty phase and served no purpose but to inflame passion of jurors and divert their attention from sentencing. Any comment regarding demeanor of a non-testifying defendant amounts to improper closing argument, but agreed the misconduct in this case was harmless beyond a reasonable doubt.

DISSENT (Johnson, J.): Agreed with reversal of capital murder conviction under Count III, but dissented from majority’s determination that state proved capital murder, as charged in Count II. Both capital murder convictions and corresponding death sentence should be set aside. The designation of TROUTEN as a “principal capital murder victim” is a phantom concept, manufactured by the state’s charging document and perpetuated here by the majority, but totally devoid of any legal support. No Kansas case was cited for state’s charging document and perpetuated here by the majority.

CRIMINAL: CRIMES AND PUNISHMENT - EVIDENCE - JURY TRIAL
STAT V. LABORDE
CLAY DISTRICT COURT - REVERSED; COURT OF APPEALS - REVERSED
NO. 107872 - NOVEMBER 6, 2015

FACTS: When Laborde and Price broke up, Price left and Laborde retained control over military gear Price left behind to pick up later. Laborde prevented Price from retrieving the property, by lying about not having the items, or lying about where the items were located. State charged Laborde with theft by deception, later amending the charge to name the United States Army as owner of the missing property. Both parties submitted jury instructions on theft by unauthorized control. On these instructions, jury convicted Laborde of felony theft. Laborde appealed, claiming insufficient evidence supported her conviction. Court of Appeals affirmed in unpublished opinion. Panel found state failed to present sufficient evidence to convict on theft by deception charge, but alternative theory of theft was available through Laborde’s invited error of unauthorized control instruction, and sufficient evidence supported Laborde’s conviction on that alternative theory. Laborde’s petition for review of sufficiency of the evidence was granted.

ISSUE: Sufficiency of the Evidence

HELD: Court of Appeals improperly opened door to analysis of issue not before it. Correctness of panel’s reasoning in concluding the instruction constituted invited error was not evaluated. Issue on appeal was sufficiency of the evidence supporting Laborde’s conviction on the charged crime. Panel correctly determined the evidence was insufficient to convict Laborde of theft by deception. Judgments of Court of Appeals and district court were reversed.

DISSENT (Rosen, J.): Agreed that parties did not present issue that opens door to invited-error analysis adopted by Court of Appeals. But disagreed that evidence was insufficient to sustain a conviction of theft by deception. Laborde’s deceit precluded Price from obtaining property for a time until Laborde sold or gave it away. Her denial of knowing where the missing property was, or her various claims of returning property to Price or to Army, constituted an exercise of control over the property by means of deception.

STATUTES: K.S.A. 21-3701,-3701(a)(2), 22-3201(a)

CRIMINAL: CRIMES AND PUNISHMENTS EVIDENCE
STATE V. SPRAGUE
SALINE DISTRICT COURT – CONVICTIONS AFFIRMED; SENTENCE VACATED, REMANDED
NO. 108062 – DECEMBER 4, 2015

FACTS: Jury convicted Sprague of premeditated first-degree murder of wife. Hard 50 sentence was imposed pursuant to K.S.A. 22-4635. On appeal Sprague claimed: (1) jury should have been given unanimity instruction when State presented evidence the victim could have been killed by blow to head or by strangulation; (2) evidentiary hearing was required on Sprague’s pre-sentencing motion for ineffective assistance, which district court summarily denied; (3) prosecutorial error in closing argument; (4) conviction violated corpus delicti rule because Sprague’s extrajudicial statements to police were uncorroborated; (5) motion for acquittal should have been granted because insufficient evidence supported the conviction; (6) it was error to admit gruesome pictures; (7) motion to
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suppress evidence found in Morton building should have been suppressed because search went outside scope of warrant for search of home; (8) cumulative error denied Sprague a fair trial; and (9) the hard 50 sentence was unconstitutional.

ISSUES: (1) Unanimity Instruction, (2) Motion Alleging Ineffective Assistance of Counsel, (3) Prosecutorial Misconduct, (4) Corpus Delecti Rule, (5) Motion for Acquittal, (6) Admission of Gruesome Pictures; (7) Constitutionality of Hard 50 Sentence

HELD: No unanimity instruction was required because this was not a multiple acts case.

Sprague's motion alleging ineffective assistance of counsel was insufficient to require an evidentiary hearing. There was no error in district court's summary denial of the motion.

Prosecutor's use of "preposterous" to describe defendant's story was improper as conceded by state. Prosecutor implying two witnesses had "no motive" when testifying was also improper. Error was harmless, however, when comments were not gross and flagrant, were not product of ill will, and had no effect on outcome of trial in light of overwhelming evidence against Sprague.

Sprague was not convicted in violation of corpus delecti rule. Rule's clarification in State v. Dern, 302 Kan. 3 (2015), was cited. Here, "formal" application of rule was clearly satisfied when state far exceeded the evidentiary threshold necessary to establish the murder of the victim.

No error in denying motion for acquittal. Ample evidence supported Sprague's conviction.

Admission of gruesome images claim was dismissed because it was not preserved for appeal.

There was no error in denying motion to suppress evidence. Under facts of case, warrant authorizing search of the home was sufficient in scope to authorize law enforcement's search of the outbuilding.

Cumulative error did not deny Sprague a fair trial. Two instances of harmless prosecutorial error, considered together, are likewise harmless.

As recognized in State v. Soto, 299 Kan. 102 (2014), hard 50 sentencing scheme in K.S.A. 22-4635 violates Sixth Amendment as interpreted in Alleyne v. U.S., 133 S.Ct. 2151 (2013). Sprague's hard 50 sentence was vacated. Case was remanded for resentencing. Whether the new hard 50 statute, K.S.A. 2013 Supp. 21-6620, violates Ex Post Facto Clause when retroactively applied under subsection (f) is unripe issue in this case, and court refrained from issuing advisory opinion as state encourages.


FACTS: American Highway Technology and its insurance carrier appeal from an order awarding permanent-total-disability compensation to its employee, Wimp. An employee qualifies for that compensation when an on-the-job injury has left "the employee . . . completely and permanently incapable of engaging in any type of substantial and gainful employment." K.S.A. 44-510c(a)(2). American argues that in this case, Wimp's inability to find other work was largely due to his limited intellectual ability and, thus, American should not be responsible for his inability to find work.

ISSUES: Workers Compensation; Gainful Employment

HELD: Court stated that K.S.A. 44-510c(a)(2) considers the ability of "the employee" who was injured to obtain gainful employment, not the ability of Stephen Hawking or even the ability of the theoretical average person. Because Wimp suffered parallel injuries to both arms, the Workers Compensation Board properly applied a rebuttable presumption of permanent total disability. Court also stated that Wimp had always performed manual labor, had limited ability to do other work, and had limited or no ability to do manual labor after his work injury. Court held substantial evidence supported the Workers Compensation Board's conclusion that American did not rebut the statutory presumption of permanent total disability and Wimp was left incapable of engaging in gainful employment due to his on-the-job injuries.

STATUTES: K.S.A. 44-510c, -556; K.S.A. 77-201, -621

ESTATES; PETITION FOR ADMINISTRATION IN RE ESTATE OF BRENNER

SHERMAN DISTRICT COURT - REVERSED AND REMANDED WITH DIRECTIONS 113,228 - NOVEMBER 20, 2015

FACTS: As heir-at-law of Earlene F. Brenner, Beverly Goodman petitioned for administration of her mother's estate more than 6 months after the date of her death, alleging there were assets to be marshaled and administered. Beverly's brother, Danny Brenner, objected to the petition claiming there were no assets in the estate and that Beverly's petition was really a claim against the estate barred by

COURT OF APPEALS

CIVIL

JUDGMENTS; EXCUSABLE NEGLECT
MORTON COUNTY HOSPITAL V. HOWELL
MORTON DISTRICT COURT-CONFIRMED 112,768 - OCTOBER 30, 2015

FACTS: Howell was served with a petition and summons to appear in a limited actions case being brought against him by Morton County Hospital for money he allegedly owed it. Howell appeared and admitted the allegations. A judgment was entered against him. Exactly 1 year later, Howell filed a motion to set aside the judgment and admitted the allegations. A judgment was entered against him.

HELD: No error in denying motion for acquittal. Ample evidence supported Sprague's conviction.

Admission of gruesome images claim was dismissed because it was not preserved for appeal.

There was no error in denying motion to suppress evidence. Under facts of case, warrant authorizing search of the home was sufficient in scope to authorize law enforcement's search of the outbuilding.

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the 6-month nonclaims statute, K.S.A. 59-2239. The district court granted Danny's motion to dismiss finding there were no substantial assets subject to administration.

ISSUES: Estates; Petition for Administration

HELD: Court treated Danny's motion to dismiss as a motion for summary judgment and found there were material facts at issue—whether there were assets owned by Brenner subject to administration. Court stated Beverly's petition was seeking the right to administer the estate, not file a claim against the estate. Court stated whether there are assets or not, without an administrator appointed and acting under the supervision and guidance of the district court, Danny's claim of no assets cannot be verified. An administrator duly appointed would have authority to search for any assets owned by Brenner at the time of her death. If there are assets, then the estate can administer the assets in accordance with the law. If it is found there are no assets, then the estate can be closed and no harm is done. Who pays for the cost of administration would be an issue for the district court to decide at the appropriate time. Court reversed and remanded with directions for the district court to allow the appointment of an administrator pursuant to K.S.A. 59-2232.

STATUTES: K.S.A. 59-506, -617, -618, -2221, -2239; K.S.A. 60-212

DISSENT: Judge Pierron dissented and would affirmed the district court. Judge Pierron stated that the issuance of letters of administration is rarely a challenged issue. However, the district court did not err in finding Brenner’s estate lacked substantial assets to administer. Judge Pierron would find Beverly’s petition was untimely and involved yet to be determined claims against Brenner’s estate.

OPEN RECORDS; STANDING

HUNTER HEALTH CLINIC V. WICHITA STATE UNIVERSITY, ET AL.

SEDGWICK DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
111,586 – NOVEMBER 6, 2015

FACTS: The Wichita Eagle and Beacon Publishing Company, Inc., (Eagle) presented a request for records to Wichita State University (WSU) under KORA. Upon learning of the request, Hunter Health Clinic (Hunter) brought a putative KORA cause of action to prevent WSU from releasing what it asserted were private Hunter records. After considering Hunter's standing under KORA to bring the lawsuit and the merits of Hunter's claims, the district court granted Hunter injunctive relief preventing WSU from disclosing what the court determined were private records relating to Hunter. The question in the case was whether a person who seeks to prevent a public agency from disclosing claimed private records has statutory standing to bring a cause of action under the Kansas Open Records Act (KORA).

ISSUES: Open Records; Standing

HELD: Court concluded that in Kansas an injunction provides an equitable remedy to a party for a legal wrong that gives rise to a cause of action. An injunction, therefore, must be supported by a cause of action. Since Hunter did not have a cause of action under KORA, it lacked standing to obtain an injunction enforcing KORA. For the same reason, Hunter lacked standing to obtain a decision on the predicate question of whether the e-mails were part of the public record. Court did not review the district court's decision that the e-mails were not part of the public record because the matter was moot and also declined to consider the Eagle's requests to strike WSU’s appellate brief and disregard it as a party based on the attorney general's entry of appearance and WSU's subsequent change in legal position in this lawsuit. Court reversed and remanded the case with directions to dismiss the petition.

STATUTES: K.S.A. 45-215, -216, -217, -218, -219, -221, -222, -223; K.S.A. 60-901

DIVORCE; RETIREMENT ACCOUNTS; DORMANCY
IN RE MARRIAGE OF LARIMORE

SEDGWICK DISTRICT COURT – AFFIRMED
112,422 – NOVEMBER 6, 2015

FACTS: Janice challenges the district court’s refusal in 2014 to compel her former husband, David, to cooperate in the preparation and execution of a qualified domestic relations order (QDRO). The QDRO was necessary to execute on the division of David’s retirement accounts provided in the parties’ divorce decree filed almost 12 years earlier in 2002. Janice contended the district court erred when it found the judgment had become absolutely extinguished and unenforceable because she failed to execute on the judgment within 7 years of the entry of the divorce decree.

ISSUES: Divorce; Retirement Accounts; Dormancy

HELD: Court held that under the facts of this case, although retirement benefits were not yet payable, K.S.A. 2014 Supp. 2403(c) did not toll the running of the dormancy period for a judgment in a divorce decree that divided a party's retirement accounts governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 (2012) et seq., because the legal process for enforcing the judgment, the filing of a qualified domestic relations order, was not stayed or prohibited.

STATUTES: K.S.A. 60-254, -2403, -2404

AD VALOREM TAX - PROPERTY VALUATION
IN RE KANSAS STAR CASINO

COURT OF TAX APPEALS – AFFIRMED
NO. 111650 – NOVEMBER 20, 2015

FACTS: Kansas Court of Tax Appeals (COTA) appraised 195.5 acre property in Sumner County used for casino operation at $80,510,000, including $16,931,250 in land value based on actual price the Kansas Star Casino, L.L.C. (Kansas Star) parent company paid for the land. Kansas Star appealed, arguing COTA's appraisal of the land was erroneously inflated, and should have been valued based on sales of surrounding agricultural property. Kansas Star also claimed appraisal of county's litigation appraiser (Jortburg) was unsupported by the record and did not conform to Uniform Standards of Professional Appraisal Practice (USPAP). County cross-appealed, arguing COTA erroneously undervalued the property by treating marquee sign as personal property, and by not including the cost of Kansas Racing and Gaming Commission (KRGC) rental trailers, $1.6 million in organizational costs, and $3.1 million in financing costs as soft costs in determining replacement cost of improvements.

ISSUES: (1) Value of Subject Property, (2) COTA's Reliance on Jortburg's Appraisal, (3) Undervalue of Subject Property

HELD: Kansas Star argued, that value attributable to the casino management contract should be subtracted from property value of the subject property for purposes of ad valorem taxation, was rejected. COTA correctly determined the highest and best use of the subject property was operation as a casino because operating a casino was legally permissible for Kansas Star in addition to other highest-and-best-use requirements. Land value total included purchase price of one tract, and price paid to acquire property and to purchase option on another tract. State ex rel. Stephan v. Martin, 227 Kan. 456 (1980), was distinguished. COTA correctly found Kansas Star was not acting under undue compulsion when it purchased the subject property, and found tract used for ingress and egress and for proper drainage was not excess land. Any error in valuing both tracts together was harmless in this case.

There was no violation of USPAP in Jortburg's conclusion that $16,931,259 paid for subject property was for land only and not consideration for management contract. COTA's rejection of por-
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tions of Jortburg's appraisal did not require invalidation of entire appraisal report. Even if non-USPAP compliance portions are assumed, any error was harmless in this case.

COTA correctly concluded that county did not meet burden of proving the marquee sign was real property. COTA also correctly found no soft costs in the cost of rental trailers for KRGC, the $1.6 million in organization, administrative, and legal costs, and the $3.1 million in financing costs.

STATUTES: K.S.A. 2014 Supp. 74-8702(f), -8734(a), -8734(d), -8734(h)(1), -8734(h)(6), -8734(h)(12), -8734(h)(13), -8734(h)(16), -8734(h)(17), -8735(a), -8735(h), -8736(e), -8751, 77-601 et seq., -621, -621(a)(1), -621(c), -621(d), -621(e), 79-503a, -503a(k), -505, -506; K.S.A. 74-8733 et seq., 77-601 et seq., 79-501, -504, -1456; K.S.A> 1979 Supp. 79-342

**CRIMINAL**

PROSECUTORIAL MISCONDUCT; SENTENCING; JURY INSTRUCTIONS; APPRENDI

STATE V. KIMBERLIN

LYON DISTRICT COURT – AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH DIRECTIONS

FACTS: Kimberlin appealed following his convictions of aggravated battery and various drug crimes. Stated generally, Kimberlin challenged the manner in which his felony sentences were calculated, the accuracy of the court's journal entry, the propriety of a comment made by the prosecutor in closing argument, one of the instructions given to the jury, and the use of his criminal history to calculate his sentence.

ISSUES: Prosecutorial Misconduct; Sentencing; Jury Instructions; Apprendi

HELD: Court held the district court erred in designating aggravated battery, which had a presumptive sentence of probation, as the primary crime. As a result, Kimberlin's felony sentences must be vacated and remanded for resentencing. Court found it unnecessary to address Kimberlin's alternative argument that the district court erred in imposing a prison sentence for his aggravated battery conviction. Court found the state conceded that the journal entry must be corrected because it erroneously reflected that the district court ordered the misdemeanor sentences to run consecutively, rather than concurrently. The prosecutor improperly made a plea to the jury not to let Kimberlin get away with what he did. Court held that although the evidence in this case hinged entirely on the credibility of the victim's testimony, her testimony constituted direct evidence supporting the jury's guilty verdicts. Considering the lack of prosecutorial ill will and the fleeting nature of the comment, Court concluded the state satisfied its burden to demonstrate that there was no reasonable possibility the misconduct affected the trial's outcome in light of the entire record. Court also held the trial court did not err in giving the jury a deadlock instruction before the jury deliberations began. Court rejected the Apprendi issue.

STATUTES: K.S.A. 21-6804, -6805, -6819; K.S.A. 22-3504; K.S.A. 60-261

CRIMINAL: CRIMES AND PUNISHMENT

STATE V. MCFETTERS

SHAWNEE DISTRICT COURT - VACATED AND REMANDED WITH DIRECTIONS

NO. 112784 - NOVEMBER 6, 2015

FACTS: District court sentenced McFetters to 20 month prison term for drug conviction, with suspended sentence for 18-month probation. At subsequent revocation hearing, McFetters admitted to violating conditions of his probation. Probation officer testified in part that McFetters had already received a 3-day intermediate sanction under K.S.A. 2014 Supp. 22-3716(c)(1)(B) for criminal trespass citation. District court revoked probation and sent McFetters to prison. McFetters appealed.

ISSUES: (1) Revocation of Probation, (2) Ordering a Prison Sentence

HELD: In light of McFetters' stipulation to violating some conditions of probation, and nothing in record to conclude district court's decision was arbitrary, fanciful, or unreasonable, the district court was well within its discretion to revoke McFetters' probation.

Before imposing underlying prison sentence, district court was required to impose either 120- or 180-day sanction in K.S.A. 2014 Supp. 22-3716(c)(1)(C) or (D), unless district court's remarks at revocation hearing were sufficient to invoke exceptions found in K.S.A. 2014 Supp. 22-3716(c)(9). Here, district court's conclusory remarks about McFetters' apparent unwillingness or inability to conform behavior to requirements of probation did not satisfy the particularity requirement in K.S.A. 2014 Supp. 22-3716(c)(9). Order sending McFetters to prison was vacated. Case was remanded to district court for new dispositional hearing at which district court can either impose intermediate sanction under K.S.A. 2014 Supp. 22-3716(c)(1)(C) or (D), or alternatively, set forth with particularity its reasons for invoking exceptions in K.S.A. 2014 Supp. 22-3716(c)(9) prior to ordering service of prison sentence.

STATUTES: K.S.A. 2014 Supp. 22-3716(c)(1), -3716(c)(1)(B), -3716(c)(1)(C), -3716(C)(1)(D), -3716(c)(9)

CRIMINAL: CRIMINAL PROCEDURE - IMMUNITY

STATE V. EVANS

JOHNSON DISTRICT COURT – REVERSED AND REMANDED

NO. 112000 – OCTOBER 23, 2015

FACTS: State charged Evans with aggravated battery, based on Evans stabbing Pena with sword in Evans' garage following friendly wrestling match. At pretrial hearing on Evans' motions for self-defense immunity, K.S.A. 21-5231, district court weighed the evidence and dismissed the complaint, finding Evans was immune from prosecution because state failed to establish probable cause that Evans' use of force in defending himself was unlawful. State appealed, arguing district court improperly weighed conflicting evidence instead of viewing evidence in light most favorable to state, and erred in granting immunity because evidence did not support finding that Evans' use of deadly force was objectively reasonable.

ISSUE: Self-Defense Immunity

HELD: K.S.A. 2014 Supp. 21-5231 and related self-defense statutes were interpreted. In determining probable cause standard for immunity from prosecution, state bears burden of proving the defendant's use of force was not justified. In ruling on motion for self-defense immunity, district court should have resolved all facts and evidentiary inferences in favor of the state, the party opposing this dispositive motion. Majority adopts reasoning in State v. Hardy, 51 Kan. App. 2d 296 (2015), pet. for rev. filed April 22, 2015, the only case thus far to address the process necessary to resolve immunity claims. Here, the conflicting evidence on Evans' motion, when not viewed in any party's favor, could have supported a ruling for either party. But when viewed in favor of the state, the evidence was sufficient to find probable cause to rebut Evans' claim of immunity and submit case to jury. District court erred in granting self-defense immunity to Evans and dismissing the aggravated battery charge. Reversed and remanded with directions to reinstate the complaint.

DISSENT (Arnold-Burger, J.): Would affirm district court's dismissal of charges against Evans. Disagreed with majority's preliminary hearing analogy and conclusion that district court must view evidence in a statutory immunity hearing in light most favorable to
In Kansas. State also argued this argument could not be raised for first time on appeal, and no factual determination was made because Texas and Kansas statutes were comparable as a matter of law.

ISSUE: Person Classification – Prior Foreign Convictions

HELD: Under holding in State v. Dickey, 301 Kan. 1018 (2015), Mullens can challenge person classification of the 2003 Texas burglary for first time on appeal, and state’s argument based on Mullens’ stipulation to his criminal history was rejected. Here, sentencing court necessarily found the Texas burglary adjudication involved entering a dwelling without authority with the intent to commit a felony, theft, or sexually motivated crime therein. It erred in making that factual finding without examining the permissible documents identified in Dickey for information that would have supported such a finding. Mullens’ sentence was vacated. Case was remanded for further proceedings to determine whether Mullens’ Texas burglary adjudication should be classified as a person or nonperson offense for criminal history purposes

STATUTES: K.S.A. 2014 Supp. 21-5111(k), -5807, -5807(a)(1), -6811, -6811(d), -6811(d)(1); K.S.A. 22-3504(1)

CRIMINAL: CRIMES AND PUNISHMENT – EXCLUSIONARY RULE

STATE V. GRAY

HARVEY DISTRICT COURT – AFFIRMED IN PART, REVISED IN PART, REMANDED WITH DIRECTIONS

NO. 1120355 - OCTOBER 30, 2015

FACTS: Gray gave false name when he was stopped by Officer Huntley for not signaling a turn, and tried to run from the investigating officers. Disclosure of his true identity revealed outstanding warrants and a suspended driver’s license. State charged Gray with drug possession charges, traffic offenses, and two counts of felony interference with law enforcement — one based on giving Huntley a false name, one based on trying to run from officers. Gray filed motion to suppress, alleging illegal traffic stop and detention. At hearing on the motion, he argued for first time that the stop violated Kansas statutes prohibiting racial profiling. District court denied the motion, finding Huntley did not stop Gray because of Gray’s race, and the stop was a permissible pretextual stop. Gray was convicted in bench trial of possession of traffic offenses, drug offenses including felony possession of marijuana, and two counts of felony interference with law enforcement. On appeal Gray claimed district court erred in denying motion to suppress when officer who conducted traffic stop violated K.S.A. 2014 Supp. 22-4609, and a Batson-type hearing was required because statute has no prescribed mechanism for enforcement. State argued that this issue was not preserved for appeal, that statutory prohibitions against racial or other biased-based policing are not constitutional protections subject to exclusionary rule, and that substantial competent evidence supported district court’s finding that Huntley did not stop Gray because of Gray’s race. In his appeal Gray also claimed insufficient evidence supported felony interference with law enforcement convictions because state did not prove Huntley believed he was investigating a felony. Gray also claimed the district court lacked jurisdiction to impose felony sentence for possession of marijuana because state did not charge that offense.

ISSUES: (1) Remedy for Violation of K.S.A. 2014 Supp. 22-4609, (2) Sufficiency of Evidence – Felony Interference with Law Enforcement, (3) Jurisdiction to Impose Felony Sentence for Possession of Marijuana

HELD: Adoption of Batson-like procedure to resolve racial policing claims is unnecessary. Gray is not asserting violation of constitutional rights; thus judicially created exclusionary rule does not provide a remedy for suppressing the evidence. But plain language of K.S.A. 22-3216(1) authorizes Gray to seek suppression of evidence
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- However, each pleading or document submitted electronically through the Portal must be submitted as a single, complete document.
- For example, a brief should not be filed in separate parts such as a cover page as one filing, the table of contents as a second filing, the table of citations as a third filing and the body of the brief as a fourth filing. A brief is considered a single document and should be filed as a single filing.

Please continue to visit the Appellate Practice Reminders section of The Journal for more helpful hints regarding Appellate e-filing. If you have any questions regarding e-filing, or need any assistance with your filing, please do not hesitate to contact the Clerk's Office at (785) 296-3229. We are here to help.

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Contract Brief Writing. Former research attorney for Kansas Court of Appeals judge, former appellate division assistant district attorney in Sedgwick County. Writing background includes journalism degree, Kansas City Times intern, U.D.K. beat reporter and grant writer. I have written more than 50 appeals and had approximately 30 oral arguments in the Kansas Court of Appeals and Kansas Supreme Court. I have criminal and civil litigation experience, in addition to civil and criminal appellate experience. I welcome both civil and criminal appeals. Rachelle Worrall, (913) 397-6333, rwlaw310@outlook.com.


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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.

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