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The Kansas Legislature adjourned Sine Die on May 29, 2019. When you review the raw numbers, the 2019 session was comparable to previous years. For instance, in 2019 the Kansas Senate introduced 241 senate bills, 44 senate resolutions and 12 concurrent resolutions. The Kansas House proposed 411 bills, 24 resolutions and 14 concurrent resolutions. The number of bills introduced is similar to the numbers introduced in previous years. However, the number of bills sent to the governor for approval was down more than 20 percent. In 2019, Gov. Laura Kelly approved 71 bills, vetoed the tax bill¹ (twice) and SB 67, the abortion reversal pill. Gov. Kelly also made several line-item vetoes from the budget. Finally, the governor also let HB 2209, the Farm Bureau Health proposal, become law without her signature.

Whether the lack of bills sent to the governor was by design or simple coincidence is hard to say, but the pace at which the legislature moved was noticeably slower. For instance, the Senate Judiciary Committee is one of the busiest committees in the legislature. In 2019, 67 bills were referred to the Senate Judiciary Committee. The committee held 19 hearings before the turnaround deadline and 24 hearings before the drop-dead deadline. In 2018, the committee heard 25 percent more bills over nine more hearings. This clearly had an impact on how many bills continued through the legislative process. As such, less was done—but as John Wooden once said, “Never confuse activity with achievement.”

Schools, Taxes and the Budget

When the Kansas Legislature was active, its focus was on three issues: K-12 education, tax cuts, and the state budget. The legislature was in a time crunch to deliver what it hoped would be a constitutionally appropriate school finance plan to the Kansas Supreme Court. The plan was crafted by the governor’s office and the Kansas Senate, and it included an additional $360 million over four years.² The Kansas House
was more interested in the short term, with alterations to the funding formula. However, the house position lost out in the closing moments of the regular session, and Kansas Attorney General Derek Schmidt defended the school finance plan before the Kansas Supreme Court.

Both chambers were interested in a tax cut this session. They passed a tax bill twice with similar provisions that included: Kansas itemized deductions (decoupling); deferred foreign income; global intangible low-taxes income; capital contributions and FDIC premiums, and a small food tax deduction. Both times, Gov. Kelly vetoed the measures; both times the legislature failed to override. Look for this to repeat itself in 2020.

Except for the K12 lawsuit, the state budget is the only true necessity for the legislature each session. This year’s mandatory work can be found in House sub for SB 25.3 This bill includes $7.1 billion in state general funds. Major adjustments for FY 2020 include $4.9 million and 313 new employees for KanCare; $12.4 million for CHIP; $46 million and change for KDADS; $19 million and 58 FTE employees for DCF; $41 million for Corrections to deal with shrinkage, bed space, HEP-C and housing female inmates. The budget also includes a 2.5 percent state employee raise, including judicial branch employees. The governor made five line-item vetoes to the budget. The largest was for a $51 million payment for KPERS. Each of these line-item vetoes was overridden during the Veto Session.

Medicaid Expansion

In the 2019 session, the issue of Medicaid expansion produced the most press and controversy. The Kansas House passed HB 2066 to expand Medicaid coverage to an additional 130,000 Kansans. The Kansas Senate appeared to have the votes to follow suit, but senate leadership kept the bill in committee, away from a vote. In a last-minute effort, Senate Minority Leader Anthony Hensley (D-Topeka) offered a procedural motion to pull HB 2066 from committee and place it on general orders. This motion needed 24 votes to pass; it got 23.

Sen. Jim Denning (R-Overland Park) has agreed to discuss the issue next session. There is a plan to create a committee to review Medicaid expansion in 2020. This came after a tumultuous session with three separate protests aimed at expanding Medicaid. Supporters of Medicaid expansion hung four banners from the Capitol rotunda rail, dropped thousands of leaflets in the rotunda and disrupted the Senate on Sine Die. The last protest saw nine protesters arrested.

Court of Appeals Nominations

Gov. Kelly had the opportunity this session to nominate a replacement for Judge Patrick McAnany, who was retiring from the Kansas Court of Appeals. Kelly first nominated District Court Judge Jeffry Jack from Labette County. Almost immediately, it was discovered that Judge Jack made controversial comments on social media. Two days later, Kelly withdrew the Jack nomination.

The process for nominating a court of appeals judge was amended in 2013 to require Senate confirmation, while provisions dealing with the withdrawal of a nomination were removed. Gov. Kelly’s withdrawal of Jack’s nomination became actionable, and a lawsuit was filed to determine the proper nominating authority. Under KSA 20-3020, should the governor fail to nominate a replacement within 60 days of the opening, the nomination is to be made by the Chief Justice of the Kansas Supreme Court. This lawsuit marked the first time in Kansas history—as far as I can discover—that the governor, the legislature and the chief justice were ever captioned as defendants in the same action.6

The Kansas Supreme Court (minus Chief Justice Nuss) heard the case on an expedited timetable and ruled that Gov. Kelly did not have the authority to withdraw the Jack nomination. KSA 20-3020 doesn’t merely lack a withdrawal process, that process was intentionally removed in 2013. As such, the Jack confirmation was still active, and the senate needed to vote on that nomination before the 60-day deadline lapsed. On May 14th, the Kansas Senate obliged and voted down the Jack nomination 0-38-1.7

Immediately following the vote, Gov. Kelly announced that Sarah E. Warner was her subsequent nominee to the Kansas Court of Appeals. This confirmation was swift and positive. The Kansas Senate confirmed Sarah Warner to the court of appeals on Sine Die, May 29th; the tally was 37-1-2.8 The lone negative vote was cast by Sen. John Doll, (I-Garden City), who wanted a judge from western Kansas.
replace the merit selection process for Kansas Supreme Court justices with the process used to choose Kansas Court of Appeals judges. The process outlined in SCR 1610 is identical to KSA 20-3020 and sets out a governor appoint/senate confirm model. To pass, the motion needed 24 votes; it received 28. However, this proposal, introduced by Sen. Ty Masterson (R-Andover), was not moved to a final vote. Instead Sen. Masterson called for a review over the summer. Others called for hearings beginning the first week in 2020.

Rep. John Barker (R-Abilene) introduced HCR 5010 in the house that would require the Kansas Supreme Court to issue opinions within a year of hearing a case.

Sen. Dennis Pyle (R-Hiawatha) introduced a SR 1731 calling for the resignation of Judge Jack. That resolution has no legal effect but kept the issue alive. The Senate did not take that up.

Judicial Branch

Once again, the Kansas Judicial Branch made a supplemental budget request for funds to provide raises for staff and judges. This year, enhancements totaling $20.1 million were requested. These enhancements include judicial raises ($7.4 million); nonjudicial raises ($10.3 million), and seven new judges/staff with 20 unfunded positions ($2.0 million). Currently, Kansas is ranked 51st in the nation for district judge pay. Those enhancements would have moved Kansas closer to the middle of the pack.

After rounds of discussions and budget debate, the enhancements were removed form the budget bill. Instead, raises were given to all state employees—2.5 percent.

The court received approval to extend the judicial branch surcharge fee for another four years. This fee generates nearly $9 million annually for previous raises to nonjudicial personnel. Without action, the surcharge would have sunset this fiscal year, and the court would have needed to find funds to bridge the gap. The sunset provision was extended and will be reconsidered every four years instead of every two years.

The Kansas Judicial Branch was also able to gain approval for HB 2211 which allows judges to waive driver’s license reinstatement fees should the defendant qualify due to manifest hardship. The hope is that the program will give those who owe traffic fines the incentive to apply for the waiver and pay only a percentage of the fee, minus penalties. The judicial branch believes this will have a net positive impact on the judicial branch budget.

KBA-Supported Bills

The KBA initiated and/or supported several bills in 2019, covering issues ranging from attorney registration and business associations to court services and family law concerns. Every bill introduced by the KBA received a hearing. All but one was passed out of committee; three became law.

HB 2038 automatically revokes certain inheritance rights upon divorce, including appointment of property, power of attorney or instrument allowing the former spouse to act as a fiduciary. It was the most straightforward bill in conference this session. It included one bill and added language requested by the Senate which read, “This section is part of and supplemental to the Kansas Probate Code.” The house concurred 120-0.

HB 2039 formally adopts Supreme Court rules regarding tribal judgments. Previously, such foreign judgments were recognized via comity, but HB 2039 recognizes them statutorily. The KBA Indian Law Section supported this measure.

HB 2105 was supported by the KBA Corporate Law section. That section created a subcommittee to draft updates to the LLC code. The subcommittee is comprised of Bill Matthews, Bill Quick, Prof. Webb Hecker, Prof. Virginia Harper-Ho and Garrett Roe. The bill was passed by the Kansas House 117-0; it was heard in the senate and recommended favorable for passage, but was never scheduled for debate by the full senate. The KBA was able to combine HB 2105 into a Conference Committee Report for HB 2039. That bundled bill included the LLC update and new rules for in-kind donations for animal shelters (HB 2243). The CCR was adopted by both chambers with nearly unanimous votes (121-0/39-1). On June 21, 2019, KBA members who drafted this legislation attended the bill signing ceremony with Gov. Kelly.

The KBA introduced HB 2020 to repeal the attorney registration provisions enacted in 2016. Those provisions required
Kansas lawyers to include personally identifying information when registering as a Kansas attorney. That information is then transmitted to the Kansas Secretary of State’s office to determine if the lawyer was eligible to vote in nominating commission elections. The KBA was the primary conferee on this bill, but OJA provided testimony, along with Mark Dupree, Deborah Hughes and Jay Hall. Kansans for Life opposed the changes.

The bill was not worked in committee and failed to survive the turnaround deadline.

HB 2072\textsuperscript{21} was supported by the KBA Insurance Section. It would reinsert language prohibiting the use of binding arbitration in insurance contracts. The bill would not affect reinsurance or contracts between insurance companies. Robert Sullivan testified for the KBA. The Kansas Insurance Department had no problem with the bill. It was, however, opposed by the American Property and Casualty insurance Association. HB 2072 was recommended favorably by the House judiciary Committee but failed to make it above the line for action on the floor prior to the turnaround deadline; it was then stricken from the calendar. The KBA has begun discussions with interested parties and plans to work on mutually agreeable language over the interim.

**KBA-Opposed Bills**

In 2019, the KBA was asked to review more than 75 different bills. The KBA offered legal analysis on most of them, regarding constitutionality, practical application, potential conflicts and drafting issues. Those reviews were carried out by KBA sections. On occasion, a KBA section found the proposal to run afoul of long-standing KBA policy. In those instances, the KBA was directed by its Board of Governors to oppose the proposal. Below are a few of the bills opposed by the KBA this session.

The KBA Family Law Section opposed SB 157.\textsuperscript{22} Ron Nelson appeared for the KBA. Other opponents include the KDJA and one concerned lawyer from Wichita. Eighteen supporters of the bill testified or filed written comments. The KBA was one of six groups to oppose the bill.\textsuperscript{23} The committee amended the bill to include a presumption that “if there is a presentation of documentation or other information by a parent that would support a finding of good cause that domestic abuse has occurred or is occurring, there shall be a presumption that it is not in the best interest of the child for parents to have temporary joint custody and share equally in parenting time.” The KBA Family Law section, KDJA and the Kansas Coalition against Domestic and Sexual Abuse opposed this language. The bill passed out of committee but was never debated by the full senate.

SB 56/HB 2115\textsuperscript{24} are identical bills that would require the installation of software on contractors’ computers to monitor and verify contract terms. The KBA opposed the bill because it would require law firms with state contracts to allow a third party to track keystrokes and mouse activity and transmit a photo of computer screens to the State. The KBA was joined by more than a dozen organizations in its opposition to those bills. Both bills were subsequently pulled from the calendar.

The KBA Title Standard Committee opposed SB 55.\textsuperscript{25} The KBA opposed it when it was first introduced in 2018, and opposed it again when it was reintroduced this year. The bill would upend years of partition law in Kansas and make it more cumbersome to sell property in Kansas. It received a hearing but never went to a vote in committee.

**Conference Committee Reports**

Prior to First Adjournment, the Judiciary Conference Committee bundled several bills to pass them with one vote. These bundled bills are found in conference committee reports. The difficulty this session was the lack of bills in conference and bills passed by both chambers but in different form. This year, there were only six bills in conference but more than 30 up for debate.

The Judiciary Conference Committee prioritized the six bills in conference and created packages dealing with crime and punishment, contracts, courts, consumer protection, business entities and public agencies.

**Crimes, Punishment and Criminal Procedure – CCR for SB 18\textsuperscript{26}**

The bill in conference was SB 18 which includes amendments to the crime of counterfeiting currency (SB 134), access to presentence reports (SB 19), out-of-state convictions (HB 2048); drug abuse treatment programs (HB 2396); penalties for involuntary manslaughter and child abuse (SB 108); mitigating factors when the victim is an aggressor (HB 2283); and domestic violence notifications policies for law enforcement officers (HB 2279).

**Courts – SB 20\textsuperscript{27}**

The base bill of this Conference Committee Report, SB 20, extends the judicial branch docket fee surcharge. Under current law, the extension was to expire or sunset after two years. The Senate removed this provision, while the House maintained it. In conference, both sides agreed to place a four-year sunset provision in law. The committee also added language to recognize tribal court judgments in district court (HB 2039).
Consumer Protection – CCR SB 78

The bill in conference was SB 78, which dealt with assignment of certain rights and benefits for real property under an insurance policy. It adds protections relating to housing for victims of domestic abuse (SB 150).

Public Agencies – CCR HB 2290

The bill in conference was HB 2290 which would create a victim's compensation division within the KSAG. The committee added language concerning background checks for individuals who have unsupervised access to children and the elderly (HB 2360); exceptions to the Kansas Open Records Act (HB 2137); creation of the criminal justice reform commission (HB 2108); deferment of implementing the scrap metal database until July 1, 2021 (SB 219), and creation of the Kansas Closed Case Task Force to investigate hits on CODIS (SB 102).

Other Bills

The Judiciary Conference Committee was unable to roll some bills into conference committee reports this session. Bills to be held over include:

HB 2336 - Clarifying when offenders under supervision of the secretary of corrections are awarded jail credit. (124-0) (From House Corrections) (Heard in Senate Judiciary, no action taken.)

HB 2244 - Creating an affirmative defense to the crime of possession of a controlled substance for possession of certain medical treatments. (House Vote 89-35) (From House Judiciary) (Not heard in Senate)

HB 2034 - Enacting the supported decision-making agreements act to provide a statutory framework for adults who want decision-making assistance. This would provide options for individuals who fall short of requiring a power of attorney. (101-15) (House Federal and State Affairs)

HB 2291 - Providing that a court order modifying a criminal sentence only modifies the portion of the sentence referenced by the court and not remaining portions of the original sentence. (102-22) (House Judiciary)

Finally, the Kansas Legislative Research Department has published its first 2019 Summary of Kansas Legislature. This link provides basic information on bills passed into law:


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.
The 2nd Annual KBA Photography Contest

Categories:

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FOR THE PUBLIC GOOD:
Top Ten + Reasons Why Lawyers do Pro Bono Work

by Mira Mdivani

As KBA President, I get to speak a lot. Yet, ancient wisdom and my own experience tell me that the best thoughts do not come from me. With that in mind, I have asked my fellow lawyers to tell me their ten top reasons for doing pro bono. I received quite a few reasons, certainly more than ten, here they are. You will see some recurrent themes, and some unique prospective. Let’s see you agree, disagree, or would like to add your own reasons:

1. **No 1. Reason:** It is the right thing to do.

2. **Moral Values:** Because being poor does not change how a person should be treated.

3. **Responsibility:** Because we need to give back to our community.

4. **Empower:** Our pro bono work allows us to use the law to empower those who would otherwise be paralyzed by lack of legal representation.

5. **Serve the Community:** I think is our duty to serve our community and those who are the most vulnerable, which are women and children. I am grateful for the opportunity to serve our pro bono clients and make a difference in their lives.

6. **Human Rights:** We have to support the human rights of others.

7. **Return Dignity to Human Beings:** We do pro bono work because we have awesome power to help return dignity to human beings.

8. **Legal System is Scary:** The legal system and legal issues are scary. We can bring confidence and reduced fear to the process for clients.

9. **Justice:** There is no equal justice unless there is equal access to justice.

10. **Give Back to the Community:** As attorneys, we are supposed to find ways to give back to our communities. Let’s face it, as lawyers, our profession has always had a bad rap. The profession can always use the good mojo that pro bono work offers.

11. **Someone Has to Do It:** Because someone has to do it, and we have the resources

12. **Feels Good:** I do it because I’m a softy, for lack of a better term. I really do feel good when I can use my skills to help someone who TRULY needs it. It makes all the bad days worth it when a client gives you a big hug of appreciation.

13. **Humbling** – reminds me of how blessed I am and keeps me grounded.

14. **Growth** – to surround myself with others who give of themselves and learn how I can do better.

15. **Knowledge** – to expand my experience and learn more about other areas.

16. **Meaningful Work:** Obviously, it is meaningful work -- often more so than my everyday work.

17. **Paying Our Dues:** It’s what lawyers should do as part of “paying our dues.”

18. **Support What I Care About:** It’s a way to support causes and organizations whose work I believe in.

19. **Pay Back to the Little Town:** To pay back the little town that helped raise me and cannot, in these times, afford a paid city attorney.

20. **Compelling Need:** I have a compelling need to help others. In the case of large scale pro-bono events, for example, assisting the naturalization applications, desire to help others
in a process for which there are either not enough attorneys to assist or for whom attorney fees would be a financial challenge.

21. Moral Obligation: We have a moral obligation to fight injustices. Where we have skills that can prevent or ameliorate misery, we should use them.

22. Sworn Obligation: It is our sworn obligation and professional responsibility to represent the needy.

23. Meet Other Lawyers and Community Members: It allowed me to meet other lawyers and community members on an informal basis.

24. Access to Justice: I do not think that access to legal services should be restricted only to people who can afford to pay for them.

25. Creates Balance for Me: On the other hand I want to serve and help people (reason why I became a lawyer) but on the other hand I like nice vacations, education, etc. I do exactly two cases a year (not 1 nor 3). I have a couple of groups who send these to me and for the last 3 years, it has been first come first serve.

26. Duty: Can’t say no. No other lawyer in five counties and two states who isn't a prosecutor, and in one county, no other lawyer at all. Want to help. Feel as though I should help. It’s one of the privileges of having a license to practice law. The potential client is black and blue from being battered by her husband. The potential client is someone I’ve known all my life and is low income. The potential client is a local nonprofit that does great things in my community. And on, and on, and on.

27. Marketing: At the end of these cases, the way I am hugged and praise is unreal. It usually moves me. I figured if it does that to me, it will probably have the same effect on people who get told about me, leading them to come to me.

28. Want to Help: I want to help those who are less fortunate than me. If I don’t do it, who will?

29. Do Something: Instead of wringing my hands about the bad things that happen to people, I am doing something, no matter how small, to counteract it.

30. This is Why I Became a Lawyer: To help others was the main reason I became a lawyer – pro bono is the most rewarding personally – advocacy in its purest form.

31. To Help the Most Vulnerable: To help those that are most vulnerable and marginalized by our laws and to give voice to the voiceless.

32. It Feels Good: There’s nothing like solving a legal problem for someone who can’t afford to pay attorney fees. They’re usually happy and extremely grateful. It feeds your soul to make people happy.

33. How Reasons for Pro Bono Change: I suspect the reasons you uncover will vary with the lawyers, and after 35 years, I would add that my reasons have changed from when I was younger. I got some kind of certificate or award from the KBA when I was an associate for a couple of cases I took through a contested hearing that I accepted from Kansas Legal Services. I suspect I did those cases because 1) in an abstract sense I thought it was the right thing to do, 2) my firm encouraged me because the firm’s leadership thought it was the right thing to do, and 3) I thought it would be good experience as a new lawyer to take on a contested matter. Now I am nearing retirement and I have a couple of pro bono or greatly reduced fee cases I am working on, and have finished a third similar one. I am doing them because I care about changing the law for the better, and I think my representation has a chance to accomplish that (I am challenging provisions in the City Code that I contend are unconstitutional) and because animal rights are a sub-issue in these cases and I believe that people have many more opportunities to have their voices heard than animals do. If I don’t speak for them, no one will. My primary reason for doing this now is that I feel called to do it out of passion for the underlying issue. My viewpoint has changed; I now see the “deep” issue as one of universal justice, even moral justice, and to me it goes beyond the confines of human law. Fortunately, my experience has given me the tools I need to work within the framework of the human legal system. So I do.

34. Happy Retirement: It allowed me to discover where I wanted to spend my time after retirement.

With special thanks to: Deena Bailey, Amy Lemley, Sarah Molina, Shahzad Ghafoor, Kathy Bussing, Denise Hammond, Mason Ellis, Leyla McMullen, Daniille Atchison, Karen Miller, Aleen VanBebber, Kim Pikul, Raymond Reza Bolourtchi. Monique K. Centeno, Stephanie M. Smith, Etta Walker, Laurie Spindler, and Mary Feighny, for sharing their thoughts with me, for doing pro bono work, and for being awesome humans.

About the KBA President

Mira Mdivani practices business immigration law in Overland Park. She is an expert in business global mobility and corporate immigration compliance, assisting U.S. and international businesses with visas for international personnel and I-9 audits and developing corporate immigration compliance practices. Mira’s law school professor and mentor John Klamann encouraged and enabled her to do pro bono work early in her legal career. The Mdivani Corporate Immigration Law Firm’s Pro Bono practice was established the same year as the firm itself, in 2004. Since then, all the lawyers at the firm do pro bono work helping immigrant women and children with pursuing legal status in the United States.

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Getting Real About Student Debt

by Mitch Biebighauser

Young lawyers are beginning their careers with more student loan debt than ever. “Student loan debt in 2019 is the highest ever.”1 “On a percentage basis, the amount of student loan debt held by 30-39 year-olds has increased 30.2% over the past five years.”2 According to the American Bar Association, the average debt taken on by a law school graduate was $84,000 if you attend public schools and $122,158 if you attend private schools. This is just for going to law school and doesn’t include the cost of undergraduate education.”3 Student loan debt has many downstream impacts; beyond monthly repayment, it affects how young lawyers plan their careers, the impact of unforeseen changes in career, flexibility to take chances in various practice areas, and it sometimes necessitates or precludes government employment—giving careful balance to forgiveness programs and lower earning potential. The impact is measurable:

![Total Student Loan Balances by Age Group](image)

Source: Federal Reserve Bank of New York Consumer Credit Panel/Equifax.
We can talk endlessly about who or what is to blame for the exorbitant cost of law school, but it’s far more productive to focus on changing what needs to change. The Blue Sky Initiative is confronting the structural barriers that hold schools back. It envisions lower tuition, less financially-stressed graduates, and a profession that looks more like our diverse society.

Much of our focus is on a de facto regulator of law schools, U.S. News & World Report—a ranking that does not consider how its methodology impacts the modern and future law school. The incentives it creates and hierarchy it reinforces complicate even the most basic reform conversations within law schools. Decision-makers need new systems of measurement that produce better incentives, yet still offer consumers valuable information as they decide where to attend law school. The Initiative also plans to continue to work with the actual regulator, the ABA Section of Legal Education & Admissions to the Bar, on how it can better nurture innovation and help schools responsibly discharge their duties to our profession and those we serve. Regulatory change can affect the cost of joining the legal profession in big and small ways.

We don’t quite know what the future holds for law schools. Who will they educate? How? When? What we do know is that our current path leads to trouble. We can diverge, however, if people throughout our profession work together. We need structural change to achieve more accessible, affordable, and innovative law schools.

The Blue Sky Initiative’s ambitions reach high, but it is proportional to the challenges we plan to address in the coming months and years. It is clear that it will take cooperation among people and organizations throughout the profession. The Initiative is already working with bar association, corporate, and nonprofit partners, but it will take more. We invite you to read more about how we hope to get there at lawschooltransparency.com/progress/.

**About the Author**

Mitch Biebighauser is an Assistant Federal Defender for the District of Kansas in Wichita, where he practices criminal defense of indigent individuals charged with crimes by the federal government. He was previously in private practice at Bath & Edmonds, P.A., in Overland Park, where he practiced local, state, and federal criminal defense.

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*mitch_biebighauser@fd.org*

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2. Friedman, supra.

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**Percent of Balance 90+Days Delinquent by Loan Type**

<table>
<thead>
<tr>
<th>Percent</th>
<th>Credit card</th>
<th>Student loan</th>
<th>Auto loan</th>
<th>Mortgage</th>
<th>Home equity line of credit</th>
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</table>

Source: FRBNY Consumer Credit Panel/Equifax.
According to the National Registry of Exonerations, there have been 2,372 exonerations in the United States from 1989 to 2018. Since the inception of conviction integrity units in 2002, there have been a total of 344 exonerations resulting directly from their investigations. In 2018 alone, 99 of the known 151 exonerations—approximately two thirds—were the result of either a conviction integrity unit or a wrongful conviction entity.

With those successes in mind, the Wyandotte County District Attorney’s Office is proud to be the leader in Kansas by establishing the first ever conviction integrity unit (CIU) in the state—but hopefully not the last. Our CIU functions as an independent unit within the district attorney’s office that addresses credible claims of innocence in a timely, efficient and consistent manner. The CIU was developed, in part, due to the 2017 release of Lamonte McIntyre, who spent over 23 years in prison for a conviction that a judge found was manifestly unjust.

As ministers of justice, we believe in upholding our duty to refrain from improper methods calculated to produce convictions regardless of the strength of the evidence, and use every legitimate means to bring about convictions that are just. As such, we respond whenever we receive new substantial and credible information that the evidence used to imprison someone for a serious or violent felony was not trustworthy. That information is reviewed to determine if we can remain confident that the right person is convicted for the crime charged.

It is our sincere hope that we will not be the only CIU in the state of Kansas, but will be the first of many to emerge as the need is realized and widely accepted. The major barrier to review or development of policies or procedures that could prevent wrongful convictions is a systemic failure to acknowledge the mistakes of our past, correct them, and do all that we can to ensure we never repeat them. Any time there is a system that involves humans, error is possible. If we fail to accept the possibility of human error, we doom ourselves to repeat past failures.

Due to previous injustices, there is a community mistrust in our justice system. We seek to bolster trust in our county and the justice system as a whole. In doing so, we aim to increase safety and the perception of safety as well as to move the community forward together. In addressing these issues, we will build trust in the community and increase support for prosecutors through demonstrating that we understand that the ultimate goal is to seek truth and justice and not merely convictions.

Unfortunately, the push for new policies and procedures necessary to prevent wrongful convictions is often met with a host of roadblocks, including a lack of funding and opposition to the reopening of closed cases. Fortunately, the people of Wyandotte County and the Unified Government Commissioners recognized the need and responded by funding the creation of the CIU. Bolstered by the success of other CIUs throughout the country, we look forward to the day when CIUs are the rule and not the exception.

About the Author

Mark Dupree, Sr. was elected District Attorney of Wyandotte County, Kan. in 2016. After receiving his undergraduate degree from the University of Kansas, Dupree earned his Juris Doctor from Washburn University. An active member of the KBA, he serves as the 11th District representative on the KBA Board of Governors. Mark is married to Shanelle Dupree, an attorney in her own right; they have four children.

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Let’s Talk about IOLTA

by Susan Saidian

I hope everyone has enjoyed the summer. September brings new school clothes, books, football season, committee meetings of all sorts, and a host of new events and tasks. It is also when the Kansas Bar Foundation’s Interest on Lawyers Trust Accounts (IOLTA) committee traditionally holds its annual meeting to select recipients of IOLTA grants.

IOLTA provides funding for programs that promote access to justice, legal services for underserved populations and support for legal education throughout the state. In keeping with the September Back-to-School theme, I thought I would provide a little history lesson about the IOLTA program.

IOLTA programs began in the 1960s and 1970s in Canada and Australia as a means to fund programs providing legal services for the indigent and other charitable services. After banking laws in the United States changed to allow interest on checking accounts, IOLTA programs were established. Florida was the first state to establish an IOLTA program, followed by California, Idaho, and Maryland. Now all 50 states, the District of Columbia and the U.S. Virgin Islands all have IOLTA programs. Forty-six states require licensed attorneys with trust accounts to participate in IOLTA; in four other states, attorneys can opt out. Kansas is an opt-out state.

Enough with the history lesson, now to the nuts and bolts of how our program works. Attorneys place client funds in an account at a bank that participates in IOLTA. Interest that accrues on those eligible accounts is periodically sent to the Kansas Bar Foundation throughout the year. In early summer, the KBF publishes the grant application, which also sets forth the criteria for the grant and announces the deadline for applications. All applicants must be a 501(c)(3) qualified organization. The deadline is usually in September, and the committee meets in September or October to review the applications and select the recipients. The committee includes KBA and KBF board members, and appointees from organizations throughout the state that have an interest in access to justice.

Typically, the committee receives 20-30 applications and reviews them ahead of the meeting. The grant amounts vary; sometimes smaller grants are given to several organizations and sometimes larger amounts are given to fewer recipients. The types of programs vary from year to year. Some grants provide legal services directly to underserved populations—such as survivors of domestic abuse, immigrants, or children adjudicated in-need-of-care. Some programs provide funding for legal education for students and adults. Other programs use IOLTA funding to assist with advocating for child victims...
The amount available for grants depends on interest rates and the number of attorneys participating. That brings me to my last point: if you are not or your firm is not currently participating in IOLTA, please consider doing so. If your bank does not currently participate, Anne Woods at the KBF can help with getting the bank set up. Most banks can benefit from participating because having an IOLTA program allows the bank to receive credits that can improve its rating with regulators. Credit unions are also eligible to offer IOLTA. See if your bank offers IOLTA by visiting: https://www.ksbar.org/partnersinjustice

I thank Anne Woods and the staff at KBF for helping make our IOLTA program a success that continues to build. I also thank Scott Hill, the current committee chair, for his leadership, and I thank all the committee members—past and present—for their thoughtful service. The more our members know about and participate in IOLTA, the stronger and more effective the program will become.

About the Author

Susan Saidian attended Millsaps College and Washburn University, obtaining her bachelor’s degree in 1982. She graduated from Washburn University School of Law in 1988. She spent most of her years in private practice in the area of bankruptcy, working for both consumer and business debtors, creditors and although she found all areas rewarding, she particularly enjoyed her work for consumer debtors. She is a member of the American Bar Association, Kansas Bar Association, Wichita Bar Association, Kansas Women Attorneys Association, and has served on the board of CASA of Sedgwick County. She has also served on the Kansas Bar Foundation’s IOLTA Committee. She is now in-house counsel at Line Medical, and lives in Wichita with her husband, David.

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Mr. Jeffery L. Carmichael, KTLA Representative jcarmichael@morrislaing.com
Ms. Amii N. Castle, Kansas Governor’s Appointment amiiicastle@ku.edu
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Ms. Anne Woods, KBF Staff Liaison awoods@ksbar.org
Supreme Court Rule 24

The eFiling system has a new attorney certification check box that all attorneys and staff should study carefully before checking. This is not just another end user agreement from iTunes that can safely be ignored.

The certification requirement on filers relates to the new statewide case management system (Odyssey) which went live in Kansas’ 8th and 21st Judicial Districts back on August 5. As that system rolls out, there will be significantly improved public access to case information from participating courts, including easier public access via the internet to the documents filed in a case.

Increased public access fulfils a vital obligation of the courts but also creates potential privacy and security issues arising from public disclosure of personal and confidential information. The Kansas Supreme Court approved Rules 20-24 to address those concerns (kscourts.org/rules/eCourt.asp). The certification check box on eFLEX aims to focus filers’ attention to those Rules as they relate to filed documents.

Certificate of Compliance

The relevant portion of the certification (as it appeared on eFLEX when this article was written):

CERTIFICATE OF COMPLIANCE

I certify the document(s) being filed comply with applicable requirements of the Kansas Supreme Court Rules regarding personally identifiable information or sealed documents:

1. For documents submitted for filing with a court located in a judicial district using the Odyssey electronic case management system, the attached document(s) are submitted under Supreme Court Rule 22(d), Supreme Court Rule 23(b) or Supreme Court Rule 24; or
2. For documents submitted for filing with a court located in a judicial district not using the Odyssey electronic case management system, the attached document(s) are submitted under Supreme Court Rule 123.

Any filing attorney clicking that Certificate of Compliance check box must be fully aware of the weighty responsibilities associated with it. The Supreme Court demands that an attorney affirmatively agree to be solely “…obligated to protect the confidentiality of personally identifiable information.…”
When you click that box, you are on your own with no back-up as the Rule warns that, “A district court clerk has no duty to review a document to ensure compliance with this rule.”

**Protected Personally Identifiable Information**

The information an attorney must protect by exclusion or redaction from filed documents is enumerated in Rule 24(b):

1. the name of a minor and, if applicable, the name of a person whose identity could reveal the name of the minor;
2. the name of an alleged victim of a sex crime;
3. the name of a petitioner in a protection from abuse case;
4. the name of a petitioner in a protection from stalking, sexual assault, or human trafficking case;
5. the name of a juror or venire member;
6. a person’s date of birth except for the year;
7. any portion of the following:
   - an email address except when required by statute or rule;
   - a computer username, password, or PIN; and
   - a DNA profile or other biometric information;
8. the following numbers except for the last four digits:
   - a social security number;
   - a financial account number, including a bank, credit card, and debit card account;
   - a taxpayer identification number (TIN);
   - an employee identification number;
   - a driver’s license or nondriver’s identification number;
   - a passport number;
   - a brokerage account number;
   - an insurance policy account number;
   - a loan account number;
   - a customer account number;
   - a patient or health care number;
   - a student identification number; and
   - a vehicle identification number (VIN);
9. any information identified as personally identifiable information by court order; and
10. the physical address of an individual’s residence.

The information a filing attorney must scrub from documents has significantly expanded from what was addressed in Rule 123. That Rule only protected social security numbers, birth dates and financial account numbers. The broader definitions of protected personally identifiable information in Rule 24 aims to combat the many ways criminal and other nefarious purposes can be furthered against a party with easy access to seemingly innocuous bits of information. However, as a result, a filing attorney needs to beware.

**Caution Zones**

For example, 7(C) requires an attorney scrub any portion of “other biometric information” from filed documents without adequately explaining what that might be. Various Kansas and federal statutes—as well as some scholarly literature—including things like facial characteristics (including photos and video) and handwriting (including signatures). A signature from a contract could, theoretically, be problematic under Rule 24(b)(7)(C).

Subsection 10 presents another concern. It requires that an attorney scrub “…the physical address of an individual’s residence.” In other words, any certificate of service at an individual’s residence would need to be redacted as to the address. Likewise, any return of service where an individual was served at his or her residence would also need to have that address redacted. That, of course, means the court and parties referring to the documents during litigation or post-judgment actions will not see where a party was served, if service was at a residence.

There are other concerns filing attorneys might have about clicking the certification box (e.g. subsection 1 where the minor may be a defendant in a civil action). It is important to understand Rule 24 completely, and ask questions on any vague interpretations, prior to clicking through and uploading a document. Clicking that box casually may create a host of problems for the filer, including an issue under Rule 3.3 of the Kansas Rules of Professional Conduct. Read Rule 24, your forms and pleadings, and any documents you upload through eFlex carefully, with eyes wide open to the risks of that little click box.

**About the Author**

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

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law practice management tips and tricks
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Thursday, September 26 & Friday, September 27-2019 Elder & REPT Conference. Manhattan, KS

October
Friday, October 11- Social Security Live Lunch & Learn. Topeka OR Live Webinar
Friday, October 25- KOGA, Wichita, KS
Wednesday, October 30- Indian Law Lunch & Learn in Topeka OR Live Webinar

November
Friday, November 8- Annual Alternative Dispute Resolution CLE, Topeka, KS
Thursday, November 21- Annual Employment Law CLE, Topeka, KS

December
Friday, December 6, 2019- 2019 KS Chapter of AAML Conference, Lawrence

Live Webinars:

September
Monday, September 9 – Staying Within the Lines. 1.0 hour
Wednesday, September 11 – Yelp, I’ve Fallen Into Social Media and I Can’t LinkedOut! 1.0 hour
Wednesday, September 18- Show Me the Ethics. 1.0 hour
Wednesday, September 25 – The Truth, The Whole Truth, and Nothing but the Truth. 1.0 hour

October
Friday, October 11- Social Security- Live Webinar OR Live Lunch & Learn, Topeka
Wednesday, October 30- Indian Law- Live Webinar OR Live Lunch & Learn, Topeka

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Free Headshots at the KBA
Every Wednesday
2pm–4pm
In earlier columns, I wrote about some of the science supporting legal writing advice. I cited empirical evidence and cognitive science principles backing up some well-known legal writing principles. This column discusses cognitive science that explains biases that all people have that can affect how we reason. Because these biases affect how we reason, you should understand them as you seek to persuade. After explaining what these cognitive biases are, I offer a few tips on how you should adjust the style and content of your legal writing to account for them in your advocacy.

A cognitive bias can be described as a natural tendency our brains have when we process and interpret information. Much research has shown that our brains routinely use intellectual shortcuts in our everyday lives to simulate the results of logical reasoning, saving time and reducing cognitive load. But these shortcuts or rule-of-thumb approaches come with a price: They lead to systematic errors in judgment. These brain shortcuts don’t cause so many errors that we abandon them, but they create tendencies or biases in our thinking processes. When these biases creep into our legal reasoning, they prevent us from reaching better-reasoned decisions. Two natural tendencies or biases that can affect our legal reasoning are the confirmation bias and the bias blind spot.

The confirmation bias is our brain’s tendency to want to confirm beliefs that we already hold. People tend to seek and more readily accept information they believe supports a hypothesis or an existing belief they have. They tend to interpret new information in ways that are more consistent with those already formed hypotheses or beliefs. And if information conflicts with a formed hypothesis or belief, or if it supports a different hypothesis or conflicting belief, people tend to discount or even avoid that information. People also tend to pay more attention to evidence that shows their belief is correct, and they tend to pay less attention to or miss evidence that can prove their hypotheses are wrong. This bias can occur even when we form a hypothesis or belief on fairly thin evidence; and our beliefs tend to persevere even when the initial evidence on which they were based has been discredited.

This natural tendency can affect legal reasoning. For example, once you decide to advocate for your client, your brain’s confirmation bias may filter evidence in your case in favor of your client. Your brain will have a tendency to accept information consistent with your client’s case and to discount the other side’s evidence and arguments. You are more likely to miss or pay less attention to conflicting evidence.

Confirmation bias may also make it harder to change a decision-maker’s existing hypothesis or belief. If, for example, you are before a judge who simply does not like your case from the beginning, you may have to overcome the judge’s confirmation bias. This doesn’t mean the judge has made up her mind, but she may be more inclined to view the evidence in the other side’s favor. On the other hand, if you sense that your client’s story resonates with your judge from the outset, you may have an advantage you don’t want to lose.

You need to control for confirmation bias in evaluating your case and adjust your advocacy as well.

If your brain is telling you that you already adjust for this bias (after all, you learned to be objective and see the other side’s arguments in your first year of law school?), then you
need to know more about another cognitive bias—**the bias blind spot**.

We are all subject to cognitive biases, yet individuals tend to believe they are largely immune or less susceptible to them than others.\(^{12}\) We acknowledge our weaknesses, but we conclude we are above average when it comes to overcoming cognitive bias.\(^{13}\) This tendency is the bias blind spot. Researchers explain this blind spot in part by “the introspective illusion.” \(^{14}\) We evaluate the conduct of others by judging their actions. But when we evaluate our own conduct, we consider all the events and information that led us to behave as we did.\(^{15}\) It is more difficult for our brains to recognize in us what we criticize in others.\(^{16}\) Thus, know your brain has a tendency to want to confirm existing beliefs and also know that your brain has a tendency to overestimate your ability to control for that bias.

How might you account for these biases in your advocacy? Here are a few tips:

- When evaluating your case and determining your chances of winning, slow down your reasoning process to avoid the shortcuts your brain may take. Admit to yourself that you will have a natural tendency to discount counterarguments as weak. Actively look for conflicting evidence and devote the necessary time, attention and care to reasoning through your opponent’s arguments.

- In your advocacy, remember how important that first impression is. When you write your complaint or answer, remember the judge’s first impression will be the filter through which all the evidence is reviewed later in the case. If you sense that first impression favored the other side, then understand you have a hurdle to overcome. Understand you must now replace the story or framework the judge has created with one that better favors your client. This is a bigger hurdle than creating the framework or hypothesis in the first place.

- When deciding the theme of your case, think about the stories and beliefs your audience knows and shares. If your theme captures a story or belief that is familiar to your decision-maker, she or he may be more inclined to find your way. If the decision-maker’s initial hypothesis favors your client, she or he will be more motivated to sift through the evidence in a way more favorable to you.

- When drafting briefs and memoranda, spend significant time drafting your introduction/nature of the case/preliminary statement section. The first summary or story you tell will be the framework from which the judge views the rest of your document. The preliminary statement’s purpose should not be simply to introduce the reader to your case; rather, its purpose is to force a favorable hypothesis and provide a framework into which the reader can neatly fit all the supporting evidence you present.

- Take advantage of a reader’s tendency to pay more attention to confirming evidence. Provide more detail and devote more space in your supporting memorandum or brief to evidence that supports your position. All material facts should NOT be treated equally. Give the reader a more vivid picture of your “good” facts. “Bad” facts can be acknowledged in more general terms.

In summary, you can be an even more effective advocate if you (1) recognize the cognitive biases you have and overcome them, and (2) recognize that an adversary or decision-maker has the same biases and either counteract them or use them to your advantage.

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**About the Author**

Pamela Keller is a clinical professor at the University of Kansas School of Law. She directs the lawyering skills program, moot court, and the judicial field placement. Before teaching she practiced employment law with Ice Miller in Indianapolis and clerked for the Hon. John W. Lungstrum, U. S. District Court of Kansas.

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3. *Id.* at 8.
4. *Id.*
5. *Id.* at 20 (citing Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 Rev. Gen. Psychol. 175, 177 (1998)).
7. *Id.*
8. *Id.*
11. *Id.*
12. *Id.* at 28.
13. *Id.* at 29.
14. *Id.*
15. *Id.*
16. *Id.* at 34.
FEDERAL RETIREMENT BENEFITS IN DIVORCE:
Civil Service, Military Retired Pay & Railroad Retirement

By Curtis G. Barnhill
The federal government is an important provider of retirement benefits to tens of millions of Americans. The rights to these benefits arise from many different situations; for example, pension benefits for federal civilian employees; military retired pay for members of U.S. armed forces; and retirement benefits for private industry employees who worked for a railroad industry employer. These retirement benefits can be divided in divorce by court orders somewhat like qualified domestic relations orders or QDROs (although ERISA does not control any of these retirement benefits). This article discusses these circumstances and provides the practitioner with practical advice on drafting and effectuating such division orders.

I. Federal Employees Pensions

Almost all civilian federal employees are participants in one of two retirement plans: either the Civil Service Retirement System (CSRS) or the Federal Employees Retirement System (FERS). Included in these two plans are federal civilian employees of the executive branch agencies, the U.S. Postal Service, Congressional employees, and certain employees of the U.S. Judiciary. FERS automatically covers civilian employees who began service on or after January 1, 1987; CSRS covers civilian federal employees who began working for the federal government on December 31, 1986 or earlier.

Who participates in CSRS and FERS?

CSRS is a defined benefit plan under which an employee was required to contribute either seven percent or 7.5 percent or eight percent of the employee's pay. The federal government matched that mandatory contribution. The civilian employees in CSRS do not contribute or participate in social security.

FERS has three parts: participation in social security, mandated participation at a minimum contribution level in a 401(k)-like program known as the Thrift Savings Plan (see below), and participation in a defined contribution plan known as the Basic Benefit Plan. For purposes of this article, the term “FERS” refers to the Basic Benefit Plan. Most federal employees now are participating in FERS. Some retired federal employees are in CSRS, and some older federal employees may be grandfathered participants in CSRS, or even participants in both CSRS and FERS. It is a good practice to always make inquiries as to which plan(s) a federal employee is participating in.

What is a COAP?

Retirement benefits under both FERS and CSRS are considered marital property in divorces under Kansas law. As such, these retirement benefits can be divided as marital property, be assigned in whole or in part as maintenance, or can be assigned as child support. FERS and CSRS retirement
benefits are divided by a “Court Order Acceptable for Processing” (COAP), not by a qualified domestic relations order (QDRO). COAPs are approved and administered by the Office of Personnel Management (OPM) in the Washington, D.C. area. OPM will neither review nor comment on draft COAPs in advance.

OPM strongly discourages the use of the term “QDRO” in orders dividing FERS and CSRS benefits. The Employee Retirement Income Security Act of 1974, as amended (ERISA), does not apply to any retirement plan sponsored by a government entity, including FERS and CSRS. Therefore, avoid making references to ERISA or using ERISA language in any order dividing FERS or CSRS retirement benefits, or OPM is likely to disapprove and reject the order.

Neither FERS nor CSRS use ERISA terminology; they have their own terminology in dividing retirement benefits. For example, “Employee” is the term used for the person participating in FERS or CSRS, not the ERISA term “participant.” “Former Spouse” is the term used for the ex-spouse who will receive a divided share, not “alternate payee.” “Retiree” is the term for an Employee in retirement status.

How much does the Former Spouse get and when?

When negotiating a division of FERS or CSRS benefits, it is important to keep in mind that the Former Spouse will not be able to start receiving FERS or CSRS benefits before the Employee actually retires or withdraws contributions. FERS or CSRS benefits may be divided as (1) fraction or percentage of benefit, or (2) a formula whose values are readily ascertainable on the face of the COAP, or (3) a fixed dollar amount. A pro rata share is defined in OPM regulations as a formula providing to the Former Spouse a portion that is, “one half the fraction whose numerator is the number of months of federal civilian and military service that the employee performed during the marriage and whose denominator is the total number of months of federal civilian and military service performed by the employee.” This is essentially 50 percent of the marital portion.

An Employee’s benefit is generally paid in the form of a lifetime annuity. The COAP should specifically divide the Employer’s annuity and specifically direct OPM to pay the Former Spouse a portion of the Employee’s annuity. The Employee can also elect to receive some of the contributions back in a lump sum at retirement or withdrawal. Be certain to include in the property settlement agreement and in the COAP that the Former Spouse has a right to a share of any return of contributions.

Both FERS and CSRS include cost-of-living adjustments (COLAs), which are determined annually. Employees may also get salary adjustments that might impact the Former Spouse’s award under the COAP. The Former Spouse’s share will automatically include proportional increases due to a COLA or salary adjustment under a COAP awarding either fractional, percentage or formula allocation of FERS or CSRS benefits, unless the COAP provides otherwise. An award of a fixed dollar amount in a COAP is interpreted by OPM to exclude COLA increases, unless the COAP expressly orders inclusion of COLA increases.

If the Ex dies, does the Former Spouse still receive benefits?

The Former Spouse does not automatically have a right to survivor benefits under FERS or CSRS unless the COAP expressly provides for an award of a “Former Spouse Survivor Annuity” (FSSA) to the Former Spouse. The Former Spouse’s right to a FSSA should be explicated and clearly provided for in a separation agreement, or an adjudicated divorce decree or mediated agreement. Generally, the Former Spouse’s right to a FSSA terminates if the Former Spouse remarries before 55 years of age (unless the Former Spouse and Employee were married at least 30 years before divorce). To be eligible for an FSSA, the Former Spouse must have been married at least 9 months to the Employee or Retiree who performed at least 18 months of civilian service covered by CSRS or creditable under FERS.

MALPRACTICE ALERT: An award or assignment of a FSSA must be made in the first court order dividing the marital property of the Employee (or Retiree) and the Former Spouse. OPM will not honor a court order that modifies or replaces the first property division order. Draft it right the first time! A “court order” means any judgment or property settlement issued by or approved by any court of any state. That includes property settlement agreements. Also, OPM will not honor a COAP that attempts to award a FSSA after the retirement or death of the Employee.

Who pays for the FSSA? The FSSA is not free; there is a cost to it which is paid by a reduction in annuity payments.
There are two options for paying for the FSSA: a reduction in the amount the Employee receives in annuity payments, or a reduction in the Former Spouse entitlement under the COAP. Which party pays for the FSSA should be covered in a property separation agreement, a mediation agreement or an adjudicated divorce decree. Otherwise, if the COAP is silent as to which party pays for the FSSA, OPM will collect the annuity reduction from the Employee’s annuity.

The total FSSA benefits for all COAPs for an Employee cannot be more than 50 percent of the Employee’s benefits under FERS and not more than 55 percent under CSRS. The same basic COLA rules stated above apply to FSSA benefits. Generally, all of the above applies to divorces, annulments and separate maintenance actions, except for FSSA benefits. The Former Spouse can receive FSSA benefits under a decree of divorce or an annulment, but he cannot receive FSSA benefits under a decree of separate maintenance.

Additional information on CSRS & FERS

The “Handbook for Attorneys on Court-ordered Retirement, Health Benefits, and Life Insurance under the CSRS, FERS, FEHB and FEGLI” (RI 83-116 July 1997) is a detailed and comprehensive guide to dividing CSRS and FERS benefits, as well as certain other benefits for federal employees. This handbook may be downloaded for free from the OPM website at: https://www.opm.gov/retirement-services/publications-forms/pamphlets/ri38-116.pdf

II. Thrift Savings Plan

The Thrift Savings Plan (TSP) is a defined contribution plan for federal civil service employees and military personnel. Each Employee’s individual account in TSP is funded through Employee contributions, and in some cases, employer contributions, and gains and losses on investments of the contributions. “[A] TSP account can be divided in an action for divorce, annulment or legal separation, or garnished to satisfy a participant’s past-due alimony or child support obligations.”

Because TSP is a government plan, ERISA does not apply to TSP. The term “Participant” is used for the person participating in TSP. “Payee” is the term used for the ex-spouse who receives a divided portion of a TSP account, not an “alternate payee.” An order dividing a TSP account is a qualifying “Retirement Benefits Court Order.” It is not a QDRO. A Retirement Benefits Court Order must be issued pursuant to a court decree of divorce, annulment, or legal separation; or a court order or court-approved property settlement agreement incident to such a decree issued by a state, District of Columbia, territorial or Indian court with appropriate jurisdiction.

Drafting the Court Order

In order to be qualified, the Retirement Benefits Court Order must specifically state the name “Thrift Savings Plan.” Terms such as ‘all retirement benefits,’ ‘Government benefits,’ ‘Federal retirement benefits,’ ‘Thrift Savings,’ or ‘Thrift Savings Account’ are not adequate.” TSP will only qualify a Court Order that awards the Payee either (1) a specific dollar amount, or (2) as a fraction or percentage of the Participant’s account as of a specific past or present date.

TSP will not pay either interest or earnings on the Payee’s entitlement unless the Court Order specifically provides for them. The term “earnings” includes both gains and losses. If the Court Order “provides for earnings, but does not specify a rate or a per diem dollar amount, the TSP will calculate earnings based on the type of TSP funds the participant was invested in on the date used to calculate the payee’s entitlement, the number of shares the participant had in each fund on the date used to calculate the payee’s entitlement and the share price of those TSP funds up to two days prior to disbursement.

Can a Participant have more than one TSP account?

A Participant who was in the military and is also a federal employee may have two separate TSP accounts: one for military service and another for civil service employment. If the Participant has two TSP accounts, division of each of the accounts should be identified separately in the property settlement agreement, or decree, as well as in the Retirement Benefits Court Order.

What help will TSP give me in drafting the order?

TSP will not review or pre-approve proposed drafts of Qualified Retirement Benefits Court Orders. However, to help a spouse draft a valid court order, TSP will provide the spouse or the spouse’s attorney with certain account information of the Participant’s. Such information includes the Participant’s account balance, the Participant’s outstanding loan balance, if any; and annual or quarterly statements. Requests for this information must be made in writing to TSP.

Check here for more information on TSP

TSP has published a very helpful online booklet about dividing TSP accounts entitled, “Court Orders and Powers of Attorney.” To receive a pdf copy of the booklet, go to: https://www.tsp.gov/PDF/formspubs/tspbk11.pdf. There are other informative publications at the TSP website, including a model Retirement Benefits Court Order.

III. Military Retired Pay

One selling point to attract potential recruits and encourage re-enlistment is the benefits available to military personnel,
including retirement benefits. Military retirement pay is technically not a pension. Rather it is a federal entitlement, which generally is earned after completing twenty years of active service in one of the uniformed services. The uniformed services of the United States are the Army, Air Force, Navy, Marine Corps, Coast Guard, and the commissioned corps of the National Health Service and the National Oceanic and Atmospheric Administration. Members of the Reserve Component (National Guard and Reserves) may also be eligible for retired pay after attaining 60 years of age, and performing a minimum of twenty years of qualifying service.

What is the USFSPA?

Like all government retirement plans or systems, ERISA is not applicable to retired military pay. The controlling federal statute that provides for the division of military retirement pay is the Uniformed Services Former Spouses’ Protection Act (USFSPA). Retired Military Pay is divided by a “Military Retirement Pay Division Order” not a QDRO. The USFSPA provides for the enforcement of court orders, including final decrees of divorce, dissolution, annulment and legal separation, and court-ordered property settlements incident to such decrees.

The term “court” means state, District of Columbia, and territorial courts of competent jurisdiction, and also includes federal courts and courts of foreign countries “with which the United States has an agreement requiring the United States to honor any court order of such country.” The court order may only provide for the payment of child support, alimony or division of property. As to a division of property, the court order must “specifically provide...for the payment of an amount, expressed in dollars or as a percentage of disposable retired pay, from the disposable retired pay of a member to the spouse or former spouse of that member.”

Why is subject-matter jurisdiction so important under the USFSPA?

In order to obtain subject-matter jurisdiction under USFSPA to divide the Member’s military retirement pay, the divorce court must establish personal jurisdiction over the Member by one of only three ways: either by consent of the Member, by residence of the Member (other than due to military assignment), or by domicile of the Member. It is a good practice to include recitation of the basis for subject-matter jurisdiction of the divorce court in the separation agreement. Further, it is prudent that the district court make a written finding of the factual basis for subject-matter jurisdiction under the USFSPA and that the court also include the specific, written legal conclusion in the decree that the court has subject-matter jurisdiction under the USFSPA to divide the Member’s military retirement pay. The division order itself must include a recitation of the basis of subject matter-jurisdiction.

What are some terms I need to know to divide military retirement pay?

The correct terms of art to be used in a division order are “Member” (the term “Servicemember” is also used) and “Former Spouse.” The Servicemember’s rights under the Servicemembers Civil Relief Act, 50 U.S.C § 501, must be observed by the divorce court, and the division order must certify that Servicemember’s rights under that Act were observed.

Only “Disposable Retired Pay” may be divided.Disposable retired pay is the total monthly retired pay to which a Member is entitled, minus deductions for: (a) previous overpayments, (b) forfeitures ordered by court martial, (c) military or VA disability pay, and (d) amounts deducted to provide a SBP annuity. The term ‘retired pay’ includes retainer pay.

What is the 10/10 Rule and why is it so important?

In order for the Agency to make direct payments to the Former Spouse for a division of retired pay as marital property, the Former Spouse must meet the 10/10 Rule. This Rule requires that, in order for the Agency to directly pay the Former Spouse’s share of the retirement pay to the Former Spouse, the Former Spouse must have been married to the Member for at least 10 years, during which time the Member performed at least 10 years’ worth of creditable service. Division of military retirement pay, however, can still be awarded by the court to the Former Spouse or by agreement of the parties even if 10/10 rule is not met, but payment must come directly from the Member as a personal debt to the Former Spouse. Note: the 10/10 rule only applies to property divisions; it does not apply to an award of alimony or child support.
What are the ways military retirement pay can be divided?

Retired pay divided as marital property is awarded as either a fixed dollar amount or as a percentage of disposable retired pay. A variation of a percentage award is to use a formula that computes the former spouse’s interest in the retired pay “based on the relationship of the length of the parties’ marriage (numerator) to the member’s total service that is creditable towards retirement (denominator).”76 “A formula award is stated as a marital fraction in which the numerator and the denominator are multiplied by a given percentage.”77

Another variation is a “hypothetical retired pay award,” which is “based on a percentage of retired pay that is calculated using variables provided in court that are different from the member’s actual retirement variables.”78 “A hypothetical award...define[s] the property interest in the retired pay as if the member had retired at the time the court divided the member’s military retired pay based upon the member's rank and years of service accrued to that point in time. Thus, the former spouse does not benefit from the member’s pay increases due to promotions or increased service time after the divorce.”79

Due to a change of the definition of “disposable pay” under the USFSPA as mandated by Section 641 of the National Defense Authorization Act (NDAA) of 2017, a court order entered after December 23, 2016, (if the order becomes final prior to the member’s retirement) providing for a division of military retirement pay must state each of the following three variables.

If the member entered the service before September 8, 1980:

1. A fixed amount, a percentage, a formula or a hypothetical that the former spouse is awarded;
2. The member’s pay grade at the time of divorce;
3. The member’s years of creditable service at the time of divorce; and in the case of a reservist, the member's creditable reserve points at the time of divorce.

If the member entered military service on or after September 8, 1980:

1. A fixed amount, a percentage, a formula or a hypothetical that the former spouse is awarded;
2. The member’s high-three amount at the time of divorce (the actual dollar figure);
3. The member’s years of creditable service at the time of divorce; or in the case of a reservist, the member’s creditable reserve points at the time of divorce.80 81

A Former Spouse may not begin actually receiving benefits when the Member “becomes entitled to receive retired pay,” which means retires from the military.82 A division of property award computed as a percentage of a Member’s disposable retired pay shall be increased by the same percentage as any cost-of-living adjustment.83 “The total amount of the disposable retired pay of a member payable under all court orders...may not exceed 50 percent of such disposable retired pay.”84

A client from 15 years ago called and said the military retirement payments stopped!

What happened?

A Former Spouse can unexpectedly lose military retirement payment through no personal fault. How is that possible? Be aware that a Member may be able to waive or exclude from disposable retired pay some or all of VA or military disability pay85 one might receive at the time of divorce or a later date, or some or all of any pay benefits one might receive under programs known as Concurrent Retirement and Disability Pay (CDRP)86 or Combat-Related Special Compensation (CRSC).87 88 Courts cannot divide disability benefits, but there have been measures designed by attorneys to protect against the loss of a Former Spouse’s anticipated share of the ex’s military retired pay. One popular remedy was a provision in a property settlement agreement in which the Member agreed to indemnify the Former Spouse for the loss of any part of retired military pay due to a waiver because of some kind of disability benefit due to military service. In 2017, the U.S. Supreme Court held that the clear language of the USFSPA preempts a state court’s authority to order a veteran to indemnify a Former Spouse for the loss of a portion of the veteran’s military retirement pay caused by the waiver of retirement pay to receive service-related disability benefits.89 Under a recent Kansas Court of Appeals decision, parties in Kansas cannot even contractually agree that a Service member is personally liable to a Former Spouse through an indemnification or reimbursement clause for any part of waived retired military pay due to disability. Courts cannot order indemnification to the Former Spouse for Retired Pay waived for disability benefits.90 The court of appeals panel noted, however, that “although the district court cannot order the division of military disability benefits, it is permissible for the court to consider the financial effect of disability pay when dividing assets and ordering spousal support.”91

In addition to waiving disposable pay for service-related disability benefits, a retired member can also lose some or all disposable retired pay through a court-martial for post-retirement criminal misconduct.92 Therefore, a Former Spouse should be aware that a qualified military retirement pay division order is no guarantee the Former Spouse will actually receive a share of the ex’s military retired pay that was awarded to the Former Spouse by the divorce court.

Make certain your client is eligible for survivor benefits, too

Survivor benefits for a Former Spouse are not automatically awarded. Provisions for Survivor Benefit Plan (SBP) for For-
The Journal of the Kansas Bar Association

The maximum SBP benefit is 55 percent of the Member’s retired pay, if awarded before age 62; it’s 35 percent if awarded after age 62.93 “A retired-pay-as-property [SBP] award must be expressed as a fixed dollar amount or percentage of disposable retired pay. If the parties were divorced prior to the member’s retirement, the court order can express the [SBP] award as an acceptable formula or hypothetical retired pay award.”96 An award of SBP coverage must be included in the property settlement agreement or divorce decree.97

A completed and signed DD Form 2656-1, Election for SBP Coverage, must be submitted to the designated agent (e.g. DFAS or the Coast Guard Pay and Personnel Center) within one year of the date of the first court order granting the former spouse SBP coverage, along with a certified copy(ies) of the relevant legal document(s).98

Malpractice Alert: Timely submission of the completed and signed Form 2656-1 and all other required information within one year from the date of divorce is crucial. If the Member refuses or cannot be found to sign the voluntary election form, the Former Spouse should timely submit to the designated agent a completed and signed DD Form 2656-10 for a “deemed election” of the SBP.99

SBP coverage is automatically suspended if Former Spouse remarries before reaching 55 years of age, but may be reinstated if the remarriage ends in death of the subsequent spouse, divorce or annulment. Remarriage after age 55 has no effect upon SBP coverage.100 “When former spouse coverage is elected, the current spouse must be informed. Only one SBP election may be made. If there is more than one former spouse, the member must specify which one will be covered.”101

What and who is the Designated Agent?
The Defense Finance and Accounting Services (DFAS) is the “designated agent” that makes all retired pay payments to Members and Former Spouses and SBP payments to Former Spouses; and it approves all such division orders for Army, Air Force, Navy and Marine Corps personnel. DFAS main office is in Cincinnati, Ohio.102 The Coast Guard Pay and Personnel Center located in Topeka, Kansas, is the “designated agent” for the Coast Guard, the NOAA and the National Health Service.103

Get more information here.

IV. Railroad Retirement

The Railroad Retirement Act (RRA)104 replaces social security for rail industry employees and provides monthly annuities based on age and service or on disability.”105 “Benefits are administered by the U.S. Railroad Retirement Board (RRB), an independent agency in the executive branch of the Federal government.”106 “The RRB does not administer the private pension plans of rail industry employers.”107 RRA annuities are not subject to ERISA.108

Only Non-Tier I Benefits are divisible
“Annuities under the RRA may be comprised of several components, with the most common components being known as tier I and tier II.”109 Non-tier I benefits are marital property subject to division by a court order.110 These divisible benefits are: Tier II Component, Supplemental Annuity, Vested Dual Benefit and Overall Minimum Increase.111 RRA disability annuities are subject to division.112 The RRB will apply a Partition Order to the employee’s non-tier I benefits only; regardless of the wording of the partition Order or divorce decree.113

The RRB computes annual benefit estimates based on the employee’s service and earnings.114 Benefit estimates are gross annuity amounts before any reductions.115 RRB cannot fur-
nish present value of future benefits.116 “Upon request, the RRB will provide a report of the amount of the monthly annuity being paid to a retired railroad employee and a breakdown of the divisible and non-divisible components.”117

What is a Partition Order?

An order dividing non-tier I benefits is a “Partition Order” or an “Order Dividing Railroad Retirement benefits.”118 The three key provisions of a Partition Order are: (1) the order “must be final and issued in accordance with the laws of the jurisdiction of that court.”119 (2) The Partition Order “must provide for the division of the employee’s benefits under the RRA, as distinguished from payments under a private pension plan.”120 (3) The order “must provide for the division of the employee’s benefits as part of a final disposition of property between the parties, rather than as an award of spousal support.”117

A Partition Order “may state the division award as a percentage, a dollar amount per month, or as a fraction of the employee’s benefits subject to division.”122 Payments to a former spouse pursuant to the Partition Order “may begin with the employee’s annuity beginning date, a date specified in the decree or Partition Order, the month the Office of General Counsel receives the Order, or the first month in which both parties attain age 62, depending on the particular circumstances of the case.”123

What is a divorced spouse annuity?

"In addition to providing monthly annuities for employees of the rail industry, the RRA also provides annuities for spouses, divorced spouses and survivors who meet certain eligibility requirements [emphasis added].”125 However, such annuities are not subject to partition."125 Furthermore, a court cannot mandate entitlement to a divorced spouse annuity. The RRB will disregard any attempt by a state court to award the divorced spouse annuity or surviving divorced spouse annuity. Similarly, the RRB will disregard any attempt by a state court to bar entitlement to a divorced spouse annuity or surviving divorced spouse annuity.126

More information from the RRB.

The RRB’s publication entitled “Attorney’s Guide to the Partition of Railroad Retirement Benefits” is very useful to the practitioner and is available online for free at: https://www.rrb.gov/pdf/partition.pdf.

V. Social Security Benefits Cannot Be Assigned in Divorce

Social Security benefits are probably the most common type of retirement benefits received by Americans. Social Security benefits, however, cannot be divided or assigned in a divorce by court order or by agreement of the parties.128 But, if the marriage lasted 10 years or more, a divorced person may be entitled under certain circumstances to social security benefits based upon the ex-spouse’s SSA record,129 or entitled to surviving divorced spouse benefits.130

VI. Summary

The above information covers just the basics in this large and complex area of the law. If more information is needed, the author recommends the websites maintained by the agencies responsible for administering these programs. The quality of that information, and the helpfulness of the agency, however, varies greatly. The author’s opinion is that the Railroad Retirement Board has the most helpful online information and is a very responsive agency. Of course, the railroad industry is a very close-knit and relatively small community.

The other agencies deal with tens of millions of employees, spouses, ex-spouses, and beneficiaries. Keep an eye on their websites. The author has recently noticed marked improvements in the TSP website.

There are a number of secondary research sources available of varying quality and usefulness. As mentioned above, if you do military divorces, “The Military Divorce Handbook: A Practical Guide to Representing Military Personnel and Their Families” (2nd Ed.) by Mark E. Sullivan (ABA) 2011, is essential. In the author’s opinion, the best overall research source is the “Qualified Domestic Relations Handbook” (3d ed.) by Gary A. Shulman (Wolters Kluwer). This is a loose-leaf service and is updated at least annually. But it is pricey, and may not be within the budget of a practice that only occasionally divides retirement assets.

About the Author

Curtis G. Barnhill is a founding partner at Barnhill & Morse, P.A. in Lawrence, Kansas. Barnhill has practiced employee benefits law for over 29 years; for the last ten years he has focused much of his practice on QDROs and division of retirement benefits in divorces. Available for consultation and referrals on QDRO and division issues, he also takes referrals on other pension issues. Barnhill received a J.D. from the K.U. School of Law, an M.A. from K.U., and a B.A. from A.S.U.

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References:

2. See generally, 5 USC § 8331(1).
4. Id.
5. Id.
6. Id.

10. Id.
11. Id. at p. 7.
12. In lieu of “QDRO,” the Office of Personnel Management (OPM) coined and uses the term “court order acceptable for processing,” or a “COAP.” See 5 C.F.R § 838.103 (Definitions).

13. Handbook for Attorneys, supra note 9, at p. 5.
14. 5 C.F.R § 838.103 (Definitions).
15. Id.
16. Id.
17. 5 C.F.R § 838.211.
18. 5 C.F.R. §§ 838.305(b)(1).
19. 5 C.F.R. § 838.621.
20. 5 C.F.R. §§ 838.303 & 304.
21. 5 C.F.R. § 838.401 et seq.
22. 5 C.F.R. § 838.622.
23. 5 C.F.R. § 838.622(b)(1).
24. 5 C.F.R. § 838.622(b)(2).
25. 5 C.F.R. § 838.
26. 5 C.F.R. § 838.103, see definitions of “former spouse” and “former spouse survivor annuity.”
27. 5 C.F.R. § 838.806(b)(2).
28. 5 C.F.R. § 838.806(c).
29. 5 C.F.R. § 838.103, see definition of “court order.”
30. 5 C.F.R. § 838.806(b)(1).
31. 5 C.F.R. § 838.807(a).
32. 5 C.F.R. § 838.807(b).
33. 5 C.F.R. § 838.807(c).
34. 5 C.F.R. § 838.807(d).
35. 5 C.F.R. § 842.613.
36. 5 C.F.R. § 831.641.
37. 5 C.F.R. § 838.735.
38. 5 C.F.R. § 103; a careful reading of the definition of the term “former spouse” indicates that in order to be eligible for a FSSA, the marriage had to be “terminated” prior to the death of the employee or retiree. A marriage is terminated under a divorce or an annulment, but not under a legal separation.

40. Id.
41. Id.
43. Court Orders and Powers of Attorneys, at p. 3.
44. Id.
45. Id.
46. Id. at pp. 3 & 4; see also 5 C.F.R. § 1653.2.
47. Court Orders and Powers of Attorneys, supra note 43, at p. 4; also see 5 C.F.R. § 1653.2.
48. Id.
50. Id.
51. Id.
53. Id.
54. Id. at p. 3.
55. Id. at p. 2.
56. This article covers the retirement benefits for those who entered Uniformed Service prior to January 1, 2018. This article does not cover the new Uniformed Services Blended Retirement System (BRS), which became effective for new Service members who joined a Uniformed Service on or after January 1, 2018. For more information about BRS, see https://militarypay.defense.gov/Blended Retirement/.
57. See 10 U.S.C. § 1406 et seq.
60. 10 U.S.C. § 10732.
63. 10 U.S.C. § 1408(a)(2).
64. 10 U.S.C. § 1408(a)(1); see also K.S.A. § 23-2801(a) (“All property owned by married persons, including the present value of any vested or unvested military retirement pay . . . shall become marital property at the time of commencement by one spouse against the other of an action in which a final decree is entered for divorce, separate maintenance, or annulment.”); see also In re Marriage of Williams, Case No. 113,103, 417 P.3d 1033 (Kan. 2018) at Syl. ¶ 2 (“Kansas statutes grant Kansas district courts subject-matter jurisdiction to hear divorce actions and to divide property, including military retirement benefits. As such, Kansas district courts are courts of competent jurisdiction under the USFSPA.”)
67. 10 U.S.C. § 1408(c)(4). See also In re Marriage of Williams, Case No. 113,103, 417 P.3d 1033 (Kan. 2018) at Syl. ¶ 3 (“The USFSPA does not preempt the exercise of personal jurisdiction if a military member resides in Kansas (other than because of military assignment), has his or her domicile in Kansas, or consents to a Kansas court’s jurisdiction. But, by providing limited grounds for the exercise of personal jurisdiction, the USFSPA preempts Kansas’ long-arm statute.”)
68. 10 U.S.C. § 1408(c)(7)(A).
70. 10 U.S.C. § 1408(c)(7)(A).
73. 10 U.S.C. § 1408(d)(2).
74. Id.
75. 10 U.S.C. § 1408(d)(1).
77. Id.
79. Id.
80. See discussion on DFAS website at: https://www.dfas.mil/garnishment/usfspa/NDAA--17-Court-Order-Requirements.html.
81. High 3 information can be obtained on a Servicemember’s Leave and Earnings Statements (LES). See. Id. One may obtain the information needed to calculate the “High 3” by serving a subpoena on DFAS (or other appropriate designated agent) requesting the pay information for 36 month period needed. For more information, see, The Military Divorce Handbook, Mark E. Sullivan, Vol. 2 (2011) at pp. 476-77. If you are representing anyone involved in a military divorce, you should make Mr. Sullivan’s essential book a part of your professional library.
82. 10 U.S.C. § 1408(d)(1),
83. 10 U.S.C. § 1408(d)(8).
84. 10 U.S.C. § 1408(e)(1).
86. 10 U.S.C. § 1414.
88. For a fuller discussion of disability waivers of disposable retired pay, see The Military Divorce Handbook at pp. 509-19.
90. In re Marriage of Babin, No. 119,099, 437 P3d 985 (Kan. App. 2019) Syll. ¶ 2 ("If any portion of a veteran's military retirement pay is reclassified as disability benefits by the Veteran's Administration, under the preemption doctrine any such reclassified portion is the veteran's exclusively and is no longer subject to a state court order of distribution to such veteran's former spouse. This is true even if the parties have agreed differently and the court has adopted such agreement. The parties cannot rely on the sanctity of contract to escape federal preemption.")
91. Id. at Syll. ¶ 3. Such consideration by the court appears practical only at the time of the actual divorce. This advice offers small comfort to the Former Spouse whose ex-husband (like Mr. Howell) waives his military retired pay for service-related disability benefits 25 years after the divorce.
95. https://militarypay.defense.gov/Benefits/Survivor-Benefit-Program/
97. Id.
102. DFAS Garnishment Law Directorate
P.O. Box 998002
Cleveland OH 44199-8002
Phone: 888-DFAS411 (1-888-332-7411)
Fax: 877-622-5930 (toll free)
103. Commanding Officer, U.S. Coast Guard
Pay & Personnel Center
444 S. E. Quincy St.
Topeka, KS 66683-3591
(866) 772-8724
(785) 339-2200
105. https://www.rrb.gov/Resources/LegalInformation/PartitionofRRA/The_RRA.
106. Id.
107. Id. Generally, private pension and retirement plans sponsored by railroad industry employers for benefit of railroad industry employees are subject to the provisions of ERISA.
108. ERISA § 4(b); 29 U.S.C. § 1003(b).
110. Id. see also 20 CFR §§ 295.1(b) and 295.5(a).
113. 20 CFR § 295.4(b).
115. Id.
116. Id.
117. Id.
119. Id. see also 20 CFR § 295.2.
121. Attorney's Guide, Summary of Requirements for RRB Partition Order, supra note 11; see also 20 CFR § 295.3.
122. Attorney's Guide, Summary of Requirements for RRB Partition Order, supra note 118.
123. Id.
124. The Divorced Spouse Annuity eligibility requirements may be found at: https://www.rrb.gov/Benefits/G-177C.
126. See also, 20 CFR § 295.1(b).
128. 42 U.S.C. § 407(a); see also In the Matter of the Marriage of Knipp, 15 Kan. App. 2d 494, 809 P2d 562 (1991) at Syll. ¶ 1 ("In a divorce action, federal law precludes a Kansas court from dividing a lump sum social security disability award in a property division order."); but see also id. at Syll. ¶ 2 (In a divorce action, federal law does not preclude a Kansas court from considering the value of a lump sum social security disability award in dividing marital property.").
129. See https://www.ssa.gov/planners/retire/divspouse.html.
130. See https://www.ssa.gov/planners/survivors/ifyou.html.
The Most Important Seat at the Table is the Extra One — and the Kansas Women Attorneys Association Has Plenty

by Darby VanHoutan

Because I refused to believe my supervising attorney when she told me that the typical dress code at the Kansas Women Attorneys Association’s annual conference was uber-casual summer camp attire, I walked in wearing a white blouse, slacks, and heels.

To be fair, I was fresh off my first year at Washburn University School of Law, where I had been fed a healthy diet of professionalism lunch and learns and stuffy networking mixers. It had made me all but convinced that if I wanted to be in the legal profession, I was going to have to water myself down and keep my mouth shut when it came to challenging the status quo.

This cynicism is not unique to me, either. My friends and I spent many nights our 1L year, albeit usually over a round of margaritas, sharing our fears that the law might never challenge the archaic norms and systemic barriers that are so obviously still present.

Over the past year, we have listened to several speakers who, although they had experience and confidence, never seemed passionate about what they were talking about and rarely had time to stick around for questions.

We had sat through countless panels where lawyers and judges advised us to continue to do what has been done for decades, even if we disagreed or questioned it, simply because that is the way things are.

This was frustrating because these events were almost always purely attended by students like my peers and me who, in essence, are the next generation of attorneys. And although changes do not happen overnight, and sometimes not even in
a generation, they do not stand a chance of ever happening if the advice being passed down is to never challenge anything.

It was almost as if there was a table where all the lawyers and judges we had seen speak on campus or met at an event had a reserved seat where their voices could be heard, and the only way for us to get one was to fall in line and keep our ideas to ourselves.

Maybe all of this was why I could not fathom that the things my supervising attorney told me about the KWAA's annual Lindsborg conference could be true. But when I sat down at the first event of the conference, a panel made up of five women, I was surrounded by women with braids in their hair and fanny packs on their waists.

The women on that first panel talked about what they believed it took to be a leader and, more specifically, how they found themselves in leadership roles. One woman, Linda Parks, attended board meetings at a firm she had previously worked, un-invited and typically the only woman at the table, before being picked for a leadership position. Another woman, Laura McConwell, entered her position after being elected and, later in the conference, spoke about what it takes to run for office.

I talked to every person I could at the conference, little by little, asking them more serious questions. I was still fairly skeptical of the possibility that legal professionals would be willing to talk openly about their own doubts, especially with a student.

At first, I asked things like how they got to the job they had currently. But then, I asked whether there were things they disliked about their jobs or they wished were done differently. Not only did they answer my questions, they also asked questions back to me about what my experience had been with a specific subject. They made me feel comfortable to share my frustrations and shared theirs openly in return.

At the CLEs and other sessions, the women talked openly about topics they felt insecure about and asked each other questions across classrooms. It was the exact opposite of what I had experienced so far in law school. Not only were these women being honest about what the legal profession still had to learn, they felt comfortable enough to question and challenge one another openly.

I heard the origin story of the KWAA's annual conference, told by the founding women. Thirty years ago, over a round of drinks at a hotel bar, a few women decided that they needed a place that they could return to regularly to share ideas and get reenergized about the law.

It made me think of the routine round of margaritas my peers and I had after long weeks the past few semesters where, although much smaller decisions were being made, we were looking for the same thing — a safe place where we could be heard.

Although I am not naive enough to believe that my second year of law school will be cynicism-free, it is reassuring to know that, if I need it, the KWAA will make room for students like me at their table.

About the Author

Darby VanHoutan is a rising 2L at Washburn University School of Law and is interested in criminal defense and first amendment law. She received her Bachelor of Science in Journalism and Political Science from the University of Kansas in 2018. She is currently finishing a summer externship working as a law clerk for attorney Etta L. Walker in Sharon Springs, KS, funded by the Dane G. Hansen Foundation.

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Mindfulness and Meditation Can Benefit a Lawyer’s Well-being

by Lou Clothier

In the past, I was contemptuous of those who advocated the practice of meditation. Adherents of meditation were implicitly admitting they needed help with their mental health. I wasn’t about to show any weakness. I was a tough guy, an athlete, a “manly man.” In reality I was very ashamed of my fears, anxieties and depression that were my constant companions. I didn’t want others to know. I put on a mask of toughness and proceeded through life not addressing my mental and emotional well-being.

I have been humbled as a result of my very public failures. I’ve fallen far short of being the person and the lawyer I always wanted to be. I’m not as tough as I thought. Anne McDonald, former KALAP Executive Director, gave me a small book that introduced me to the concept of mindfulness several years ago. Mindfulness is the practice of being present in the moment. It is also the core of meditation practices, something one must master to become truly skilled at meditation. Being in the moment means being mindfully aware of what is going on right here and now, in our experience. I want the peace and clarity mindful meditation can provide.

Meditation is certainly not new. Evidence exists that people have practiced meditation for at least the last 5,000 years or more. In the Indus Valley, archaeologists discovered evidence of people practicing meditation in wall art dating from approximately 5,000 to 3,500 BC.

Presently, many benefits of meditation are recognized, including:

• it can reduce anxiety;
• it can lower stress;
• it can reduce the effects of depression;
• it may promote more restful sleep;
• it can decrease loneliness; and,
• it can improve focus.
There are several methods of meditation, including:

- Guided meditation (meditating under the guidance of an experienced practitioner)
- Mindfulness meditation (about being in the moment—being mindful)
- Relaxation meditation (primary purpose is to simply relax)
- Transcendental meditation which uses mantras (a word, phrase or sound repeated to aid concentration in meditation)

In addition to my personal meditation practice, I attend a meditation group led by Topeka, Kan., attorney, Whitney Casement, senior associate with Goodell Stratton Edmonds & Palmer LLP. Whitney's law practice involves employment defense litigation and administrative law. Whitney informed me she began meditating about four or five years ago, at a time her litigation practice was causing her to have anxiety attacks. According to Whitney: “I started meditating due to anxiety. I continue to meditate because it makes me the best attorney I can be.”

Whitney is passionate about meditation and wellness. I asked her why she is willing to discuss publicly her anxiety attacks that led to her practicing meditation. She told me: “My mission is to help defeat the stigma of mental health issues and to help defeat the myth that attorneys are not allowed to take care of their well-being.” Whitney's courage is not typical. Historically, most lawyers do not admit they need help.

The 2016 National Taskforce on Lawyer Wellbeing Report emphasized that the legal profession must take steps to minimize the stigma of mental health and substance use disorders because the stigma prevents lawyers from seeking help. The Report identified the critical need to enhance the well-being of all lawyers by making dramatic changes to the often-toxic culture of the legal profession.

The Report defined well-being as a continuous process in which lawyers strive for thriving in each dimension of their lives, focusing on the following dimensions:

- Occupational
- Intellectual
- Spiritual
- Physical
- Social
- Emotional

The Hon. Chris McAliley, United States Magistrate Judge, Southern District of Florida, believes our ability to rest in the present moment enhances our sense of ease and satisfaction and sharpens our skills. Meditation can help attorneys thrive in their quest for well-being. The Hon. Stephen D. Hill, Judge of the Kansas Court of Appeals is another avid meditator and proponent of meditation. Judge Hill chairs the Judicial Stakeholders’ Committee for the Kansas Task Force on Lawyer Well-being.

If you want to start a meditation practice to enhance your well-being, it is as simple as finding a relatively quiet place to concentrate and be “still” with your thoughts. To help enhance the meditation experience, there are many meditation phone apps such as “Insight Timer” and “Calm,” two of Whitney's favorites. There are also hundreds of YouTube videos you can access online. You may want to also seek out a meditation group to increase exposure to more experienced practitioners of this art.

Try practicing meditation. It will enhance your well-being, and it may help you be the best lawyer you can be.

### About the Author

**Louis M. Clothier** is the Executive Director of the Kansas Lawyers Assistance Program (KALAP). He also serves as an Executive Committee Member and LAP Chair for the Kansas Taskforce on Lawyer Wellbeing and is on the advisory panel for the Addiction and Recovery Conference sponsored by the Kansas Federal District Courts, scheduled in October 2019. He graduated from the Washburn University School of Law and practiced law in Leavenworth for 37 years prior to his appointment as Executive Director of KALAP. He is a former President of the Leavenworth Bar Association, Secretary of the Family Law Section of the Kansas Bar Association, and President of the Kansas School Attorneys Association. He is a member of the American, Kansas and Leavenworth County Bar Associations.

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7. Id. at p. 7.
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Promoting the Public Good at Washburn Law

by Michelle Ewert

It is both an exciting time and a daunting time to be a law professor. Every day, the headlines challenge our students to think critically about what justice means, what makes good public policy and what ethical leadership looks like. The faculty and staff at Washburn Law equip students to tackle these challenges. In particular, my colleagues do a phenomenal job modeling to students how lawyers can fulfill their professional responsibilities and create a better community. They challenge me to think broadly about what it means to use one's talents “for the public good.”

Don’t get me wrong—providing free or low-cost direct services to low-income members of our community is essential for securing access to justice. And we do that well at Washburn. In the Washburn Law Clinic, Rule 719 legal interns represent survivors of domestic violence, small business owners with limited resources, people experiencing homelessness and myriad other vulnerable people. Under faculty supervision, law students give voice to people who might otherwise fall through the cracks in the legal system. In the Volunteer Income Tax Assistance program, Professor Lori McMillan coordinates student volunteers who prepare income tax returns for low-income individuals. This program brings money back into our community through tax refunds. These direct services do a great deal to promote the public good in Topeka and throughout Kansas.

The faculty and staff at Washburn Law do so much more to promote the public good, though. They connect community members to local resources. Debi Schrock and Kerri Pelton of the Law Clinic and Martin Wisneski and the other staff of the Law Library field phone calls and emails from community members unsure of where to go for help. These staff members educate the public about available resources to help resolve their problems. This, too, is for the public good.

Through their research and writing, the faculty help shape discourse around public policy, legal education and ethics. Their articles hold a mirror up to society, showing what is, but also helping us imagine what could be. Their scholarship promotes the public good by creating the groundwork for advocacy and reform.
Additionally, the faculty and staff at Washburn Law help practicing lawyers continue to grow and learn. Associate Dean for Centers and External Programs Shawn Leisinger and his team coordinate an annual CLE program at which various faculty and staff present. And others, such as Professor David Pierce, author treatises and handbooks or, like Professor Gillian Chadwick, present frequent trainings around the country. Helping lawyers do their jobs better promotes the public good.

The faculty at Washburn Law provide critical mentoring to students and new lawyers, connecting them with more experienced practitioners in their field. As the Director of the Children and Family Law Center, Professor Linda Elrod hosts receptions for visiting scholars and other guest presenters at her home. She always invites current students and recent grads so they have the opportunity to visit with these guests in a more personal setting. And Professor James Concannon facilitates law student participation in the Sam A. Crow American Inn of Court. These opportunities for networking and mentoring help students and new attorneys transition successfully to competent practice. This, too, advances the public good.

Further, Washburn Law prepares students for ethical leadership in the community. Professor Thomas Sneed designed a course entitled Leadership for Lawyers, which introduces students to issues that might arise when they’re in leadership positions in private practice, government and community organizations. The faculty and staff at Washburn Law expect our students to become leaders, so we help them develop the necessary qualities to lead responsibly. The public good benefits from leaders with integrity.

I could say more about my colleagues and the excellent work they do to model pro bono values for our students, but time and space limit me. I’ll close, though, just by saying thank you. The way we train the next generation of lawyers will have lasting consequences for our community. I’m heartened that so many people are working hard in Kansas—and at Washburn Law in particular—to equip these future lawyers to work for the public good.

Michelle Ewert is an Associate Professor at the Washburn University School of Law. Previously, she worked as a legal services attorney at nonprofit organizations in Baltimore, the Central Valley of California, and the greater Chicago area.

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The 2019 Kansas Annual Survey of Law

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The District of Kansas, the Federal Bar Association Chapter for the Districts of Kansas and Western Missouri, and the Kansas Bar Association YLS are presenting a public Constitution day reading of the United States Constitution on the courthouse steps of each courthouse in our district. The public, especially schools, will be invited to attend. The only words spoken will be the Constitution. A senior judge at each courthouse will begin the reading, passing it off to members of the public until the reading is complete. To sign up, use the link for each courthouse:

**Wichita United States Courthouse**
Reading scheduled to take place on the East steps
[https://www.signupgenius.com/go/10c0a48afad22aaf49-wichita](https://www.signupgenius.com/go/10c0a48afad22aaf49-wichita)

**Frank Carlson Federal Building**
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[https://www.signupgenius.com/go/10c0a48afad22aaf49-topeka](https://www.signupgenius.com/go/10c0a48afad22aaf49-topeka)

**Robert J. Dole United States Courthouse**
Reading scheduled to take place on the South steps
[https://www.signupgenius.com/go/10c0a48afad22aaf49-constitution](https://www.signupgenius.com/go/10c0a48afad22aaf49-constitution)
Lawyering for the Good: Pro Bono at KU

by Meredith A. Schnug

Perhaps you, like me, were one of the millions of viewers who became engrossed in the Netflix series “When They See Us,” a dramatized retelling of the wrongful convictions of five black and Latino teenagers, later known as the Central Park Five. Or, maybe you were drawn to the HBO documentary “True Justice: Bryan Stevenson’s Fight for Equality,” highlighting the well-known advocate’s tireless work on behalf of the poor and wrongfully convicted. Watching these shows, I was compelled to reflect on our profession’s call for justice and how too often we fail to achieve it. Although these stories focus on the particular cruelty of racial injustice in our criminal justice system, we know that inequities and justice gaps persist across our legal system.1 There’s so much work to do...and sometimes, the goal feels out of reach.

I am hopeful, though, that powerful narratives like these lead us to feel a renewed call to “seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession.”2 At KU, we strive for our students to develop this justice consciousness. Every school year, Green Hall welcomes a new class of law students who, like their counterparts across the country, are already eager to use the law to help people.3 Sometimes that desire gets pushed aside by the demands of studying, working, and otherwise being involved in law school activities, which is why it is so important for law schools to provide accessible opportunities for students to serve the public good. We want our students to experience the benefits of pro bono service and then continue that commitment in practice.

KU’s Pro Bono Program seeks to fulfill two important objectives for students: 1) to foster an appreciation for the value of pro bono service as part of professional identity, and 2) to enhance their legal education through practical experience. Simply put, the program promotes “lawyering for the good” and “good lawyering.”

Lawyering for the Good

The translation of the Latin term pro bono publico is “for the public good.”5 Integral to the legal profession is our ethical obligation to serve the public good, and especially, to provide legal services to those who can least afford them.6 The ABA Standing Committee on Pro Bono and Public Service advises prospective law students to “be mindful of this responsibility when considering law as a career.”7 Likewise, law schools must teach the value of public service and foster students’ commitment to pro bono. Through KU’s Pro Bono Program, students provide supervised, uncompensated legal services to nonprofit organizations, government agencies or individuals who cannot afford representation. The program complements clinical legal education by encouraging students to engage in practical lawyering experiences—even in their first year of law school—and without having to enroll in a semester-long course.

KU students have exemplified a commitment to lawyering for the good. During the 2017-2018 school year, students performed 4,154 hours of free legal services for nonprofit organizations, government agencies and low-income individuals. Students served as court-appointed special advocates (CASAs) for children in foster care; they assisted survivors of domestic violence in obtaining protection orders; they performed legal work for the Kansas Department of Revenue, Missouri Commission on Human Rights, and for legal aid, district attorney and public defender offices.

Many students performed pro bono service through programs coordinated by the law school. These programs are de-
signed to address significant legal needs in the community but have the added benefit of being convenient for busy students. Each spring, dozens of law students spend their evenings and Saturdays in a quiet Green Hall helping Douglas County residents prepare their tax returns. This past year, law students with the Volunteer Income Tax Assistance (VITA) program prepared close to 200 tax returns for low- to moderate-income workers, helping many of them claim valuable credits like the Earned Income Credit, while avoiding exploitative fees charged by many commercial preparers. For so many families living in or near poverty, a tax refund can ease financial crisis—it means a car can be fixed, a debt paid off or deferred medical treatment finally obtained.8

KU students also participated in the Guardianship Assistance Program, in which Hinkle Law Firm and several agency partners coordinate pro bono legal representation for Wichita-area families seeking guardianship of their adult children with disabilities. Students interviewed the petitioning family members and drafted the guardianship documents, which were then reviewed and filed by attorneys working pro bono. As a result, these families are now legally able to continue advocating and caring for their children to the extent necessary.

In February, through a collaborative project with the Douglas County District Attorney’s Office, Kansas Legal Services, Lawrence City Prosecutor’s Office and the Kansas Bar Foundation, KU law students met with more than 30 individuals who sought legal assistance at our annual Clean Slate Expungement Clinic. Students working in the KU Legal Aid Clinic then represented clients who were eligible for expungement and provided counsel and advice to those who may be eligible in the future. The collective work of all the agencies involved demonstrates the growing conviction that giving people a second chance serves the public good.

Good Lawyering

Although the purpose of pro bono is to benefit the public, engaging in pro bono service benefits the individual, too. For students, pro bono service provides an invaluable opportunity to develop practical lawyering skills. It is often the first time that students are able to apply knowledge and skills learned in the classroom to real-life problems, with unexpected challenges and imperfect solutions. Students develop skills such as interviewing, counseling and advocating. They must grapple with actual ethical dilemmas and develop the capacity to communicate with diverse audiences.9 Through feedback and reflection, students learn the skills and qualities of good lawyering.10

Perhaps the most important aspect of good lawyering is professionalism, which encompasses a lawyer’s commitment to justice. Here is where narrative again can have a powerful effect. We can talk all we want about the unmet legal needs in our communities and encourage lawyers to perform pro bono service. But, when a law student sits down with a client and hears firsthand how, for example, the client was denied a job due to a decades-old conviction, that “unmet legal need” now has a face and a name and a story. And when the student then helps expunge the client’s conviction, the value of pro bono service becomes clear. By being exposed to clients’ problems and tasked with solving them, students are compelled to consider fundamental questions about justice and their role in promoting it.

Good lawyering demands that we listen to the narratives of injustice and seek to make things better. We need radical, systemic change in order to address all of the problems. But change can start small, too—maybe even spurred by some good summer television. Every contribution matters in the struggle to make our system more just. ■

About the Author

Meredith A. Schnug is a clinical associate professor and the Associate Director of the KU Legal Aid Clinic. She also coordinates the law school’s Pro Bono Program.


8. Diana Farrell et al., JPMORGAN CHASE INST., Deferred Care: How Tax Refunds Enable Healthcare Spending 3 (January 2018), available at https://www.jpmorganchase.com/corporate/institute/document/institute-tax-refunds-healthcare-report.pdf. This study concluded that tax refunds impact when consumers access health care. Consumers increased their healthcare spending by 60 percent in the week after receiving a tax refund, and in-person payments comprised 62 percent of this increased spending, suggesting that people were accessing health care services rather than just paying off debts.

9. See, e.g., Granfield & Veliz, supra note 4, at 55.

Law professionals in Kansas can participate in the pro bono community through clinics, posted projects, or by volunteering to take on specific cases displayed on the site. Opportunities are regularly updated by Pro Bono Coordinators in the 11 statewide KLS field offices.

Please check back often for new and exciting ways to put your skills, experience and training to good use by helping your fellow Kansans.

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I just finished my first year of law school, and it was everything that I didn’t think it would be.

When my mom would read stories to me before bed, I remember there was a book all about people who work (e.g., construction workers and doctors). However, like most kids, for no rational reason, I only wanted my mom to read one page: the one with the people in suits carrying briefcases and talking to a jury. Ever since I was a little kid, I have wanted to be a lawyer.

When I was a senior in high school, and I was looking for schools to pursue my undergraduate degree, I chose KU for one reason: the Legal Education Accelerated Degree (LEAD) program. LEAD students get to “double dip” undergrad elective credits with first-year law credits to earn a bachelor’s degree and a Juris Doctor in 6 years. Though earning a bachelor’s degree in three years was definitely challenging, it was nothing compared to the intimidation of being a 20-year old in a law classroom where the professor calls on you regardless of whether you want to answer.

Sometimes it can be difficult to talk to other classmates when they are able to draw from such a wealth of life experiences. During my first few weeks of classes, I thought that people wouldn’t take me seriously because I was so young. However, I had quite the opposite experience: when my classmates heard how young I was and about the LEAD program, most were impressed that LEAD students had planned to attend law school before they had even graduated from high school. Though I am younger than most of my peers, Green Hall can be a very supportive environment where people of many different experiences contribute to the school’s character. At KU Law, I learned that my age was less important than my long-term goal of becoming the best attorney to my ability.

This challenge persisted when I began working at a law firm this summer. As a young person in a law firm, it was surprising how slow the law moves. At times, I have worked on cases where the facts in controversy took place while I was in high school. Yet, exposure to colleagues with such an extensive ca-
My three points of advice for students thinking about doing the LEAD program or to anyone starting law school are:

1. **Take it seriously and do the work.** Law professors expect way more out of you than your undergrad professors. Law school can be challenging because everyone did well in their undergraduate studies, so making mistakes or receiving bad grades can be uncharted territory. There were multiple times this year when I rushed through a reading, misunderstood a case or did poorly on a test. In fact, I made more mistakes this year than any year of my life...and it doesn’t stop. One of the most challenging things for me was to slow down and do a thorough job on every task. Though you will likely make mistakes, become acquainted with uncertainty, because legal complexities are what keep us in business.

2. **Learn from non-attorneys too.** The law is a slow moving yet powerful machine. Though attorneys make the arguments and write the briefs, the legal engine would halt if attorneys really ran the show. A legal education in a classroom pales in comparison to a paralegal’s observations in the trenches of the legal process. Don’t underestimate the knowledge and guidance available from court staff, paralegals and legal assistants. Without these crucial repositories of legal insight, the law would be a chaotic wreckage.

3. **Keep a YAC mindset.** YAC stands for “You Are Capable” and is adapted from a speech by Chief Judge Julie Robinson at the 2019 KU Law Diversity Banquet. Law students young and old can feel as though they are incapable of succeeding in law school. As Chief Judge Robinson noted, these doubts have no bearing on your capabilities as a student or in practice. The secret is that almost everyone doubts themselves at one point or another. When I start to doubt myself, I try to say “You Are Capable” to myself a few times, because I am capable of making it, and so are you.

I learned that the legal field demands a high level of maturity and poise. I am beyond grateful for older students who lent me their experiences and became my friends and mentors. This year was incredibly challenging, but I wouldn’t do it any other way. It’s safe to say that after my first year in the law, I know more than ever that the law is where I belong.

**About the Author**

Zachary A. Kelsay is a second-year law student at the University of Kansas School of Law. He grew up in Independence, Missouri and received a bachelor’s in History and Global & International Studies at the University of Kansas. Kelsay also served as a prosecutor and expert witness for several years on the nationally ranked undergraduate mock trial team before beginning law school. Following graduation, he plans to practice in civil litigation. Portions of this article are drawn from Zachary’s previously published KU Law Blog (http://blog.law.ku.edu/).
Hayden High School’s Mock Trial Team: The National Competition

by Travis Lamb, Director of Communication Studies, Leadership, and Legal Studies with comments from student attorneys and witnesses

It was Topeka’s Hayden High School’s inaugural year participating in Mock Trial, and although I am legally trained, our success was facilitated by two outstanding Washburn University students who are captains of their undergraduate mock trial team, Michaela Webb and Caleb Soliday. WU’s undergraduate mock trial team is coached by Danielle Hall. (Danielle is a former KBA staffer and is now a Deputy in the Office of the Disciplinary Administrator for the State of Kansas.) We finished 2nd in our region and 2nd at the state competition; however, the first place team and perennial powerhouse—The Independent School coached by John Steere in Wichita—was unable to attend the National Mock Trial Competition in Athens, Georgia, May 16-18. So we were off and running!

Nationals consisted of meetings and four rounds of competition—plus a finals round—as well as the Awards Gala held on Saturday evening. Typically, students serve as lawyers, witnesses, and timekeepers during the rounds. Each round consists of three attorneys and three witnesses. Hayden’s delegation included: Attorneys: Thomas Doyle, Alejandro Calderon, and Adriana Baker; Witnesses: Josephine Cummings, Karina Short, and Sean McConnell. Unfortunately, Hayden faced some adversity early on, as one of our attorneys was too ill to make the trip to Georgia. We carried on, and halfway through the tournament, another of our attorneys became too sick to perform on Saturday. However, the team rallied, and Thomas Doyle stepped up to perform all three attorney roles in the remaining two rounds. Despite such an obvious setback, the National Mock Trial Board was so impressed with the team’s tenacity and training—especially Thomas’s moxy—that they awarded him “The Ironman” Award.
Josephine Cummings (witness)

I served as a witness at the National High School Mock Trial Championship. It was an eye-opening experience! On the academic side of the experience, it showed me there is so much more to being a lawyer than just standing in front of a jury and talking. There’s quite a bit of preparation a lawyer has to do for a case that can take hours. While watching the lawyers, it became very clear that all of them had to be prepared for the unexpected. Inevitably, at each trial, something wouldn’t go as planned, and they had to adapt on the spot. To some extent, this was true for witnesses as well. As a witness, one important lesson I learned was to remain calm and collected, and keep a poker face as much as possible. Whether participating as a witness or lawyer, one motto to keep in mind is to “be prepared to have the rug pulled out from under you.”

In general, the experience of National High School Mock Trial was fun. I met people from all over the country with many different backgrounds. It was fascinating to hear people converse from different parts of the country. One of my favorite activities was the “meet and greet,” where all participants were able to hang out together. Everyone there was friendly and very cool. I was able to exchange some Kansas swag provided by Washburn University with other “mock trial-ers.” I met so many friendly people and heard about their exhilarating mock trial experiences. The culture I experienced at Nationals was both overwhelming and exciting, and I wouldn’t think twice about going back! Personally, Mock trial sparked a flame for me to travel and meet new people and try new things to continue gaining knowledge, and I recommend it to everyone.

Sean McConnell (witness)

National High School Mock Trial was a great experience, not only for me, but our entire mock trial team. We were a first-year program, so this was our first time to go through the entire process from regional to state and national competition. Unfortunately, due to the timing of nationals, our graduating seniors were unable to attend. Also, we had a couple of attorneys get sick, leaving us with only one attorney on the last day of competition. This sounds like a recipe for disaster, but it actually helped us bond and improve as a team.

Despite competing at nationals with these challenges and facing very tough competition, we were able to piece together the various experiences and knowledge each of us brought to the team. I served as a witness and worked closely with our attorneys to develop my direct examination and prepare for what I might face on cross-examination. As the rounds progressed, our team could see and feel our skills steadily increasing. Also, it helped that our coaches were encouraging and supported us every step of the way. At the Award Gala, we were able to celebrate the Ironman Award our “last attorney standing” received! Overall, our experience at the National High School Mock Trial competition was very positive and makes me optimistic about the future of our team.

Mock trial is a really important competition for anyone, because it helps to develop critical thinking and speaking skills. Even if someone doesn’t plan on working in law as a judge or a lawyer, the presentation skills developed will be essential for success in life.

Alejandro Calderon (attorney)

Ever since I can remember, I have always been interested in law. As a sophomore, I learned about the possibility of forming a mock trial program at Hayden. I was excited to be a part of a team that both learns how to try cases and also competes with them. This year, as a junior, I was so happy to be a part of our program’s first year success, competing at regionals, state, and nationals!

Throughout this process, I learned so much about pushing through adversity to ensure that things actually get done. Specifically, despite not having all three attorneys available for nationals, the night before the first round, we met in the lobby of our hotel late in the evening to do everything we could to be at our best. At nationals, we faced the best teams from across the country. It was a fantastic experience, competing against so many talented people and trying to adapt to their in-round strategies and tactics.

The most valuable thing I learned from my mock trial experience is that a person really can’t have it all. Sometimes things won’t go exactly as planned and a true team must rally together because “the show must go on;” and I’m proud to say that’s exactly what we did. I cannot wait to use in my senior
year all I gained from this invaluable experience, and hopefully, we will make it to Nationals again in 2020!

My personal experience was very humbling. I really wasn’t expecting to make it to nationals in our first year, let alone shoulder so much responsibility as the “last attorney standing” due to illness that struck our other two attorneys. Earning the Ironman Award obviously made me feel good, but we would not have been as prepared without everyone’s effort and the awesome coaching we received, especially from co-captains of Washburn University’s Undergraduate Mock Trial Team, Michaela Webb and Caleb Soliday. They were there with Mr. Lamb and us every step of the way.

The most important skill I gained from mock trial is the ability to work hard. Juggling rigorous academic classes with a demanding activity like mock trial during my junior year was challenging to say the least, but I know that the work ethic I’ve developed will help me be more successful moving forward. In fact, I’m already looking forward to next year to prepare a case for regionals, and hopefully state and nationals as well! Without this competition, I would not be the person I am now. I am very grateful to my peers, coaches and benefactors who shared their time, talent and treasure with us. I may be biased, but I think the team from Hayden Catholic has a load of potential, and I look forward to what we will accomplish in the years to come!

Thomas Doyle (attorney)

Representing the State of Kansas at the National High School Mock Trial Championship was an experience unlike anything else of which I have been a part. I served as an attorney for our team. The attorneys worked as hard as we could prepping and directing our witnesses—who performed extraordinarily well under the adversity we faced. Our team definitely bonded together, and although we didn’t finish in the top 10, I have no regrets about the effort everyone gave in Athens.

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Members in the News

New Positions

Joe Bain, former member of the Kansas Board of Regents, trial lawyer and litigator with wide experience in civil law, criminal law, estate matters, dispute resolutions and more, has been hired as general counsel for Fort Hays State University. Bain is a native of Ness City, Kan., who earned a B.A. from FHSU and his Juris Doctor from the University of Kansas School of Law. Licensed in Kansas, Missouri and Colorado, Bain most recently was a member, vice president, attorney and co-manager for Cure & Bain, P.C., in Goodland. He also served as Ness City Municipal Court Judge.

Kiann Caprice of Basehor was hired as one of two city attorneys for the City of McLouth. Initially hired for 90 days, her appointment was then extended into next May. She will represent the city in Municipal Court.

Michael P. Gaughan and Rodger M. Turbak have joined the firm of Lewis Rice LLC in Kansas City, Mo. Both have extensive backgrounds in the areas of bankruptcy, creditors’ rights and banking litigation. Both men practiced with SouthLaw, P.C. before joining Lewis Rice. Gaughan is a member of the litigation team, focusing principally on protecting the rights of creditors nationwide with an emphasis on the representation of secured creditors. Turbak is an associate with the litigation team, representing the interests of local, regional and national creditors as they relate to consumer and commercial matters. He has extensive experience in representing creditors as both plaintiff and defendant throughout the complex litigation and bankruptcy process.

Lee Hendricks of the Topeka law firm of Stumbo Hanson, LLP was hired as one of two attorneys for the City of McLouth. Already the city attorney for Oskaloosa, Winchester, Meriden, Ozawkie, Perry, Edgerton, Hoyt, Belvue, Easton and Willard, Hendricks will attend regularly scheduled meetings of the McLouth City Council.

Molly Westering Hunter and John Gates announce the opening of Gates Westering, LLC, in Kansas City, Missouri, where they will continue their general practice with an emphasis in civil litigation, including business disputes, personal injury, insurance coverage, construction defects, employment claims, and outside general counsel services. Gates and Westering were previously shareholders at Baty, Holm, Numrich & Otto, PC.

Isaac LeBlanc joined the Atwood, Kan. firm of Brown, Creighton and Peckham. The recent graduate of Washburn Law School is a native of Mt. Pleasant, Iowa, but spent his childhood in Riyadh, Saudi Arabia and Qatar where his parents worked as teachers. LeBlanc earned his B.A in political science at Drury University in Springfield, Mo., and a master’s degree from Missouri State University. He has also spent 10 years in the Army Reserves.

NOTE: Members in the News items are largely gleaned from newspaper articles from across the state, provided by our clipping service. If there are questions or concerns regarding information printed here, please feel free to inquire through the following email: editor@ksbar.org
Kathryn R. “Kate” Johnson has joined McAnany, Van Cleave & Philips after practicing insurance defense in the areas of workers’ compensation and tort litigation in Iowa. She earlier clerked for the Iowa Workers’ Compensation Commissioner and was awarded a scholarship from the Iowa Workers’ compensation Advisory Committee. Johnson also serves on the Iowa Association of Workers’ Compensation Attorneys’ seminar committee.

Lara Q. Plaisance has returned to the ranks of McAnany, Van Cleave & Philips as an attorney in the firm’s new West Des Moines office. Licensed to practice in Missouri, Kansas and Iowa, she returned to Iowa six years ago, working exclusively in workers’ compensation defense. She previously worked in MVP’s Kansas City office and also spent four years as staff counsel for Travelers Insurance. A popular presenter at lunch and learn and firm seminars, she was honored as a 2019 Des Moines Business Record Forty Under 40.

Scott J. Schneider has joined Hinkle Law Firm LLC and will helm its new Topeka office. Schneider brings more than 20 years of experience in governmental relations, lobbying and professional association representation and administration. Previously, Schneider’s practice focused on governmental relations. He served as Director of Governmental Affairs for Cox Communications and Governmental Relations Director for the City of Wichita. A graduate of Friends University and the Washburn Law School, Scott and his wife Bridget have four daughters.

Meghan Voracek of Seneca was appointed in July as the Marshall Co. attorney by Kansas Gov. Laura Kelly. She was sworn in on July 5th by Magistrate Judge Angela Hecke. She was nominated by the Marshall County Republican central committee following the resignation of the previous county attorney.

New Locations and Names

Hinkle Law Firm LLC of Wichita has established a new office in Topeka, under the leadership of Wichita native Scott J. Schneider. The Topeka office is located at 800 SW Jackson, Suite 1520, across the street from the State Capitol Building.

Molly Westering Hunter and John Gates announced the opening of Gates Westering, LLC, in Kansas City, Missouri, where they will continue their general practice with an emphasis in civil litigation. Their offices are located at 701 E. 63rd St., Suite 350 • Kansas City, MO 64110 • www.gateswestering.com

Mitch Wulfekoetter (of the Topeka firm McCullough Wareheim & LaBunker PA) and Geri Hartley (of the Paola firm Nicholson, Dasenbrock and Hartley) are sharing a new satellite office in Meriden, with space in the shopping plaza on K-4, south of Meriden.

Notables

Wichita County Judge Janna Delissa resigned from her position on July 31, and Finney County Judge Michael Quint is set to retire at the end of the year. These retirements have led the 25th Judicial District Nominating Commission to seek nominations. The 25th Judicial District includes Finney, Greeley, Hamilton, Kearny, Scott and Wichita counties. The nominating commission will convene to interview candidates on Oct. 2 in the Finney County Courthouse.

Kansas Supreme Court Justice Lee Johnson who had served on the Court since 2007, will retire on September 8th. Before his appointment to the Supreme Court, Johnson was on the Kansas Court of Appeals from 2001-2007. A graduate of the Washburn University School of Law (where he ranked 2nd in a class of 211), Johnson practiced law in Caldwell and served as city attorney for Caldwell, Argonia and Hunnewell before becoming a judge.

Charles Peckham of the Brown, Creighton & Peckham law firm has been reappointed by the Kansas Supreme Court to serve on the Kansas Continuing Legal Education Commission. Newly appointed members are attorneys Aida Alaka, a law professor at Washburn University School of Law, Topeka; Susan Norton, director of adult learning at Wichita State University, Wichita; and Meredith Schnug, clinical associate law professor at the University of Kansas School of Law, Lawrence. Their terms will run through June 30, 2022. Also reappointed to the commission was Jennifer Cocking, vice president and general counsel for Capitol Federal Savings Bank in Topeka. Other current members of the commission are Joslyn Kusiak, Independence; David Moses, Wichita; Megan Walawender, Kansas City, MO; and Chief Judge Wendel Wurst, Garden City.

Stinson LLP has been awarded the Gold Standard Certification by the Women in Law Empowerment Forum, a distinction the firm has earned every year since the award began in 2011. Gold Standard status is granted to major firms that meet objective criteria concerning the number of women among equity partners, in firm leadership positions and in the ranks of thir most highly compensated partners.

Stinson LLP has also been named to Working Mother’s Best Law Firms for Women list for 2019. Firms are ranked based on female representation, access to parental support programs and support for women’s advancement. Stinson’s strategic diversity and inclusion initiatives, led by Ann Jenrette-Thomas, include efforts to provide a diverse and welcoming environment for all, with flexible work policies, employee resource groups and programs centered on career success and advancement.
Judge Terry L. Bullock (9/29/1939 - 8/2/2019)

Judge Terry L. Bullock, of Topeka, Kansas, and Palm Springs, California, passed away Friday, August 2, 2019, at Homestead in Topeka. He was born September 29, 1939, in Herington, Kansas, the son of Orville I. and Hazel J. Bullock. He is survived by his daughter, Susan Bullock of Topeka and his son, John T. Bullock, and grandchildren, Cooper Borge Bullock and Kiefer Caldwell Bullock, all of Lawrence.

Judge Bullock spent his childhood in Wilsey, Morris County, Kansas, where he graduated valedictorian of Wilsey High School in 1957. In 1961, he graduated, cum laude, from Kansas State University where he sang with the K-State Singers, touring the Far East under the direction of William R. Fischer. While at K-State, Judge Bullock was a member of Delta Upsilon Fraternity; later becoming a Member of the Board and President of the International Fraternity. He was also elected to Blue Key, senior men’s honorary, and Phi Eta Sigma and Phi Kappa Phi, scholastic honoraries.

In 1964, Judge Bullock graduated with honors from the University of Kansas School of Law. During his law school days, he interned in the office of William Ferguson, Attorney General of Kansas, served as an Editor of the Kansas Law Review and was elected to the Order of the Coif, the law school scholastic honorary. Upon graduation, Judge Bullock began the practice of law with the Topeka firm of Cosgrove, Webb and Oman.

In 1976, Judge Bullock was appointed District Judge of Kansas, and was retained in that office by the people of his district for over 30 years. Judge Bullock served as Chief Judge for five years and often sat with the Kansas Court of Appeals and the Kansas Supreme Court by special appointment. As chief Judge, he was instrumental in creating the first in the nation paperless system for the electronic processing of great numbers of cases efficiently and quickly. In his judicial work, Judge Bullock is best known for his constitutional decisions concerning the funding of the educational system for the State of Kansas.

Judge Bullock taught Legal Ethics at both the University of Kansas School of Law and the Washburn University School of Law. His teaching activities spanned 38 years and his students numbered in excess of 10,000.

Judge Bullock was honored by the Topeka and Kansas Bar Associations with their highest lifetime achievement awards. He was also a member of the American and Kansas Bar Associations and a lifetime member of the Fellows of the Kansas and American Bars. In the years following his active service on the bench, he continued to assist the bench and bar, serving as Mediator, Consultant, Special Master, Special Administrator and Expert Witness.

Judge Bullock was a founding member of the Topeka Festival Singers, with whom he performed for over 25 years, touring Europe under the direction of Dr. Kevin Kellim. He was also a member of the A.F. & A.M., Scottish Rite Bodies (32nd Degree), and the Episcopal Church.

Judge Bullock deeply loved his family, his friends, his profession, the Court, his music and his students. His fondest hope was that they all continue to grow, to prosper and to flourish.

Judge Bullock’s funeral service was held August 16, Friday, at 2 p.m. in Grace Episcopal Cathedral, Topeka. Burial was in Wilsey Cemetery, Wilsey, Kansas.

In lieu of flowers, please consider a memorial donation to the Kansas Bar Foundation or to Delta Upsilon Foundation, sent in care of Kevin Brennan Family Funeral Home, 2801 SW Urish Road, Topeka KS 66614.

Condolences may be sent online to www.kevinbrennanfamily.com.
Mike Dwyer (12/20/1943 - 5/7/2019)

Mike Dwyer, 75, of Leawood, KS, passed away on Tuesday, May 7. He was born December 20, 1943 in Kansas City to Dave and Dorothy Dwyer, he was the oldest of six. Mike graduated from Rockhurst High School, The University of Kansas, and received his law degree from UMKC. Licensed to practice law in Missouri and Kansas, he spent over 40 years in private practice. Mike married his wife, Sally, in 1977, they were married over 42 years, and had two children, Meghan Marie and David Patrick. Mike enjoyed the practice of law, the times spent with his large family and many friends attending KU games, weddings, dinner parties, Thanksgiving and Christmas gatherings, reunions, and weekends at the Lake of the Ozarks family house. He was a longtime runner and along with several of his buddies climbed 7 of the Colorado 14ers, a proud accomplishment. He loved all genres of music and took meticulous care of his collection of vinyl records and CDs. He had a kind heart, caring spirit and was sometimes jokingly referred to as St. Michael. He lived a long time (over 25 years) with Parkinson’s disease, and bravely dealt with every loss of function. 

Mike was preceded in death by his parents, Dave and Dorothy, and sister, Rene Sebus. He was loved and will be deeply missed by his wife, Sally, his children Meghann & Kolter Hoffman, David & Lindsey Dwyer, his 4 grandchildren who call him Baba - Brayden, Addilyn, Kaitlyn and Cameron, sisters Jan (Jim) Otis and Cheri (Mike) Rhodes, brothers Terry (Patty) Dwyer and Kevin (Julie) Dwyer, and many nieces and nephews. 

The family would like to thank John Williams and the Sigma Alpha Epsilon fraternity brothers for their weekly luncheons with Mike. We would also like to thank Village Shalom & Crossroads Hospice for their care of Mike. 

Services took place on Monday, May 13th at Cure of Ars Church, 94th and Mission Road with a 3:00 pm graveside service at Johnson County Memorial Gardens. 

In lieu of flowers, donations can be made, in Mike’s honor, to the Staff Fund at Village Shalom, to Crossroads Hospice or to the Michael J. Fox Parkinson’s Research Fund. 

https://s3.amazonaws.com/CFSV2/obituaries/photos/6681543291/5cd3328de259b.jpg


He was born in Benton, Kansas, on November 6, 1935, to Florence Bonner and Kenneth Derstein. 

After El Dorado High School, he graduated from Kansas State University in 1961, where he belonged to Acacia Fraterni-
always rooted for K-State whenever the teams matched up.

Ed also enjoyed being a father. He had four daughters from two marriages. He was known for speaking to anyone who would listen about the latest adventures and accomplishments of his children: Angela, Laura (Horne-Popp), Amanda (Gansen), and Allison (Oduaran). Ed was also the proud grandfather of five grandchildren: Stella Gansen, Cole Gansen, Elise Gansen, Miller Gansen and Oliver Oduaran. He found great joy spending time with his grandkids and watching them grow.

Many may remember Ed's occasional letters to the editor in the Manhattan Mercury. He was a life-long Democrat and often wrote opinion pieces regarding local and national politics. Ed often shared copies of his published letters to family across the country. Ed had the opportunity to meet a number of national politicians over the years due to his commitment to the Kansas and National Democratic Parties. He felt strongly about social justice and equity, and instilled these attributes in his children.

As Ed's health declined, he moved to Overland Park in 2016 to be nearer his children and grandchildren. He spent his remaining years keeping up on politics and K-State football and basketball. Ed is survived by his children, Angela, Laura, Amanda, and Allison; his grandchildren, Stella, Cole, Elise, Miller, and Oliver; his first wife Constance (Connie) Horne and his second wife Nancy Collins; his sisters Marjorie and Donna, numerous nieces and nephews, friends, and colleagues. He will be missed.

There will be a service for Ed at Yorgensen-Meloan-Londeen Funeral Home on September 14th, 2019 at 2 pm in Manhattan, Kansas.

We will be sharing stories of Ed, so if you would like to speak at his service, please contact his daughter, Angela Horne, angelaahorne@hotmail.com.

In lieu of flowers, please consider a donation to either the Kansas Democratic Party or the American Heart Association in Ed's name. Contributions may be left in care of the Yorgensen-Meloan-Londeen Funeral Home, 1616 Poyntz Avenue, Manhattan, Kansas 66502.

Online condolences may be left for the family through the funeral home website at www.ymlfuneralhome.com


Glenn E. McCann, 103, died Monday, July 29, 2019 at his home in Mission Woods, Kansas. He was born June 3, 1916 at Kansas City Missouri, the son of Mr. and Mrs. Benjamin McCann.

Glenn attended public schools in Kansas City. After high school he attended the University of Kansas where he earned a bachelor's degree in 1938 and an LLB degree in 1940. While attending the University of Kansas he was active in numerous school activities and while at the University of Kansas School of Law he served as Clerk of the Court. Upon graduation from the University of Kansas School of Law he passed both the Kansas and Missouri bar examinations and was admitted to practice law in each state.

Mr. McCann enlisted in the Navy in 1942 and graduated as an Ensign from the Columbia University Midshipman School. Although offered desk duties as a JAG, he declined such offer and requested that he be assigned duties on a seagoing vessel. He served aboard PC 78 salvage ships with the Pacific Ocean Westward Unit in the Aleutian Islands, and during such tour of duty the unit ultimately reached Okinawa. At the conclusion of the War he returned to Kansas City where he remained in the Naval Reserve and ultimately retired with the rank of Commander. In the event of war, he was to serve as Captain of a Destroyer Escort.

On November 1, 1951 Glenn married Helene Marie Zimmerman in Johnson County, Kansas. Helene Marie was the most important person in his life and Glenn greatly missed her after she died on December 29, 2009. After her death he remained in in their home in Mission Woods with his memories of her.

Glenn was a senior partner in the law firm of Knipmeyer, McCann, Fish & Smith and its successor firms. He was admitted to practice in the Supreme Court of the United States, all Federal Courts and State Courts of Missouri, Kansas, Nebraska, and other states. His most famous case that garnered worldwide attention was Dr. John Carpenter, D.D.S. vs. Random House Publisher, Bennett Cerf, and nine others, for Invasion of Privacy, Slander, and Libel. The case resulted in a settlement for Dr. Carpenter. John Carpenter was the father of Harleen Carpenter, also known as Jean Harlow.

Glenn was a Life Fellow of the American Bar Foundation, a founding member of 4th National Associates of Kansas City, and was a member of Mission Hills Country Club, the Vanguard Club, Delta Upsilon Fraternity and St. Luke's Hospital Foundation.

Mr. McCann is survived by one niece, Suzanne Zimmerman of Beaverton, Oregon; one nephew, Ben F. Zimmerman III of Dodge City; three great nieces; two great nephews; four great-great nephews; two great-great nieces; and many friends.

Private funeral services were held August 10, 2019. He was laid to rest at Maple Grove Cemetery in Dodge City. In lieu of flowers, a memorial fund has been established in Glenn's name to be used as scholarships for students with financial needs at the University of Kansas School of Law. Memorials can be made in care of Swaim Funeral Chapel, 1901 Sixth Avenue, Dodge City, KS 67801.


Lynd K. Mische, 75, Overland Park, KS. Born on November 24, 1943, to Irvin and Elton Mische in Vernon County,
Missouri, Lynd grew up in and around Nevada, Missouri with his sisters Betty and Diane. He received his B.A. degree and his J.D. (cum laude) from the University of Missouri-Columbia. While in law school he was a staff member of the Missouri Law Review and a member of the Order of the Coif. He spent 23 years as a dedicated partner at Gilmore Bell. He is survived by his wife, Karen Galles Mische, his children Steve (Savanna) Mische, Leigh (Jeff) Beck, and Meredith (Eric) Hayes and his sister Betty (David) Matthews. He has seven grandchildren: Xavier, Chloe, Adelyn, Xander, Charlotte, Ainsley and Eloise. He is preceded in death by his dear sister Diane Johner, and her husband Allan. He was an intelligent and kind man, with a keen wit. He lived with an unparalleled integrity that drove him to excellence in work and an unwavering dedication to his family. He was a stalwart of strength and was fueled by life's challenges. He embraced and overcame circumstances that came with losing his father at an early age and working his way through college and law school, to becoming a preeminent lawyer, excelling in his field. His greatest honor was earning the respect of his colleagues. While he held many professional accolades, those awarded by his peers in the field were his greatest source of pride. He was a charter member of the National Association of Bond Lawyers and was the first MO attorney to become a member of the American College of Bond Counsel. He was selected as one of the Best Lawyers in America for multiple years; and was selected to the list of Super Lawyers. He loved and was devoted to his family. He wanted his children to pursue their own dreams, however they led, as long as they pursued them with excellence and vigor. He enjoyed chatting with his grandkids, finding interesting ways to spark curiosity, and winding their way on a path of ideas, facts and memories. He spent 50 wonderful years married to the love of his life, Karen. They were comple-}

**Donald B. Steele (1/29/1928 - 7/11/2019)**

Donald B. Steele, born January 29, 1928 in Algona, Iowa passed away Thursday, July 11, 2019 in Atlanta, Georgia. Don and his wife Ann were long-time residents of Kansas City until 2013 when he relocated to Atlanta as a result of his wife's passing. He is survived by his son, Mark Steele, who lives in Atlanta, Georgia.

Don graduated from Central High School in 1946 in Sioux City, Iowa and attended the University of South Dakota, graduating in 1950 Cum Laude with a BA in Political Science. He received honorary memberships in Phi Eta Sigma and Phi Beta Kappa and was a member of the Delta Tau Delta Fraternity. Don joined the ROTC program as a Cadet Colonel and was commissioned as a Second Lieutenant in the infantry upon graduation.

Don went on to attend the University of Iowa College of Law, graduating in 1955 with a Juris Doctor degree in which year he joined the law firm of Morrison, Hecker, Buck, Cozad and Rogers (now known as Morrison and Hecker, LLP) in Kansas City, Missouri as an Associate and later became a Partner with the firm and later as Sr. Counsel.

Don was also a member of the American Bar Association, the Missouri Bar, the Metropolitan Kansas City Bar Association and the American Bankruptcy Institute. He was Chairman of the Commercial Law Committee of the Missouri Bar 1974-1975. Don was a member of the US Army Reserve from 1950 until retirement in 1988 with the rank of Colonel, Judge Advocate General’s Corps of the United States Army Reserve.

Don's service included two years of active duty in the Korean War (1950-1952) where he served in Japan and Korea. He was awarded the Purple Heart and the Army Meritorious Service Medals. While in the US Army Reserve, Don commanded the 8th JAG Detachment in Kansas City, Missouri and his last assignment was in the Pentagon in Washington, D.C., as the legal advisor to the Provost Marshall of the United States Army.

Don was also active in the Kansas City community serving as a member of the Board of Directors of Health Midwest and Baptist Medical Center; a past member of the Board of Mission Hills Country Club; a past Chairman of the Jackson County March of Dimes; a past president of the Phi Beta Kappa Association of Greater Kansas City; and a past president of the Delta Tau Delta Alumni Association of Greater Kansas City.

Don and his wife, Ann, were members of the Second Presbyterian Church, Mission Hills Country Club and the Kansas City Club. Memorial services were held at the Second Presbyterian Church located at 318 East 55th Street, Kansas City, Missouri 64113. The family receiving guests in the sanctuary prior to the service and will be hosted a reception at the church following the memorial service. In lieu of flowers, memorial contributions may be made to Emory University Goizueta Alzheimer’s Disease Research Center in Atlanta, Georgia (www.alzheimers.emory.edu/support/donate-now.html) and can be contacted at 1762 Clifton Road, NE, Suite 1400, Atlanta, GA 30322 with phone number 404-727-5282. Don suffered from this disease until his passing. Emory is making significant progress toward a cure which will truly be a blessing to so many families.

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Don’s service included two years of active duty in the Korean War (1950-1952) where he served in Japan and Korea. He was awarded the Purple Heart and the Army Meritorious Service Medals. While in the US Army Reserve, Don commanded the 8th JAG Detachment in Kansas City, Missouri and his last assignment was in the Pentagon in Washington, D.C., as the legal advisor to the Provost Marshall of the United States Army.

Don was also active in the Kansas City community serving as a member of the Board of Directors of Health Midwest and Baptist Medical Center; a past member of the Board of Mission Hills Country Club; a past Chairman of the Jackson County March of Dimes; a past president of the Phi Beta Kappa Association of Greater Kansas City; and a past president of the Delta Tau Delta Alumni Association of Greater Kansas City.

Don and his wife, Ann, were members of the Second Presbyterian Church, Mission Hills Country Club and the Kansas City Club. Memorial services were held at the Second Presbyterian Church located at 318 East 55th Street, Kansas City, Missouri 64113. The family receiving guests in the sanctuary prior to the service and will be hosted a reception at the church following the memorial service. In lieu of flowers, memorial contributions may be made to Emory University Goizueta Alzheimer’s Disease Research Center in Atlanta, Georgia (www.alzheimers.emory.edu/support/donate-now.html) and can be contacted at 1762 Clifton Road, NE, Suite 1400, Atlanta, GA 30322 with phone number 404-727-5282. Don suffered from this disease until his passing. Emory is making significant progress toward a cure which will truly be a blessing to so many families. ■
CIVIL

CHILDREN—JURISDICTION
IN RE A.A.-F.
GEARY DISTRICT COURT—COURT OF APPEALS
IS AFFIRMED
DISTRICT COURT IS AFFIRMED
NO. 117,368—JULY 12, 2019

FACTS: These proceedings involve five of Mother’s six children. Two of the children were born in Kansas. All of the children were subject to child in need of care proceedings while living in California. After a fight with her husband, Mother brought the children to Kansas without telling anyone. The California court revoked the children’s physical placement with Mother and ordered them returned to California. The children returned, and the California court began to inquire about a possible placement with the children’s grandmother, who resides in Kansas. In June 2015, the California court cited the UCCJEA and transferred the case to Kansas. After several years working on reintegration, the State sought termination of Mother’s parental rights. At a hearing, Mother argued that Kansas lacked jurisdiction. The district court overruled Mother’s concerns about jurisdiction and, after hearing evidence, terminated her parental rights. In a divided opinion, the court of appeals held that the record did not show that UCCJEA jurisdiction properly passed from California to Kansas and found it was error for the district court to so find. But, it ruled that any error was harmless because there was home state jurisdiction in Kansas by the time the termination hearing occurred. Mother’s petition for review was granted.

ISSUES: (1) Subject matter jurisdiction; (2) procedural due process rights

HELD: When the CINC proceedings began, California was the children’s home state. The California order transferring the case to Kansas did not specify what provision of the UCCJEA is relied on when ceding jurisdiction. Unfortunately, there is nothing in the record on appeal to show exactly what happened in California. Nevertheless, the transfer order from California gave the Kansas court jurisdiction, and Kansas knew that California would not still be trying to make decisions in the case. Principles of comity apply to the California transfer order, even though it was not a final decision in this case. There was no abuse of discretion when Kansas accepted jurisdiction in this case, in accordance with the purposes of the UCCJEA. The failure to hold a hearing within 30 days did not violate Mother’s due process rights.

STATUTES: K.S.A. 2018 Supp. 23-37,102(b), -37,110(a), -37,110(b), -37,110(d), -37,110(e), -37,201, -37,202, -37,202(a) (1), -37,202(a)(2), -37,207, -37,313, 38-2202(d), -2202(d), -2203; K.S.A. 20-301

DEEDS—REAL PROPERTY
JASON OIL COMPANY V. LITTLER
RUSH DISTRICT COURT—AFFIRMED
NO. 118,387—AUGUST 16, 2019

FACTS: Through deeds, Littler (Grantor) conveyed two tracts of real estate to two different couples, the Grantees. The deed excluded from conveyance all oil, gas, and minerals in and under the property that may be produced “for a period of 20 years or as long thereafter as oil and/or gas and/or other minerals may be produced.” That 20-year term expired in December 1987, and no oil, gas, or minerals were ever produced from either tract. In 2016, Jason Oil Company moved to quiet title to both tracts, claiming to hold valid oil and gas leases. The Grantor’s descendants (the Grantor’s Heirs) answered, claiming an interest in the mineral rights via will and arguing that any attempt to convey rights to the Grantees, or their heirs, was void under the Rule Against Perpetuities. The Grantees’ Heirs also answered, claiming a successor interest in the mineral rights. Alternatively, they claimed that if the conveyance did violate the Rule it could be reformed under the Uniform Statutory Rule Against Perpetuities (USRAP). The district court granted the Grantees’ Heirs’ motion for summary judgment, finding there was no dispute that the Grantor conveyed all of his interest in the properties to the grantees and created a defeasible estate by reservation.

ISSUE: (1) Application of the Rule
HELD: The Rule is a creation of common law. The Grantor's mineral interest was a defeasible term mineral interest. This was a present interest which remained after the conveyances and for at least 20 years. Any mineral interest that passed to the Grantees was a future interest which vested no earlier than December 1987 at the end of the Grantor's 20-year term. The deeds conveyed by the Grantor created a springing executory interest. Applying the Rule in this case would result in the Grantor's Heirs holding the mineral interests in the real estate in perpetuity, and excepting agreements such as this from application of the Rule has many benefits, including promoting the alienability of land and reducing chaos.

STATUTE: K.S.A. 59-3405(b)

CONTEMPT
IN RE PATERNITY OF S.M.J. V. OGLE
DOUGLAS DISTRICT COURT— VACATED AND CASE REMANDED
COURT OF APPEALS—AFFIRMED
NO. 115,776—JULY 19, 2019

FACTS: Ogle and Jacobs were involved in a paternity and custody proceeding. It turned contentious, enough that the district court ordered Ogle to cease widespread slander of Jacobs. Ogle did not stop, and Jacobs moved the court to hold him in indirect contempt after his comments caused her to lose her job. The district court held Ogle in indirect contempt after his comments caused her to lose her job. The district court ordered Ogle to cease widespread slander of Jacobs. Ogle did not stop, and Jacobs moved the court to hold him in indirect contempt after his comments caused her to lose her job. The district court held Ogle in indirect contempt after his comments caused her to lose her job. The district court held Ogle in indirect contempt after his comments caused her to lose her job. The district court held Ogle in indirect contempt after his comments caused her to lose her job. The district court held Ogle in indirect contempt after his comments caused her to lose her job. The district court held Ogle in indirect contempt after his comments caused her to lose her job. The district court held Ogle in indirect contempt after his comments caused her to lose her job. The district court held Ogle in indirect contempt after his comments caused her to lose her job. The district court held Ogle in indirect contempt after his comments caused her to lose her job. The district court held Ogle in indirect contempt after his comments caused her to lose her job. The district court held Ogle in indirect contempt after his comments caused her to lose her job. The district court held Ogle in indirect contempt after his comments caused her to lose her job. The district court held Ogle in indirect contempt after his comments caused her to lose her job. The district court held Ogle in indirect contempt after his comments caused her to lose her job. The district court held Ogle in indirect contempt after his comments caused her to lose her job. The district court held Ogle in indirect contempt after his comments caused her to lose her job. The district court held Ogle in indirect contempt after his comments caused her to lose her job. The district court held Ogle in indirect contempt after his comments caused her to lose her job. The district court held Ogle in indirect contempt after his comments caused her to lose her job. The district court held Ogle in indirect contempt after his comments caused her to lose her job. The district court held Ogle in indirect contempt after his comments caused her to lose her job. The district court held Ogle in indirect contempt after his comments caused her to lose her job. The district court held Oge

ISSUE: (1) Necessity of personal appearance at the hearing

HELD: K.S.A. 2018 Supp. 20-1204a does not specifically mention whether an accused must appear at the hearing. But after reading all of the statute’s provisions together, it is clear that a district court judge is allowed to proceed with a contempt hearing once the person accused is present, but not before.

STATUTE: K.S.A. 2018 Supp. 20-1204a

ATTORNEY FEES—COURTS—PROBATE CODE—WILLS
IN RE ESTATE OF OROKE
JEFFERSON DISTRICT COURT—AFFIRMED AND REMANDED
COURT OF APPEALS—REVERSED
NO. 116,333—AUGUST 2, 2019

FACTS: Testator (Oroke) deposited original will and codicil with probate court of home county. A few weeks after his death, heirs tried to locate the will but clerk of the court was unable to find it and informed heirs the will was not in the custody of the court. After a search elsewhere found no will, testator’s daughter filed intestate probate proceeding. While that proceeding was pending, and after imitation period for petitioning a will for probate had passed, clerk of the court located the will and codicil. Testator’s stepdaughter filed separate petition to probate the will. District court consolidated the two probate proceedings and admitted the will to probate, finding stepdaughter had exercised due diligence in attempting to locate the will. Testator’s daughter appealed. Court of appeals reversed. State v. Hirsh, 54 Kan. App. 2d 705, 405 P.3d 41 (2017). Panel found no exceptions applied to toll the running of the limitation period because the will was not “knowingly” withheld, and found this case distinguishable from In re Estate of Strader, 301 Kan. 50, 339 P.3d 769 (2014). Stepdaughter’s petition for review granted. After oral argument in Kansas Supreme Court, stepdaughter moved for appellate attorney fees and expenses for the entire appellate process to be paid from the estate.

ISSUES: (1) Probate—statute of limitations; (2) appellate attorney fees

HELD: Clerk’s failure in duty to produce the will distinguishes this case from Strader. Circumstances of this case conform in all respects with requirements of the unique circumstances doctrine. While that doctrine is used sparingly, neither the Legislature in repealing K.S.A. 59-620, nor the enactment of Supreme Court Rule 108(e)(4)(A), intended that an error by a judicial employee should be inconsequential as to the statute of limitations. Equitably tolling the statute of limitations provides a realistic and fair remedy for an unusual situation not contemplated by the statutory scheme. This is not a modification of Strader, but is holding limited to the unique and rare circumstances of a district court clerk not following a duty imposed by law.

Stepdaughter’s attempts to have the appellate courts uphold the district court’s admission of the will to probate provides this court with authority to entertain her motion for attorney fees. Motion for attorney fees was timely filed for consideration of appellate services rendered before Kansas Supreme Court, but not for appellate services while appeal was pending in Court of Appeals. The attorney fee request, limited to appellate services provided after panel’s opinion was filed, is reviewed and found to be reasonable. Decision of the district court is affirmed and case is remanded for further proceedings conforming with this opinion.

FACTS: Requena was convicted of rape in 1999. His conviction was affirmed on appeal. A few years later, Requena filed multiple K.S.A. 60-1507 motions. All of those motions were decided adversely and affirmed on appeal. In 2015, Requena filed his fourth 60-1507 motion in which he argued ineffective assistance of counsel and prejudice due to the State’s destruction of evidence that was potentially exculpatory. After Requena filed the motion, the district court emailed the State and asked the State to respond to Requena’s motion. The State’s response asked that the motion be denied as time-barred and successive. The district court agreed and denied the motion. That decision was affirmed on appeal by the Court of Appeals, which found no error in the district court’s solicitation of a response from the State. The Supreme Court granted Requena’s petition for review.

ISSUES: (1) Solicitation of written response; (2) right to counsel; (3) timeliness of State’s response to motion; (4) adequacy of forms; (5) right to an evidentiary hearing

HELD: A district court’s review of a State’s filed response to a 60-1507 motion, standing alone, does not create an indigent movant’s right to counsel. Because the district court did not hold a hearing, Dawson did not have the right to counsel even if the response was solicited by the district court. A 60-1507 movant has only a statutory right to counsel. The court is not required to appoint counsel for an indigent movant while the merits of the motion are still being weighed. The 7-day response timeline of Rule 133(b) is not jurisdictional. Dawson’s challenge to the adequacy of Judicial Council forms was not raised in any prior proceeding. In addition, Dawson shows no prejudice resulting from any alleged deficiency in the form. It was not error to find that Dawson failed to establish exceptional circumstances that would warrant a hearing on his 60-1507 motion.

STATUTE: K.S.A. 60-1507, -1507(f)(2)

FACTS: Dawson was convicted of a child sex crime. His conviction was affirmed on appeal and after that, Dawson filed multiple K.S.A. 60-1507 motions. All of those motions were decided adversely and affirmed on appeal. In 2015, Dawson filed his fourth 60-1507 motion in which he argued ineffective assistance of counsel and prejudice due to the State’s destruction of evidence that was potentially exculpatory. After Dawson filed the motion, the district court emailed the State and asked the State to respond to Dawson’s motion. The State’s response asked that the motion be denied as time-barred and successive. The district court agreed and denied the motion. That decision was affirmed on appeal by the Court of Appeals, which found no error in the district court’s solicitation of a response from the State. The Supreme Court granted Dawson’s petition for review.

ISSUES: (1) Solicitation of written response; (2) right to counsel; (3) timeliness of State’s response to motion; (4) adequacy of forms; (5) right to an evidentiary hearing

HELD: A district court’s review of a State’s filed response to a 60-1507 motion, standing alone, does not create an indigent movant’s right to counsel. Because the district court did not hold a hearing, Dawson did not have the right to counsel even if the response was solicited by the district court. A 60-1507 movant has only a statutory right to counsel. The court is not required to appoint counsel for an indigent movant while the merits of the motion are still being weighed. The 7-day response timeline of Rule 133(b) is not jurisdictional. Dawson’s challenge to the adequacy of Judicial Council forms was not raised in any prior proceeding. In addition, Dawson shows no prejudice resulting from any alleged deficiency in the form. It was not error to find that Dawson failed to establish exceptional circumstances that would warrant a hearing on his 60-1507 motion.

STATUTE: K.S.A. 60-1507, -1507(f)(2)
a response and the district court summarily denied the motion, although the district court did not address Requena’s claim that he could not be convicted because he was a sovereign citizen. The court of appeals affirmed; the opinion included a finding that Requena’s sovereign citizen claim was meritless. The Supreme Court accepted Requena’s petition for review.

ISSUES: (1) Consideration of written response; (2) Murdock claim

HELD: Considering a written response is not the same as holding a hearing. The right to have counsel appointed only attaches if a hearing is held. In this case, the district court had no obligation to appoint counsel for Requena and his due process rights were not violated. Because this 60-1507 motion was untimely, Requena had the burden to show that not giving him relief would result in manifest injustice. Requena’s issues raise no substantial issues of law, and Murdock cannot apply because all of Requena’s prior convictions occurred in Kansas.

STATUTES: K.S.A. 60-1507

HABEAS CORPUS
SHERWOOD V. STATE
SEDGWICK DISTRICT COURT—AFFIRMED COURT OF APPEALS—AFFIRMED NO. 115,899—JULY 12, 2019

FACTS: Sherwood was convicted of rape in 1997. His conviction was affirmed on direct appeal. More than 15 years after the mandate was issued, Sherwood filed a pro se K.S.A. 60-1507 motion alleging ineffective assistance of counsel and sentencing errors. The State responded, asking that the motion be denied as untimely. The district court summarily denied the motion, finding that not only was it time barred but also meritless. The court of appeals affirmed, and Sherwood’s petition for review was granted.

ISSUES: (1) Appointment of counsel; (2) substantive claims

HELD: There is a statutory right to counsel in a 60-1507 proceeding. In the district court, that right exists only when a motion presents substantial questions of law or triable issues of fact. The right to counsel does not exist if there is merely a potential substantial issue that would trigger the statutory right to counsel. The district court may, but is not required, to appoint counsel for an indigent 60-1507 movant while the merits of the motion are still being decided. A movant is entitled to counsel if the district court holds a hearing at which the State will be represented. But that right does not extend to the district court’s consideration of a written response to a motion. There is no evidence that counsel’s performance was deficient. Nothing else in the motion warranted an evidentiary hearing, and the district court properly denied the motion without a hearing.

STATUTE: K.S.A. 22-4506, -4506(b), 60-1507, -1507(b)

HABEAS CORPUS
THUKO V. STATE
SEDGWICK DISTRICT COURT—AFFIRMED COURT OF APPEALS—AFFIRMED NO. 115,662—JULY 12, 2019

FACTS: Thuko was convicted of sex charges in 2004. His convictions were affirmed on direct appeal. Thuko filed one K.S.A. 60-1507 motion in 2008, which was ultimately denied. Thuko filed a second 60-1507 motion in 2014. After some months passed, the district court solicited a response
from the State. After the response was filed, the district court summarily denied Thuko’s motion, finding that it was both untimely and successive and failing to find any manifest injustice that would allow for a successive motion. The Court of Appeals affirmed, and Thuko’s petition for review was granted.

**ISSUES:** (1) Right to counsel; (2) right to a hearing

**HELD:** A 60-1507 movant has a statutory right to counsel that attaches only if the district court finds substantial questions of law or triable issues of fact. The district court is not required to appoint counsel while it is evaluating the merits of the motion, although it must appoint counsel if a hearing is held at which the State is represented. A written response to the motion is not a hearing, and no right to counsel attaches. Thuko did not prove the existence of either manifest injustice or exceptional circumstances to excuse his untimely and successive 60-1507 motion. For these reasons, his motion was properly summarily denied.

**STATUTE:** K.S.A. 60-1507, -1507(c), -1507(f)(1)

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**CRIMINAL**

**APPEALS—CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—EVIDENCE—FOURTH AMENDMENT—MOTIONS**

**STATE V. CHRISTIAN**

**RENO DISTRICT COURT—REVERSED AND REMANDED**

**COURT OF APPEALS—REVERSED **

**NO. 116,133—JULY 26, 2019**

**FACTS:** Christian was arrested for failure to provide proof of insurance. Based on evidence discovered in search of Christian and his vehicle, he was charged and convicted in bench trial on drug crimes. District court denied motion to suppress. In an unpublished opinion, court of appeals reversed and remanded. Guidance judgment of court of appeals affirmed the district court on the single issue subject to review is reversed. Judgment of district court is reversed, and the case was remanded for further proceedings.

**STATUTE:** K.S.A. 20-3018(b), 22-2402

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**CRIMINAL LAW—CRIMINAL PROCEDURE—JURY INSTRUCTIONS—MOTIONS—STATUTES**

**STATE V. COTTRELL**

**SEDGWICK DISTRICT COURT—AFFIRMED**

**COURT OF APPEALS—AFFIRMED**

**NO. 114,635 —JULY 19, 2019**

**FACTS:** Undercover officer (Padron) obtained hydrocodone and oxycodone from Cottrell, through sale set up by his daughter. Jury convicted Cottrell of distributing a controlled substance and conspiring to distribute a controlled substance. On appeal, Cottrell claimed: (1) district court erred in failing to give a unanimity instruction because State alleged multiple overt acts in furtherance of the conspiracy; (2) alternatively, the overt acts alleged were alternative means to commit the crime of conspiracy, and State failed to produce sufficient evidence to support each one; (3) district court erred in instructing jury that “knowingly” was the culpable mental state for distribution of a controlled substance; and (4) district court erred in denying Cottrell’s motion for judgment of acquittal because insufficient evidence supported the charges. Court of appeals affirmed. 53 Kan. App. 2d 425 (2017). Review granted.

**ISSUES:** (1) Unanimity instruction—multiple acts, (2) alternative means—crime of conspiracy, (3) jury instruction, (4) motion for acquittal

**HELD:** No unanimity instruction was required because alleging several overt acts in furtherance of one conspiracy does not present a multiple acts case. State presented arguments and evidence about one agreement between Cottrell and his daughter: to illegally sell hydrocodone and oxycodone to Padron.
Jury instruction that lists several overt acts in furtherance of a conspiracy does not create alternative means for the crime of conspiracy.

Following State v. Brown, 295 Kan. 181 (2012), only language of a statute can create alternative means for a crime, and the conspiracy statute does not do so. State v. Enríquez, 46 Kan. App. 2d 765 (2011), is overruled. A jury instruction listing more than one overt act in furtherance of a conspiracy does not create alternative means. Instead, such an instruction merely describes the factual scenarios that could prove the material element of an overt act.

Invited error precludes reaching the merits of Cottrell’s jury instruction challenge. Cottrell actively pursued an instruction for distribution of a controlled substance that included a knowing culpable mental state, was unwavering in this request, and any error was as obvious before trial as after. Defense counsel also stated on the record that he did not object to the final instruction.

No error in district court’s denial of the motion for acquittal. No appellate reweighing of Cottrell’s testimony, and any error was as obvious before trial as after. Defense counsel also stated on the record that he did not object to the final instruction.

STATUTES: K.S.A. 2018 Supp. 21-5302(a), -5402(c); K.S.A. 2912 Supp. 21-5302(a)

19, 2019

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—MOTIONS—POSTCONVICTION REMEDIES—SENTENCES—STATUTES STATE V. DAWSON SEDGWICK DISTRICT COURT—AFFIRMED COURT OF APPEALS—AFFIRMED IN PART, REVERSED IN PART NO. 116,641—AUGUST 2, 2019

FACTS: Ewing pleaded guilty to charges of felony theft and aggravated burglary in three cases. Presentence investigation report in each case included a person felony converted from combining a Kansas misdemeanor with two Arkansas misdemeanors. Ewing appealed, arguing district court’s classification of the Arkansas convictions as person offenses required judicial fact-finding in violation of Sixth and Fourteenth Amendments. In unpublished opinion, Court of Appeals held the Arkansas false imprisonment conviction was properly scored as a person crime, but vacated the sentences in each case and remanded for resentencing because record was unclear as to what statute or subsection the Arkansas battery offense arose under. Panel also rejected State’s procedural argument for presumption of proper classification because Ewing did not lodge an objection and failed to designate a record sufficient to identify the Arkansas offense in question. Petitions for review by both sides granted in consolidated appeals.

ISSUES: (1) Out-of-state conviction—false imprisonment; (2) out-of-state conviction - battery

HELD: District court pronounced Ewing’s sentences prior to State v. Wetrich, 307 Kan. 552 (2018). State’s arguments against application of Wetrich are rejected. Arkansas false imprisonment is not a person crime. A person who would not be guilty of criminal restraint in Kansas might be guilty of second-degree false imprisonment in Arkansas. Accordingly, the Kansas crime is not comparable to second-degree false imprisonment in Arkansas because circumstances justifying an act otherwise constituting the Arkansas crime are not identical to or broader than those in Kansas. District court and panel erred when concluding the Arkansas offense should be classified as a person crime.

Insufficient evidence supports the district court’s legal conclusion that Ewing’s battery conviction was a person crime.
Even though Ewing failed to object, State had burden of establishing that he committed a version of the offense supporting the person classification. State v. Obregon, 309 Kan. ___, __ (June 28, 2019). State did not meet its burden in this case. Sentences vacated and case remanded for recalculation of criminal history score and resentencing under Wetrich. If misdemeanor conversion to a felony is no longer possible without the Arkansas false imprisonment conviction being scored as a person misdemeanor, the person or non-person classification of the Arkansas battery conviction may be moot.


CONSTITUTIONAL LAW—CRIMINAL LAW—JURIES—PROSECUTORS—TRIALS
STATE V. HIRSH
BARTON DISTRICT COURT—AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED
COURT OF APPEALS—AFFIRMED
NO. 116,356—AUGUST 2, 2019

FACTS: Hirsh convicted of aggravated assault, two counts of criminal threat for threatening wife and children, and domestic battery. Court of Appeals affirmed the criminal threat and domestic battery convictions and sentences, reversed the aggravated assault conviction and vacated that sentence, and remanded for retrial on the aggravated assault charge. Review granted on five allegations of error: (1) Brady violation of right to timely disclosure of exculpatory evidence—a sheriff’s testimony and production of a disciplinary report that provided an inconsistent account of where the incident occurred in the house; (2) two convictions for criminal threat are multiplicitous; (3) prosecutorial error; (4) erroneous refusal to recall jury to explore possible misconduct during voir dire of three jurors who did not disclose they were victims of domestic abuse; and (5) cumulative error denied him a fair trial.

ISSUES: (1) Brady violation; (2) multiplicitous crimes; (3) prosecutorial error; (4) recall of jury; (5) cumulative error

HELD: Panel erred by rejecting in par the argument because prosecutor had not suppressed the report, as knowledge and possession of information by law enforcement is imputed to the prosecutor. Nonetheless the argument is rejected on the merits because on facts in this case, the claim is rejected on the merits because on facts in this case, the one inconsistent location stated in the report did not qualify as “material” under Brady and its progeny.

Multiplicity claim challenges the two criminal threat convictions—threat to kill wife and threat to kill children. Hirsh demonstrated the threats were “unitary” conduct, but there were two units of prosecution for criminal threat in this case. Because Hirsh cannot demonstrate the second component under State v. Schoonover, 281 Kan. 453 (2006), of only one unit of prosecution for criminal threat, there is no double jeopardy or multiplicity problem.

Under longstanding Kansas caselaw, prosecutor telling jury that a witness told the truth is error. But under circumstances in this case, no reasonable probability that prosecutor’s error contributed to the verdict.


Even if an individually immaterial Brady error is assumed, and combined with a single-sentence individually harmless prosecutorial error, these two minor errors are insufficient to employ cumulative error doctrine.

CONCURRENCE (Beier, J., joined by Rosen and Stegall, JJ): Concurs in all respects but for majority’s multiplicity analysis. Does not accept that Hirsch’s threats, separated by plea from his wife to which he obviously reacted, qualify as “unitary” conduct. Would reject the multiplicity challenge on the first Schoonover component and not reach or analyze the second.

DISSENT (Johnson, J.): Dissents in part on majority’s determination that there were two units of prosecution with respect to criminal threat. Would reverse one of the convictions.

STATUTES: K.S.A. 2018 Supp. 21-5415,-5415(a), 22-3501(1); K.S.A. 21-3419(a)(1), 60-404

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—MOTIONS—POSTCONVICTION REMEDIES—SENTENCES—STATUTES
STATE V. LAUGHLIN
SEDGWICK DISTRICT COURT—AFFIRMED
NO. 117,156—JULY 12, 2019

FACTS: More than ten years after his felony-murder conviction, Laughlin filed pro se motions to correct an illegal sentence and to withdraw his plea. District court summarily denied the motions. On appeal Laughlin argued the district court erred by considering the State’s written responses to his motions without appointing counsel to represent him, and claimed his sentence is illegal because his convictions are multiplicitous.

ISSUES: (1) Due process right to appointment of counsel; (2) summary denial of motion to correct an illegal sentence

HELD: State v. Redding, __ Kan. __ (2019)(this day decided), affirmed treating K.S.A. 22-3504 motions like K.S.A. 60-1507 motions when determining whether appointment of counsel is required, held that due process of law requires
appointment of counsel at a hearing on a K.S.A. 22-3504 motion where the State is represented by counsel unless the defendant waives that right, and determined that a district court’s consideration of State’s response to a K.S.A. 22-3504 motion is not the equivalent of a hearing. Taken together, State v. Jackson, 255 Kan. 455 (1994), and State v. Hemphill, 296 Kan. 583 (2008), confirm that post-sentence plea withdrawal motions are treated like K.S.A. 60-1507 motions for purposes of determining whether the right to counsel was triggered. Thus rules announced in State v. Stewart, ___ Kan. ___ (2019)(this day decided) apply. Laughlin’s statutory right, ___ Kan. ___, to correct an illegal sentence, State v. Stewart, 301 Kan. 1018 (2015)(Dickey I), because his pre-Kansas Sentencing Guidelines Act burglary convictions should have been classified as nonperson felonies. District court summarily denied the motions as procedurally barred. Applying State v. Dickey, 305 Kan. 217 (2016)(Dickey II), Court of Appeals reversed. Kansas. Nexus analysis applied by Court of Appeals is rejected. Even under expansive reading permitted by definition of “offer to sell” in KUSA, Kansas’ jurisdiction is statutorily limited to situations in which the offer originates within the territorial boundaries of Kansas—not just because the transaction has some sort of “nexus” to the state. On facts in this case the sales were not made in Kansas nor did the offers to sell originate in Kansas, thus no jurisdiction exists based on a sale occurring in Kansas.

CONCURRENCE (Vano, D.Judge assigned): There is no stipulated fact regarding the place where any offer to sell originated, and the word “nexus” appears nowhere in the KUSA. The jurisdictional statute, K.S.A. 17-12a610, limits criminal sanction to sales or offers to sell originating within the state. On the stipulated facts in this case, the offers did not occur or originate in Kansas. Dissent goes too far in adding a penal reach that is not expressed by the Legislature and is inconsistent with Kansas precedent on reading, construing, and applying criminal statutes and sanctions strictly in favor of the accused, and keeping the court out of the business of drafting legislation—particularly penal sanctions.

Dissent (Luckert, J.(joined by Beier and Rosen, JJ.): Would interpret the offers as originating with and the sales being made by the Kansas LLCs acting through their officers and shareholders—Lundberg and Elzufon—to retain California intermediaries who extended the Kansas LLCs’ offers to California investors. These acts are sufficient to say the sales or offers to sell originated in Kansas. Thus application of Kansas law and jurisdiction is proper, and applying KUSA here does not violate any federal constitutional restriction against extraterritorial application of Kansas law.

FACTS: Minnesota residents Lundberg and Elzufon, formed a Minnesota corporation they registered to do business in Kansas to develop properties in downtown Wichita. As principals for four Kansas limited liability corporations (LLCs), they sold securities by using intermediaries who resided in California who made sales presentations in California and sold the securities from California to individuals who did not reside in Kansas. State filed criminal charges under the Kansas Uniform Securities Act (KUSA) against Lundberg and Elzufon for selling or offering to sell unregistered securities and committing fraud in selling or offering to sell securities. Lundberg and Elzufon filed motions to dismiss for lack of jurisdiction, arguing neither the offers to sell, the sales, the offers to purchase, nor the purchases were made or accepted in Kansas. Parties stipulated to the facts for deciding this motion. District court dismissed 56 of the counts related to sales involving the California intermediaries, rejecting State’s argument that any of the offers originated within Kansas. State voluntarily dismissed remaining charges and appealed. Court of Appeals reversed. 53 Kan.App.2d 721 (2017). Lundberg’s and Elzufon’s petitions for review granted.

ISSUE: (1) Jurisdiction for criminal charges - KUSA

HELD: KUSA is interpreted, examining “sale,” “offer to sell,” and whether “multiple sales” were consummated in
ISSUE: (1) Motion to correct an illegal sentence—legality of the sentence

HELD: McAlister’s sentences were final for purposes of postconviction relief in February 1999, prior to Apprendi v. New Jersey, 530 U.S. 466 (2000), which founded holdings in Dickey I and Dickey II. Pursuant to State v. Murdock, 309 Kan. 585 (2019)(Murdoc), this subsequent change in the law cannot transform a legally imposed sentence into an illegal sentence. McAlister’s sentences were legal when imposed and remained so at the time his direct appeal became final. Subsequent changes in the law did not render his sentences illegal for purposes of a K.S.A. 22-3504(1) motion to correct an illegal sentence. Court of Appeals reversal of the district court is reversed and case is remanded with directions to reinstate McAlister’s original lawful sentences.


CONSTITUTIONAL LAW—CRIMINAL PROCEDURE— MOTIONS—POSTCONVICTION REMEDIES— SENTENCES—STATUTES

STATE V. REDDING
RICE DISTRICT COURT—AFFIRMED
COURT OF APPEALS—AFFIRMED
NO. 115,037—JULY 12, 2019

FACTS: Redding entered no contest plea to rape and aggravated indecency of underage girls. Jessica’s Law sentence imposed for each count, with departure to the jointly recommended total sentence of 210 months. More than two years later he filed pro se motion to correct an illegal sentence. District court denied the motion after reviewing State’s response. Redding appealed claiming: (1) his pro se motion should have been liberally construed as a K.S.A. 60-1507 motion; (2) his due process rights were violated when district court requested a response from the State before summarily denying the motion without appointment of counsel; and (3) his sentence was illegal because district court did not consider his written allocation as a second motion to further depart from the grid-box numbers. Court of Appeals affirmed in unpublished opinion. Redding’s petition for review granted.

ISSUES: (1) Liberally construing the motion; (2) due process right to appointed counsel; (3) summary denial of motion to correct an illegal sentence

HELD: Under facts in this case, including form and content of Redding’s motion, district court did not err in construing the motion as one filed under K.S.A. 22-3504 seeking to correct an illegal sentence.

Appellate courts treat motions under K.S.A. 22-3504 like motions under K.S.A. 60-1507 motions for purposes of determining whether a hearing and appointment of counsel are required. If district court conducts a hearing to determine whether a K.S.A. 22-3504 motion presents substantial questions of law or triable issues of fact, a movant’s due process right to appointed counsel is implicated. But a district court’s review of State’s response to the motion, standing alone, is not the equivalent of a hearing and does not trigger the movant’s due process right to counsel. See State v. Stewart, __ Kan. __ (2019)(this day decided).

When district court accepts the recommendation of a plea agreement to depart from an off-grid Jessica’s Law hard-25 life sentence to a specific on-grid sentence, the court’s failure to consider a second departure to an even shorter sentence does not render the agreed-upon sentence illegal. Here, district court properly considered Redding’s initial departure motion as a request to depart from hard 25 Jessica’s law sentence to an on-grid sentence, followed statutory procedures for doing so, and was under no obligation to consider any further departures that were obliquely referenced in allocation.

STATUTES: K.S.A. 2018 Supp. 22-3504(1); K.S.A. 21-3502(a)(2), -3504(a)(3)(A), 22-3504, -4506(b), 60-1507, -1507(b), -1507(f)

APPELLATE PROCEDURE—CRIMINAL LAW— STATUTES

STATE V. RIZAL
JOHNSON DISTRICT COURT—AFFIRMED
COURT OF APPEALS—AFFIRMED
NO. 115,036—JULY 19, 2019

FACTS: In bench trial on stipulated facts, Rizal convicted of possessing a controlled substance —naphthoylindole (“K2”), a synthetic cannabinoid — with intent to distribute it at gas station she owned. Rizal appealed, claiming in part that insufficient evidence supported the conviction because State only proved she knowingly sold what she thought was “incense,” and not that she possessed K2 with “knowledge” as defined in McFadden v. United States, 576 U.S. __ (2015). Court of Appeals affirmed in unpublished opinion, distinguishing McFadden from the Kansas statute, but also finding substantial competent evidence if McFadden applied. Review granted. In supplemental brief Rizal argued new claim that the substance she possessed was not a controlled substance, but a controlled substance analog, based on her lay analysis of chemical compounds in packets sold.

ISSUES: (1) New claim on appeal; (2) knowledge of nature of the controlled substance; (3) sufficiency of the evidence

HELD: Rizal’s new analog argument is unpreserved and not reviewed. Undisputed fact in the record that Rizal possessed the controlled substance naphthoylindole.

Court examines what it means to “knowingly” exercise control over a controlled substance, finding Court of Appeals
erred in its interpretation of K.S.A. 2011 Supp. 21-5705(a)’s knowledge requirement. To convict a defendant of possession with intent to distribute a controlled substance under K.S.A. 2011 Supp. 21-5705(a), State must prove the defendant had knowledge of the nature of the controlled substance. This knowledge requirement can be established by proving the defendant either knew the identity of the substance or knew that the substance was controlled. A mistake of fact about the nature of a controlled substance can negate the knowledge requirement.

Under facts in this case, Rizal’s conviction is affirmed because State presented sufficient evidence that Rizal knew the substance was controlled.


CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—MOTIONS—POSTCONVICTION REMEDIES
STATE V. ROBERTS
SEDGWICK DISTRICT COURT—AFFIRMED COUNCIL OF APPEALS—AFFIRMED NO. 114,726—JULY 12, 2019

FACTS: In consolidated appeal, Roberts contends: (1) district court’s summary denial of the K.S.A. 60-1507 motion without appointment of counsel after receiving State’s written response to the pro se motion failed to follow protocol established in Lujan v. State, 270 Kan. 163 (2000), and thereby violated his due process rights; and (2) district court erred by denying Roberts’ request for an evidentiary hearing on the 60-1507 motion, finding the motion was untimely and successive. Court of Appeals affirmed in unpublished opinion. Review granted.

ISSUES: (1) Due process right to appointed counsel; (2) summary denial of K.S.A. 60-1507 motion

HELD: Steward v. State, ___ Kan. ___ (2019)(this day decided), clarified that the Lujan protocol does not require appointment of counsel when the district court discerns a potentially substantial issue, albeit the court has discretion to do so. District court may, but is not required to, appoint an indigent K.S.A. 60-1507 movant an attorney during the period the court is making its determination of whether the motion, files, and records present a substantial question of law or triable issue of fact. Here, district court was not statutorily required to appoint counsel, as it determined that the motion, files, and records of the case presented no substantial question of law or triable issue of fact. And district court did not conduct a hearing at which the State was represented by counsel, so as to trigger Roberts’ due process right to appointed counsel.

Roberts’ request for remand to attempt to make case to district court for exceptions to the procedural bars to his untimely and successive K.S.A. 60-1507 motion, in lieu of establishing the existence of the exceptions on appeal, is denied.

STATUTE: K.S.A. 22-3402, -4506(b), 60-1507, -1507(f), -1507(f)(2)

APPELLATE PROCEDURE—CRIMINAL PROCEDURE—EVIDENCE—JURY INSTRUCTIONS—PROSECUTORS
STATE V. ROSS
SEDGWICK DISTRICT COURT—AFFIRMED NO. 117,850—JULY 19, 2019

FACTS: Ross convicted of felony murder and second-degree murder as a lesser included offense of premeditated murder, and felony abuse of a child. On appeal he claimed: (1) State committed prosecutorial error during rebuttal closing argument by stating the jury must find the defendant guilty if it did not believe the defendant’s testimony; (2) district court violated Ross’ statutory right to lesser included offense instructions by not offering an instruction on unintentional but reckless second-degree murder as a lesser included offense of premeditated murder; (3) district court erred in admitting into evidence two recorded jail phone calls between Ross and his mother; (4) pro se additional issues claiming the jury’s verdict operated as a de facto acquittal on the charge of first-degree felony murder, and claiming K.S.A. 2018 Supp. 21-5109(b)(1) infringed his right to present a complete defense; and (5) cumulative error denied him a fair trial.

ISSUES: (1) Prosecutorial error; (2) jury instruction; (3) admission of phone call evidence; (4) supplemental issues raised pro se; (5) cumulative error

HELD: Prosecutor’s misstatement was error, but in context of prosecutor’s surrounding comments did not effectively shift burden of proof. No reversible error shown.

An instruction on reckless second-degree murder was legally appropriate, but whether it was factually appropriate is immaterial because any error in failing to offer the instruction was harmless. On evidence in the case, no reasonable probability that jury could have inferred the killing of the child victim was done unintentionally but recklessly.

No error in admitting the two phone calls. Probative value of the calls far outweighed the resulting prejudice.

Ross’ newly raised arguments were insufficiently preserved for appellate review.

Aggregated effect of prosecutor’s misstatement which did not prejudice Ross’ right to a fair trial, and assumed instructional error which was harmless, did not constitute reversible error.

STATUTES: K.S.A. 2018 Supp. 21-5108, -5109(b)(1), -5403(a)(2); K.S.A. 60-455
APPEALS—CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—EVIDENCE—FOURTH AMENDMENT—MOTIONS
STATE V. SANDERS
SHAWNEE DISTRICT COURT—AFFIRMED
COURT OF APPEALS—REVERSED
NO. 118,640—JULY 26, 2019

FACTS: Officers stopped, handcuffed and searched Sanders after he walked away from car and then allegedly ran and attempted to conceal himself by standing behind a drainpipe in the alleyway. Sanders was arrested upon discovery of outstanding warrant. Further search of his possessions resulted in drug charges. Sanders filed motion to suppress, arguing he had been unlawfully seized and searched. The district court granted the motion, noting inconsistencies and problems with officers’ testimony. State filed interlocutory appeal. In an unpublished opinion, the court of appeals panel upheld the district court’s finding that officers lacked reasonable suspicion to detain Sanders, but reversed suppression of the evidence, applying the attenuation doctrine analysis in Utah v. Strieff, 579 U.S. __ (2016), based on discovery of Sanders’ outstanding arrest warrant. Sanders petitioned for review with officers’ testimony. State filed interlocutory appeal. In an unpublished opinion, the court of appeals panel upheld the district court’s finding that officers lacked reasonable suspicion to detain Sanders, but reversed suppression of the evidence, applying the attenuation doctrine analysis in Utah v. Strieff, 579 U.S. __ (2016), based on discovery of Sanders’ outstanding arrest warrant. Sanders petitioned for review of the panel’s application of the attenuation doctrine. State cross-petitioned for review, arguing Sanders’ attempt to conceal himself and flee from the police was sufficient evidence for reasonable suspicion, and the inventory of possessions on arrest and booking would sustain application of the inevitable discovery doctrine.

ISSUES: (1) Reasonable suspicion to detain; (2) attenuation doctrine; (3) inevitable discovery

HELD: The only evidence that Sanders attempted to flee and conceal himself was the officer’s supposition which distinguished Sanders, but reversed suppression of the evidence, applying the attenuation doctrine analysis in Utah v. Strieff, 579 U.S. __ (2016), based on discovery of Sanders’ outstanding arrest warrant. Sanders petitioned for review of the panel’s application of the attenuation doctrine. State cross-petitioned for review, arguing Sanders’ attempt to conceal himself and flee from the police was sufficient evidence for reasonable suspicion, and the inventory of possessions on arrest and booking would sustain application of the inevitable discovery doctrine.

Background of attenuation doctrine and exclusionary rule is reviewed. The three attenuation doctrine factors stated in Brown v. Illinois, 422 U.S. 590 (1975), are discussed and applied. Here, all three factors favor suppression. First, the timing between the investigatory detention without reasonable suspicion and the discovery of the outstanding warrant were in close proximity. Second, the initial search of Sanders before discovery of the preexisting warrant was not an intervening circumstance that broke the causal chain between the unconstitutional seizure and search because Strieff’s reasoning was specific to a search incident to arrest after the warrant is discovered. Third, officers committed several unconstitutional violations, and their actions were purposeful and flagrant misconduct.

State did not preserve its arguments about either the inevitable discovery doctrine or an inventory search exception. District court appropriately suppressed the evidence based on the arguments presented. Judgment of Court of Appeals reversing the district court is reversed. Judgment of the district court is affirmed.

STATUTE: K.S.A. 20-3018(c)

APPEALS—CRIMINAL LAW—CRIMINAL PROCEDURE—MOTIONS—STATUTES
STATE V. SARTIN
SEDGWICK DISTRICT COURT—AFFIRMED IN PART
COURT OF APPEALS—AFFIRMED IN PART, REMANDED
NO. 115,172 - AUGUST 16, 2019

FACTS: Criminal history score for Sartin’s 1995 Kansas sentence included scoring five prior Illinois convictions classified as person felonies. He filed 2015 motion to correct an illegal sentence, arguing one of his Illinois convictions should have been scored as a nonperson felony pursuant to State v. Murphy, 309 Kan. 585 (2019). District court denied the motion, based on State v. Keel, 302 Kan. 560 (2015), overruling Murdock I. Sartin appealed, contesting the scoring of all five Illinois convictions. In unpublished opinion, court of appeals affirmed the district court’s denial of the motion, finding the Illinois crime of aggravated criminal sexual abuse was comparable to Kansas crime of aggravated sexual battery. Panel declined to consider Sartin’s challenge to the other four Illinois convictions because they were not mentioned in the K.S.A. 22-3504 motion. Sartin’s petition for review granted.

ISSUES: (1) Classification of Illinois crime of aggravated criminal sexual abuse; (2) consideration of other illegal sentencing claims

HELD: Pursuant to State v. Murphy, 309 Kan. 585 (2019) (Murdock II), Sartin is stuck with the “closest approximation” test for comparable offenses, the law in effect at the time his 1995 sentence was imposed. Panel correctly determined that Illinois’ aggravated criminal sexual abuse is comparable to Kansas’ aggravated sexual battery, and thus was properly scored as a person felony in Sartin’s criminal history score.

Appellate courts have statutory authority to consider illegal sentence issues for first time on appeal based on statutory directive in K.S.A. 22-3504(1). Panel erred when it declined to consider Sartin’s challenge to the classification of his other four Illinois convictions. Case remanded to court of appeals with instructions to consider and rule on merits of the person offense classification of the other four Illinois convictions.

STATE V. SAUCEDO
RENO DISTRICT COURT—REVISED,
SENTENCE VACATED, CASE REMANDED
COURT OF APPEALS—REVISED
NO. 117,299—AUGUST 2, 2019

FACTS: Saucedo appealed his sentence, alleging the district court erred in classifying his prior Washington residential burglary conviction as a person felony. In unpublished opinion, Court of Appeals affirmed, relying heavily on State v. Moore, 52 Kan.App.2d 799 (2016), prior to that case being reversed, 307 Kan. 599 (2018), by applying test in State v. Wetrich, 307 Kan. 552 (2018). Saucedo’s petition for review granted, and parties ordered to show cause why the Court should not (1) summarily vacate the panel’s decision; (2) summarily vacate Saucedo’s sentence; and (3) remand the case to the district court for resentencing in accordance with Wetrich and Moore.

ISSUE: (1) Out-of-state conviction—residential burglary

HELD: Under Wetrich and Moore, Saucedo’s Washington conviction was not comparable to any offense under the Kansas criminal code because the Washington crime’s mental state element is not identical to, or narrower than that of the Kansas crime. As the durational departure sentence ultimately imposed obviously followed from district court’s erroneous view of the sentence, there was an abuse of discretion. Sentence is vacated and case remanded to district court for resentencing with a criminal history score characterizing the Washington conviction as a nonperson felony.

STATUTE: K.S.A. 2018 Supp. 21-5413(a), -5413(g)(1), -5807(a)(1) -6203, -6801 et seq., -6805, -6811(e)(3)

APPEALS—APPELLATE PROCEDURE—
CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—
EVIDENCE—MOTIONS—STATUTES
STATE V. SOTO
SEDGWICK DISTRICT COURT—REVERSED
AND REMANDED
NO. 117,059—JULY 26, 2019

FACTS: Soto convicted of first-degree premeditated murder. Convictions affirmed but hard-50 sentence vacated pursuant to Alleyne v. United States, 570 U.S. 99 (2013), and case remanded to district court for resentencing. Mandate signed in May 2014. Prior to resentencing, State discovered and shared with the defense some polygraph evidence that was contrary to testimony of a key witness against Soto. Soto filed June 2016 motion seeking a new trial based on a Brady violation and newly discovered evidence. He also argued the mandate rule did not apply because it prohibited only relitigation of issues and the Brady violation had never been litigated. State opposed the motion, and filed notice it would no longer seek a hard-50 sentence. Soto filed amended motion alleging ineffective assistance of trial counsel in failing to discover the witness polygraphs and related statements. District court denied the motion without addressing merits of the Brady claim, and resentenced Soto to hard 25 life sentence. Soto appealed. State’s brief argued in part the mandate rule eliminated district court’s subject matter jurisdiction beyond that necessary to replace Soto’s vacated hard 50 sentence. State also argued the motion for new trial was not filed within the two-years of final judgment.

ISSUES: (1) Mandate rule - subject matter jurisdiction; (2) timeliness of motion for new trial; (3) ineffective assistance of counsel

HELD: K.S.A. 60-2106(c) and K.S.A. 20-108, designed to enforce the hierarchy of Kansas courts, were not designed to set up broad limits on subject matter jurisdiction once a case was remanded. Soto sought district court action on a legal issue arising from facts unknown to him until the morning his resentencing trial was set to begin. Mandate rule would not have prevented the judge from reaching the merits of the Brady issue.

Where Soto’s conviction was affirmed on appeal but some part of the sentence was vacated and remanded to the district court for resentencing, there was no final sentence, hence no final judgment under K.S.A. 2018 Supp. 22-3501(1). District judge could have heard Soto’s motion seeking a new trial. By failing to recognize he was legally authorized to hear merits of the Brady claim, district judge’s denial of Soto’s motion qualified as an abuse of discretion. Case is remanded to evaluate merits of the Brady claim and whether discovery of the polygraph reports is so significant that new trial on Soto’s guilt is required.

No need to reach merits of the ineffective assistance of counsel claim which Soto advanced only because it might make a procedure other than a motion for new trial available.

STATUTES: K.S.A. 2018 Supp. 21-6806(c), 22-3501(1), -3717(b)(2)(B); K.S.A. 20-108, -3401, 60-1507, -2106(c)

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—
EVIDENCE—FOURTH AMENDMENT—MOTIONS
STATE V. TATRO
SALINE DISTRICT COURT—REMANDED
WITH DIRECTIONS
COURT OF APPEALS—REVISED
NO. 118,237—JULY 26, 2019

FACTS: An officer stopped Tatro who was walking with a flashlight in middle of a public street in a high-crime area for vehicle burglaries. Tatro was arrested when a warrant check disclosed an outstanding warrant. Seizure and search of Tatro’s purse resulted in Tatro being charged with possession
of drug paraphernalia. She moved to suppress evidence, arguing she had been unconstitutionally detained and searched. District court granted the motion. State filed interlocutory appeal. In an unpublished opinion, the court of appeals upheld the district court’s finding that the encounter was involuntary and officer’s detention of Tatro was unsupported by reasonable suspicion. But it reversed district court’s ultimate decision, relying on Utah v. Strieff, 579 U.S. ___ (2016), to hold an intervening circumstance attenuated the taint of an unlawful seizure and thus did not invalidate a later search. Tatro’s petition for review was granted.

ISSUE: (1) Attenuation doctrine

HELD: The panel’s holding that the officer unconstitutionally seized Tatro is accepted because the State did not cross-petition for review of this adverse holding. The background of the exclusionary rule and attenuation doctrine is reviewed. The three attenuation doctrine factors stated in Brown v. Illinois, 422 U.S. 590 (1975), are discussed and applied. The district court did not err in finding the temporal proximity factor favored suppression, but the intervention factor strongly favored the State. Under Strieff, the district court erred in failing to consider the officer’s discovery of an arrest warrant as a circumstance that intervened between the officer’s illegal detention of Tatro and the search of her purse after arresting her on the warrant. The district court’s findings are too unclear to determine whether it correctly decided the flagrancy factor. The case was remanded to district court for further appropriate findings of fact under the correct legal standard.

STATUTE: K.S.A. 20-3018(b), 22-2402

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—MOTIONS—POSTCONVICTION REMEDIES—SENTENCING—STATUTE

STATE V. TAUSER
SEDGWICK DISTRICT COURT—AFFIRMED; COURT OF APPEALS—AFFIRMED
NO. 114,432—JULY 12, 2019

FACTS: Some 20 years after his conviction and sentence became final in 1996, Tauer filed motion citing State v. Dickey, 301 Kan. 1018 (2015 (Dickey I), and State v. Dickey, 305 Kan. 217 (2016)(Dickey II), and claiming his prior New Mexico juvenile conviction should have been classified as a nonperson felony in sentencing. Court of Appeals affirmed in unpublished opinion. Review granted due to conflicting panel opinions.

ISSUE: (1) Motion to correct illegal sentence

HELD: Issue in this case is whether Tauer’s sentence is illegal, not the date he filed his motion under K.S.A. 22-3504(1). Pursuant to State v. Murdock, 309 Kan. 585 (2019)(Murdock II), the point in time to assess a sentence’s legality for purposes of a K.S.A. 22-3504(1) motion to correct an illegal sentence is the moment the sentence was pronounced. If a sentence was legal when pronounced, subsequent changes in the law will not render it illegal and amenable to correction under K.S.A. 22-3504(1). The rule in Dickey I and Dickey II derived directly from Apprendi v. New Jersey, 530 U.S. 466 (2000), a change in the law after Tauer’s sentence became final. Pursuant to Murdock II, Tauer cannot avail himself of that subsequent change in the law. District court’s denial of the motion to correct an illegal sentence is affirmed.

STATUTE: K.S.A. 22-3504(1)
FACTS: E.H. and the rest of her family were injured in an auto accident caused by another driver. The at-fault driver’s insurance policy covered bodily injury up to $25,000 per person and $50,000 per accident. E.H.’s parents’ own insurance policy had underinsured motorist coverage. After all of the claims were filed, the at-fault driver’s policy settled up to policy limits with all of the injured parties. Both E.H. and her father filed a claim with Automobile Club Inter-Insurance Exchange, their insurer, for UIM benefits. ACIE disputed the amount of UIM benefits due to E.H., and she filed suit in district court for breach of contract. E.H. believed she was due $38,000, which was the $50,000 per person UIM limit minus the $12,000 she received from the at-fault driver’s coverage. ACIE countered that the $50,000 limit was per accident and not per person. The district court agreed with E.H. and awarded her $38,000, subject to her actually proving damages. ACIE appealed.

ISSUES: (1) Amount of UIM coverage available; (2) effect of state law

HELD: When calculating the amount of UIM coverage available, the district court should have added together everything that the family received from the at-fault driver’s insurance coverage and subtracted that from the $100,000 per occurrence cap available through ACIE. That results in a maximum available benefit to E.H. of $35,000. Any language in ACIE’s policy that attempts to limit coverage runs counter to the mandatory language of K.S.A. 40-284(b) and is void and unenforceable.

STATUTE: K.S.A. 40-284(b), -284(e)

SERVICE OF PROCESS—STATUTORY CONSTRUCTION
COASTAL CREDIT, LLC V. MCNAIR
RILEY DISTRICT COURT—REVERSED AND REMANDED
NO. 119,798—JULY 12, 2019

FACTS: McNair borrowed money from Coastal Credit so that he could buy a car. After McNair defaulted, Coastal Credit repossessed the car and sold it. There was a deficiency, though, so Coastal Credit filed a limited action lawsuit against McNair seeking the remaining balance, plus interest. At the time the lawsuit was filed, McNair was deployed with the United States Army to an overseas location. His wife and children lived in off-base housing. A process server attempted to serve McNair by serving a copy at McNair’s “usual place of abode” with his wife. McNair did not answer the suit or appear. Eventually, the district court granted default judgment to Coastal Credit. After noticing that his wages were being garnished, McNair moved to set aside the default judgment on grounds that service was improper. At a hearing, McNair’s wife disputed that she ever received service at the apartment. The district court denied the motion to set aside and McNair appealed.

ISSUE: (1) Adequacy of service
HELD: McNair’s only argument on appeal is that the judgment was void for lack of legal service of process. Although it is undisputed that McNair’s family lived in Manhattan, the relevant question is the location of McNair’s place of abode. The term “usual place of abode”, as used in the statute, is not the same as a person’s domicile. At the time process was served, McNair’s usual place of abode was at his Army deployment in Africa. McNair was never properly served, and the default judgment must be set aside.

STATUTE: K.S.A. 2018 Supp. 60-260(b)(4), -260(c), 61-3301(c), -3301(d), -3003(d)(1), 77-201 Twenty-fourth

CIVIL PROCEDURE—CREDITOR AND DEBTOR—ESTOPPEL AND WAIVER—FRAUD AND DECEIT—LIMITATIONS OF ACTIONS—STATUTES—SUMMARY JUDGMENT—TORTS

FOXFIELD VILLA ASSOCIATES, V. ROBBEN

JOHNSON DISTRICT COURT—AFFIRMED

NO. 119,611—AUGUST 2, 2019

FACTS: Parties involved in complex and unsuccessful real estate project that resulted in loss of millions of dollars, two federal lawsuits, a bankruptcy, and two district court lawsuits in Johnson County, one of which resulted in this appeal. Paul Robben, married to Lori Robben, was transaction broker for a 2008 real estate transactions involving Foxfield Villa Associates and parties (collectively “FVA”). FVA defaulted on a 2010 loan from Bank of Blue Valley Bank (“BBV”) for purchase and development of acreage. FVA then sued BBV in Johnson County and federal court. District court ruled against FVA’s claims and in favor of BBV’s counterclaims. Based on Paul’s 2013 disclosure that he was acting as the transaction broker under Lori’s supervising authority during the 2008 transaction, FVA filed second suit in 2016 against Lori (collectively “Lori”) alleging negligent supervision, vicarious liability, aiding and abetting negligence, common-law negligent supervision, fraudulent transfer of three properties, conspiracy to commit fraudulent transfer, and aiding and abetting fraudulent transfer. District court granted Lori’s motion for summary judgment on all FVA claims, finding in part the two-year statute of limitations barred FVA’s claims of negligence, and FVA’s claims had been extinguished based on the Uniform Fraudulent Transfer Act (UFTA). FVA appealed arguing: (1) it could not have reasonably ascertained it was injured within the two-year statute of limitations and thus was entitled to equitable estoppel; and (2) it’s fraudulent transfer claims survive because FVA could not have reasonably discovered the transfers until after it filed suit in this case. FVA also asks for recognition of new causes of actions in Kansas:—conspiracy to commit fraudulent transfers and aiding and abetting fraudulent transfers.

ISSUES: (1) Negligence claims, (2) equitable estoppel, (3) fraudulent transfer claims, (4) new causes of actions

HELD: District court did not err in applying K.S.A. 60-513(b) to FVA’s negligence claims. The act causing FVA’s injuries happened on or before 2008. Even assuming FVA did not know of Lori’s involvement until 2016, FVA’s negligence claims are still barred because the statutory limitation period begins once FVA knew it was injured, not when FVA discovered who injured it. Summary judgment was appropriate because no facts disputed that FVA had reasonably ascertained it was injured when it filed its first lawsuit in 2011.

FVA is not entitled to equitable estoppel. FVA presented no facts to establish Lori or Paul committed affirmative acts to limit FVA’s discovery of alleged negligence. FVA’s claims of fraudulent concealment, dodging subpoena service, and refusal to attend depositions are waived by failure to cite to the appellate record. FVA presented no facts or law to support a finding that Lori had a fiduciary relationship to disclose any supervisory relationship she had with Paul. And FVA’s equitable estoppel claim presents no fact questions appropriate for trial.

District court did not err in granting summary judgment on FVA’s fraudulent transfer claim that was based on transfer of three properties. Each property transfer is reviewed. FVA’s fraudulent transfer claim relies on K.S.A. 33-204(a)(2) or K.S.A. 33-205(a) which grant a creditor the right to recover for a fraudulent transfer when a debtor does not receive reasonable value for transfer of the property. Such claims are subject to the four-year time limitation in K.S.A. 3-209(b) and are not entitled to saving clause in that statute. Even if fraudulent transfer of the properties for actual intent could be presumed as arising under K.S.A. 33-204(a)(1), FVA is not entitled to the savings clause on facts in this case. District court’s reliance on Bi-State Dev. Co., In., v. Shafer, Kline & Warren, Inc., 26 KanApp.2d 573 (2018), was harmless error. FVA waived estoppel and limited discovery arguments by failing to brief the arguments.

District court did not err in granting summary judgment against FVA’s claims of conspiracy to commit fraudulent transfers, and aiding and abetting fraudulent transfers. Even if FVA had a cause of action for conspiracy to commit a fraudulent transfer, FVA cannot recover because summary judgment against the underlying claim of fraudulent transfer was appropriate. Kansas courts have never determined whether conspiracy can extend to include conspiracy for fraudulent transfers, or whether a party may raise a claim of aiding and abetting a fraudulent transfer. Split of authority in other jurisdictions is noted.

STATUTE: K.S.A. 33-201 et seq., -201(g), -204, -204(a)(1), -204(a)(2), -204(b)(1), -204(b)(3) -205, -205(a), -209(a), -209(b), 60-513(a), -513(a)(4), -513(b)
FACTS: Peterson is an inmate who subscribed to a newspaper. The correctional facility seized two issues of the paper, claiming that they had content which was a threat to the facility’s safety. Peterson appealed the seizure and the decision was upheld by the Secretary of Corrections’ designee. Peterson then filed an inmate grievance claiming he was subject to improper censorship. That grievance was denied. Peterson followed up by filing a K.S.A. 60-1501 petition, arguing that the Department of Corrections was not properly applying its own regulations regarding censorship. The district court denied the petition as untimely, and Peterson appealed.

ISSUE: (1) Timeliness of petition

HELD: Peterson’s use of the facility grievance procedure was not part of his administrative remedies and did not toll the time in which to file his 60-1501 petition. Because the time limit was not tolled, the district court properly dismissed Peterson’s petition as untimely.

STATUTES: K.S.A. 2017 Supp. 60-1501, -1501(b); K.S.A. 75-52,138

NEUTRAL RISK—WORKERS COMPENSATION
JOHNSON V. STORMONT VAIL HEALTHCARE
WORKERS COMPENSATION BOARD—AFFIRMED
NO. 120,056—JULY 12, 2019

FACTS: Johnson worked as a housekeeper at Stormont Vail Hospital. In 2015, while working, Johnson tripped and fell. The resulting injury to her knee required rehabilitation and physical therapy, and kept her off work for three months. Six months later Johnson fell again. As before, she did not know what caused the fall. She broke her wrist and was again off work for an extended period. Johnson sought workers compensation benefits and an administrative law judge awarded compensation for both falls. Stormont Vail sought review from the Workers Compensation Appeals Board, arguing that Johnson’s falls stemmed from neutral risks and did not arise out of and in the course of her employment. The Board disagreed, and Stormont Vail appealed.

ISSUES: (1) Causation beyond neutral risk; (2) burden of proof

HELD: The Board correctly found that walking was part of Johnson’s work duties. She was working, and walking, when she fell. Both falls involved neutral risk with a particular employment character, and as such, her injuries are compensable. Johnson was not required to prove that her injuries did not result from a neutral risk. Once the Board found that Johnson met her statutory burden, the burden shifted to Stormont Vail to support its claim that there was no particular employment character tied to Johnson’s activity during the falls.


CRIMINAL

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—FOURTH AMENDMENT—MOTIONS
STATE V. ARRIZABALAGA
SALINE DISTRICT COURT—AFFIRMED
NO. 120,209—JULY 26, 2019

FACTS: Trooper stopped Arrizabalaga on I-70 for traffic infraction, and noted the van smelled of a strong odor-masking product and was filled with boxes and bags. Ticket issued when dispatch confirmed Arrizabalaga’s license was valid and provided criminal history. Arrizabalaga consented to further questioning about criminal record and to search of his van, but withdrew consent some 24 minutes into the stop when trooper stated he was searching for large amount of drugs and asked passenger to exit the van. Arrizabalaga was then detained for another 24 minutes for police dog to arrive. Dog alert resulted in Arrizabalaga’s arrest on drug charges. Arrizabalaga filed motion to suppress. District court denied the motion, finding in part that reasonable suspicion existed for the initial traffic stop, and that Arrizabalaga consented to additional questions until withdrawing his consent for search of the van. Arrizabalaga filed second motion to suppress, arguing the length of detention for drug dog’s arrival was too long. District court granted this motion, based on trooper’s lack of diligence in pursuing purpose of stop, and holding Arrizabalaga for excessive time until drug dog arrived. State filed interlocutory appeal, citing Rodríguez v. United States, 575 U.S. 348 (2015), to argue the length of detention does not matter once trooper has reasonable suspicion during a traffic stop.

ISSUE: (1) Traffic stop—duration of detention

HELD: No Kansas caselaw directly addresses the narrow issue in this case as to whether trooper was diligent enough in verifying or dispelling his suspicion of drugs after finding reasonable suspicion. State’s reliance on Rodríguez is criticized. Here, district court properly applied analysis in United States v. Sharpe, 470 U.S. 675 (1985), to find in context of facts of this case that the length of the stop was excessive. Substantial competent evidence supports district court’s finding that trooper failed to diligently and reasonably pursue the purpose of the stop, because he did nothing about his suspicion until the second 24-minute period began.

DISSENT (Gardner, J.): Would reverse the district court’s suppression of evidence. Neither the law nor facts in this case suggest that Arrizabalaga’s detention for 24 minutes based on trooper’s reasonable suspicion of a crime was unreasonable. No Kansas case has examined the permitted length of a detention justified by reasonable suspicion after the conclusion.
of a traffic stop to get a drug dog on site, but federal cases are cited and discussed. No authority suggests due diligence requires officer to call a drug dog as soon as the officer reasonably suspects criminal activity is occurring, particularly where other factors, such as consent, show no need for a drug dog at the time. Under facts in this case, trooper was diligent in trying to get drug dog as soon as possible under the circumstances.

STATUTES: K.S.A. 2018 Supp. 22-3608; K.S.A. 22-2402(l)

CRIMINAL LAW—CRIMINAL PROCEDURE—SECURITIES—SENTENCES—STATUTES
STATE V. MORLEY
SHAWNEE DISTRICT COURT—REVERSED, SENTENCES VACATED, REMANDED
NO. 120,017—AUGUST 16, 2019

FACTS: Four Kansas investors lost $845,900 as a consequence of Morley’s actions in selling preferred stock shares in Summit Trust Company. Morley was indicted on multiple counts of securities fraud, sale of unregistered security and acting as an unregistered issuer agent. Pursuant to plea agreement, Morley entered no contest plea to one count of securities fraud and one count of acting as unregistered issuer agent, and State dismissed remaining ten counts. Both convictions have presumptive prison terms, and are subject to special rule of presumed imprisonment for violations of Kansas Uniformed Securities Act. Morley’s criminal history included similar wrongdoing that culminated in a 2006 consent order issued by Maryland Securities Commissioner permanently barring Morley from the securities and investment advisory business in that state. District court imposed concurrent prison terms, but granted Morley’s motion for dispositional departure, placed Morley on probation for 36 months, and ordered payment of $845,900 in restitution. Sole basis stated for the dispositional departure was Morley taking responsibility for his actions. State appealed.

ISSUES: (1) Substantial competent evidence for acceptance of responsibility, (2) substantial and compelling reason to support a dispositional departure

HELD: Kansas law applicable to departure decisions is summarized. Under facts of this case, Morley’s acceptance of responsibility for his crimes may be a valid nonstatutory mitigating factor in support of a downward durational departure sentence, but there was no substantial competent evidence to support that factor. As in State v. Theurer, 50 Kan. App. 2d 1203 (2014), motivation for Morley’s no contest pleas was not to accept responsibility but to mitigate his accountability by obtaining a very favorable outcome. And while Morley agreed to pay restitution, he offered no plan and had no real financial ability to pay all or a substantial part of victims’ losses given his age, limited income and pending bankruptcy proceedings.

Even if substantial competent evidence supported this mitigating factor is assumed, in this case the district court erred in its legal conclusion that this factor was real, substantial, and compelling such that the district court was forced by the case facts to abandon the status quo, venture beyond presumptive prison sentences, and grant probation. Reversed and remanded to district court for resentencing.

STATUTES: K.S.A. 2018 Supp. 17-12a508(a)(5), 21-6604(b)(1), -6604(b)(2), -6815(a), -6815(c)(1)(A)-(E), -6817(a)(1), -6817(a)(4), -6820(f); K.S.A. 17-12a301, 12a402, -12a501, 22-3209(2)

CRIMINAL PROCEDURE—MOTIONS—SENTENCES
STATE V. SCHULZE
SALINE DISTRICT COURT—SENTENCE VACATED AND CASE REMANDED
NO. 119,184—JULY 26, 2019

FACTS: Schulze entered no contest plea to felony theft. District court imposed sentence using a PSI report that showed a criminal history score of C and listed 18 prior convictions. Shortly after sentencing, court services provided an amended PSI that increased criminal score to B and listed 23 prior convictions, including two person misdemeanors not included in the original report. State moved to correct an illegitimate sentence. District court granted the motion and imposed an increased sentence, holding the original sentence violated applicable statutory provisions requiring all of a defendant’s prior convictions to be counted. Schulze appealed.

ISSUE: (1) Sentencing - error in presentence report

HELD: Schulze’s original sentence controls. State has burden of proving the defendant’s criminal history score, and if it fails to find one or more convictions, it is prohibited from later amending, and ultimately increasing, the severity level of the defendant’s criminal history for the crime(s) at issue. Based on State v. Dickey, 301 Kan. 1018 (2015), and State v. Weber, 297 Kan. 805 (2013), State cannot later challenge the factual basis for Schulze’s criminal history score when it failed to object to it before the district court. Invited error rule, and distinction between factual and legal stipulations, are discussed.

STATUTES: K.S.A. 2018 Supp. 22-3504; K.S.A. 2017 Supp. 21-6810(c), -6810(d)(6), -6811(a), -6814(a), -6814(b), 22-3504; K.S.A. 2016 Supp. 21-6804(a)
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