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‘Tis the Season

by Shelby Smiley, Executive Director, KBA/KBF

As we approach the holiday season it seems the perfect opportunity to reflect on the abundance of gratitude I feel for the opportunity to be a part of the Kansas Bar Association family. It’s been one year since I joined the KBA and I am still thrilled, humbled and grateful to be granted the opportunity to work for our members. Here are just a few of the reasons why.

1. **KBA Work Family.**

I’m thankful for my coworkers’ idiosyncrasies. Their unusual viewpoints. Even their wacky senses of humor. Our wide variety of perspectives, experiences and attitudes generate a unique team dynamic that makes every day more interesting. And it’s great to know that by combining our weird brains, we can create ideas that none of us could ever conceive separately.

2. **Board members.**

The Kansas Bar Association Board of Governors and the Kansas Bar Foundation Board of Trustees are some of the hardest working board members I have ever encountered. I’m grateful that they placed their trust in me a year ago to lead these amazing organizations. I’m so lucky to have their support and wisdom as we work together to strengthen the organizations and improve our service to our members, trustees and the entire Kansas legal community.

3. **Members who support each other.**

One of the key benefits of belonging to an association is access to all the other people who belong. Whether through in-person events, online communities, sharing resources and knowledge, or just simply letting others know that they are not alone, the KBA community looks out for each other. I’m thankful that so many of our members are willing to take time out of their busy schedule to ensure their fellow members have the tools to be successful lawyers.

4. **Members who are dedicated.**

The KBA wouldn’t be successful without our committed volunteers. Our members care about the work of the KBA, the content we create and the events and activities we plan. Whether delivering high-quality continuing legal education, writing and editing content for our Journal or advocating for the legal profession on legislative issues, KBA members are eager to volunteer and go the extra mile to deliver.

5. **Members who keep coming back.**

It’s wonderful to see so many members already renewing their memberships this year. I’m grateful that our members see the value in the work the KBA does for lawyers and understand that their dues are, at least in part, a contribution to make that work possible. Thank you for continuing to be the hardworking, dedicated, and professional members that make our association so wonderful.

6. **Fresh coffee in the breakroom** on the days that I don’t have time to make fancy coffee. I like coffee. A lot.

7. **Ugg slippers** hidden under my desk. Sometimes my office gets cold. And everyone knows you can’t concentrate when your feet are freezing.

8. **Time off.** Hey, you’ve got to recharge and take care of the other part of your life. Be grateful for time off from work over the holidays, and enjoy spending time with friends and family.

This season is a time to sit back, take stock and express gratitude for the good things in our lives. In between bites of turkey, cranberry sauce and stuffing, take a minute to think about what you’re thankful for at work.
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Please contact Anne Woods at 785-861-8838 if you have questions about giving options or how to become a KBF Fellow.
2020 Awards of the KBA

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

Deadline for nominations is Friday, March 6.

Phil Lewis Medal of Distinction

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

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

Distinguished Service Award

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

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

Professionalism Award

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

Pillars of the Community Award

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

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

This award may be but need not be given every year. More than one recipient can receive the award in a one year.
Awards of the Kansas Bar Association (Con’t.)

Christel Marquardt Trailblazer Award

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

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

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

Distinguished Government Service Award

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

Courageous Attorney Award

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

Outstanding Young Lawyer

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

Diversity Award

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

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

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

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

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

Outstanding Service Awards may recognize:

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

Pro Bono Award(s)

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

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

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

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

Nominee’s Name _______________________________________________________________

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

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

______________________________________________________________________________
______________________________________________________________________________
______________________________________________________________________________
______________________________________________________________________________
______________________________________________________________________________
______________________________________________________________________________
______________________________________________________________________________

Nominator’s Name _______________________________________________________________
Address ______________________________________________________________________
Phone __________________________ E-mail ________________________________________

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

KBA Awards Committee
Attn: Deana Mead
1200 SW Harrison St.
Topeka, KS 66612-1806
Kansas Bar Association
20th Annual CLE
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Technology can do so many things to make our lives easier and even safer. Our car may beep if we start to drift onto the shoulder. Our smart phones anticipate the words we might want to type based on what we have typed before. The word processing software identifies when we have potentially misspelled or misused a word or made a grammar error.

The problem is that all of these benefits can lull us into a sense of complacency. We may no longer feel compelled to pay as much attention when driving if we know the car will beep if it starts to drift. And we may not type or proofread as carefully if we think spell check is doing the work for us. And yet Microsoft Word’s spelling and grammar check has no problem with the phrase: words ewe knead two no.1

Many times, we just need to slow down and carefully read to identify when we have inadvertently typed “statue” instead of “statute.” And you only need to experience once the embarrassment of inadvertently omitting the “L” in “public” before you add that “Find” and “Replace” protocol to your editing checklist.

But there are also some homophones or related words where the correct spelling or usage is harder to detect because, well let’s face it, sometimes we just don’t know the difference.

**Affect vs. Effect**

Take this example:

Keanu Reeves has that **effect**.

Keanu Reeves has that **affect**.

The first sentence is saying that the actor had a particular impact, as in “She swooned when she saw his gorgeous smile; Keanu Reeves has that **effect** on most women over 45.” The second sentence conveys something about how the actor is displaying his mood or feelings, as in “He was expertly cast as a laid-back surfer dude in *Point Break* because Keanu Reeves has that **affect** perfected.”

One way to remember the difference is that when used in this context, you would pronounce the words differently. Effect begins with the “eh” sound, like in “exit” and has the emphasis on the second syllable. Affect begins with the same sound as the word “after” and has the emphasis on the first syllable.

In the examples above, the words are used as nouns. But effect and affect can also both be used as verbs:
The law **effected** Governor Kelly’s will.
The law **affected** Governor Kelly’s will.

As used in the first sentence, effect means to bring about or to accomplish, as in “After she had campaigned in support of the bill for months, the passage of the law **effected** Governor Kelly’s will.” In the second sentence, affect means to influence or impact. “Because her testamentary documents contained the provision the statute banned, the law **affected** Governor Kelly’s will.”

While some may also pronounce these two words differently when used as verbs,¹ I find that distinction less helpful here. More useful is to remember that most of the time if you are using the word as a verb, the correct spelling will be affect, and if you are using it as a noun, effect will be the correct choice. Many people use the mnemonic RAVEN to remember this:

Remember Affect=Verb, Effect=Noun.

**Principle vs. Principal**

Consider the following sentences:

**Principal** place of business is a **principle** relevant to the law of jurisdiction.

It is an important **principle** that agents should not have conflicts of interest with their **principals**.

**Principle** has only one meaning, while principal can be used in multiple ways. **Principal** can be an adjective or a noun. When used as an adjective, **principal** means the most important. When used as a noun, it means a person or entity with authority, like a school principal or the person or entity that appoints an agent. **Principal** also refers to the original sum of money loaned or borrowed, both as a noun and as an adjective, as in the principal amount of money he owned. **Principal**, on the other hand, is always a noun and means a foundational or fundamental belief, law or doctrine.

**Principal** ends in “pal” and so some people remember the difference by noting that it is a good idea to be a pal to the person in charge. But that **principal** is less helpful when the word is used as an adjective. Instead, I like to remember that **principle** ends in “le” and so does the word “rule.” So as a rule, use **principle**, while every other use is your pal: **principal**.

**Assure vs. Ensure vs. Insure**

Take this phrase:

Let me **assure**/**insure**/**ensure** you.

Which one is correct? The answer depends on what you mean to say. If you are trying to make someone feel better, you would say, “let me **assure** you.” If, on the other hand, you work for an insurance company, then you might want to say, “let me **insure** you.” If you want to provide a guarantee, then you would say, “let me **ensure** you.”

The confusion arises because all three words are related to the idea of making sure. Some American writers will use ensure and **insure** interchangeably. However, **insure** is relatively easy to distinguish because you can limit its use to the contexts surrounding insurance policies. The harder one is the difference between **assure** and **ensure**. To assure someone is to remove his or her doubts. To ensure something is to make certain it will or will not happen. One idea to help remember the distinction is that **ensure** means to guarantee, which ends with two “e’s.” Remembering that might help connect it to the word that begins with “e”: **ensure**. But you can also remember that when you **assure** someone, you are giving them a **sure**, as in “I am **sure** everything will be alright.”

Let me assure you that it is nearly impossible to ensure perfection. Instead, let your principal goal be to remember these principles: Let the RAVEN be your guide, make a pal out of the rule, and be sure of a guarantee.

---

¹ Words you need to know.

**About the Author**

Betsy Brand Six is a Clinical Associate Professor and the Director of Academic Resources at the University of Kansas School of Law. She teaches Lawyering Skills, Writing for Law Practice, and Jurisdiction. She aspires to be a person of principle, who assures her students of their potential, and who has a positive effect on students’ lives and careers.

bsix@ku.edu
“I love my CASA so much. Can I take her to show and tell?”

by Susan Saidian

A CASA is more formally known as a Court Appointed Special Advocate. CASAs are volunteers who receive special training over eight weeks, must pass a background check and commit to the time necessary to meet with children in foster care who have been adjudicated by the court system to be “in need of care.”

In Kansas, there are 23 local CASA organizations overseen and aided by CASA of Kansas. It has long been a force for good for children who find themselves in the court system due to abuse and/or neglect.

The National CASA Association got its start in 1977 when Judge David Soukup in Nevada had to determine what was in the best interests of a three-year-old who had suffered abuse and neglect. His idea was to have volunteers who would advocate for the child with actual information obtained from interactions with the child and who would also be parties to child in need of care proceedings where abuse or neglect was involved. He needed someone who could tell him what was in the best interest of the child, using information from the child’s perspective—something that could only be provided by someone who had direct interaction with the child other than the state or the parents. https://www.youtube.com/watch?v=ayoDh_v8tSM

Judge Soukup’s idea materialized into the Court Appointed Special Advocate/Guardian Ad Litem program, which ulti-
mately got its start in Seattle, Wash., and which now has local programs in 49 states and the District of Columbia.

A CASA meets with a child, listening to the child and observing the child’s behavior. Each CASA volunteer must meet with their child a minimum of once a month throughout their appointment to the case. Most of the time, the volunteer meets with the child far more frequently. The average time a volunteer is assigned to a child is two years. The training CASAs receive enables them to elicit information they can then incorporate into a report that is provided to the judge—a sort of an expert report on the child’s status. In Kansas, the CASA is NOT a party to the proceedings. CASAs participate in every court hearing and all other meetings and staffings regarding the child. Judges rely heavily on the court report, even though the CASA is not a party to the case (CASAs cannot present evidence, call witnesses, etc.)

The Kansas CASA Association supports 23 community-based programs in various ways, including technical support, recruitment assistance and training. Through that support, more than 2,150 children were served by 900 volunteers in 2018. Those 2,150 children represent only approximately 30 percent of children in need of care being adjudicated through the Kansas court system, and there is a need for more volunteers.

The Kansas Bar Foundation is proud to have Kansas CASA as one of its prior and current IOLTA grant recipients. It has had a tremendous impact on the children assigned a CASA in child in need of care cases. If you are interested in getting involved with the CASA program, please visit www.kansascasa.org

“Being in foster care is living in a constant state of flux: homes, schools, families...everything is always changing, often suddenly and without warning. My only constant was my CASA advocate. Without her, I would have been lost in the system.”
—Former child in need of care

“The Kansas Bar Foundation is proud to have Kansas CASA as one of its prior and current IOLTA grant recipients. It has had a tremendous impact on the children assigned a CASA in child in need of care cases. If you are interested in getting involved with the CASA program, please visit www.kansascasa.org

“CASA is recognized in Kansas and across the country as a model for watching over and protecting children in the court system. What makes CASA so successful is highly motivated volunteers and their ability to devote the time and attention needed to help one child at a time. The advocates and volunteers for CASA make a lifelong difference for children.”
—Senator Jerry Moran

About the Author

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

sgsaidian@gmail.com
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First Amendment Follies: Forbidden Films and the Kansas State Board of Review

by Mary Feighny

Imagine watching *When Harry Met Sally*, a 1989 film starring Meg Ryan and Billy Crystal playing two college acquaintances whose relationship evolves over the years and, eventually blossoms into romance. The couple are dining in Katz’s Deli in New York. Meg, trying to explain to a boastful Billy that women do, on occasion, fake orgasms, begins to writhe, invoke the Lord’s name, and moan with abandon, prompting a middle-aged woman at the next table to exclaim: “I’ll have what she’s having.”

Had this movie been distributed in Kansas prior to 1968, the deli scene would have been cut by the Kansas State Board of Review, an agency whose charge was to ensure that only clean and wholesome films, as determined by “three well-educated Christian women,” reached Kansas movie theatres. This article chronicles the agency’s rise and demise, felled eventually, by the First Amendment.

I. That’s Entertainment

In 1894, the first public protest of a motion picture erupted in New York City: *Dolorita in the Passion Dance*—shown on a Thomas Edison kinetoscope.1 Fearful of a raft of *Doloritas* invading the state and leading Kansans down a dark path, the Kansas legislature established, in 1913, the State Censor Board, whose mission was to review all “moving–picture” films before they could be exhibited in the state.2 Exhibiting an unapproved film exposed the theatre owner to criminal prosecution, with a maximum fine of $100 per day.3

The state superintendent of public instruction was tasked with rejecting moving picture films that were “sacrilegious, obscene, indecent, or immoral, or such as tend to corrupt morals.”4 An unhappy theatre owner could appeal the decision to a committee comprised of the governor, the attorney general, and the secretary of state, whose decision was final.5

Not surprisingly, this law—like similar laws throughout the nation—was challenged as offensive to the First Amendment. However, the U.S. Supreme Court rebuffed the fledgling motion picture industry by upholding an Ohio law that authorized its censors to reject all films unless “of a moral, educational, or amusing and harmless character.”

It cannot be put out of view that the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded . . . as part of the press of the country or as organs of public opinion. They are mere representations of events, of ideas and sentiments published and known; vivid, useful, and entertaining, no doubt, but, as we have said, capable of evil, having power for it, the greater because of their attractiveness and manner

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1 *The Taming of the Snood*
   - Date of Review: 1940-06-11
   - Company Name: Columbia Pictures Corp.
   - Starring: Buster Keaton
   - Contains Smoking: [Not Stated]
   - Eliminations: Reel 1B: Cut close-up scene where maid is shown astride Buster’s neck.
   - Reel 1B: Eliminate scene where maid is shown in bending position and Buster places hand upon her body.
of exhibition. It was this capability and power, and it may be in experience of them, that induced the state of Ohio, in addition to prescribing penalties for immoral exhibitions . . . to require censorship before exhibition, as it does by the act under review. We cannot regard this as beyond the power of government.6

The State Censor Board was overhauled in 1917, perhaps in part, because Governor Arthur Capper felt that he had more important things to attend than watching Madame La President.7 Madame was a silly farce about a young actress working her feminine wiles on the stuffy and married judge responsible for evicting her from a hotel. The Reverend Festus Foster convinced the state superintendent to reject the film because it would “shake the confidence that women have in their husbands.”8

That seems to be its lesson, that you can’t trust a man . . . Now, men are to be trusted. At least 50 percent of the men in Kansas are as virtuous as the purest woman. Not one man out of 10 would flirt with a married woman. They are above such things. I have great confidence in the morality of the Kansas man, and any picture that represents men in general as weak and of loose character is harmful. [Miss Anna Held] displays too much of her personal charms. She does it with the purpose of stirring masculine passions. That condemns the picture. [It] is the purpose of the Kansas censor to put the ban on anything that is harmful. It is better that our people know nothing of the wicked ways of the world.9

The appeal committee, possibly concurring with Miss Held’s opinion that the minister was an “old fogey,”10 reversed the decision. Unhappy in his role as movie critic in-chief, Governor Capper expressed his displeasure:

The first members of the Board of Review were Mrs. J.M. Miller, Chair; Miss Carrie Simpson, and Mrs. B.L. Short—"well-educated Christian women of average intelligence."16 In the Board’s annual review covering the period of 1917-1918, Mrs. Miller noted that the members endeavored to “give to the state a class of films free from immoralities and possessing artistic and educational value... insisting on clean, wholesome films... and [eliminating] those

Heeding Governor Capper’s request, the legislature, in 1917, created the Kansas State Board of Review comprised of three gubernatorial appointees “qualified by education and experience to act as censors.”12 The salaries were insufficient to attract male candidates so, with one exception in the Board’s 50 year history, the members were female.13

This gender disparity sometimes created problems when the members wielded their scissors to excise portions of films that, in the view of at least two members, ‘tended to debase or corrupt morals.’

In 1920, W.H. Huston, owner of the Columbus Advocate, thought that the board would benefit from a masculine presence and, as such, requested Governor Allen to “get rid of some of the petticoats” as “one would be a-plenty.”14
things which tend to debase morals or establish false standards of conduct." They were particularly concerned with films depicting crimes, sex relations, and “comedy of the slapstick variety—much of which was of such disgusting character...and evil suggestiveness” that the Board “protested long and loud against [its] production.”

Rather than rejecting a movie in toto, the Board, noting that ‘every film possesses some merit,’ preferred to order excisions from the reels to eliminate offending portions. Sometimes the excisions were made; sometimes not—most likely because the Attorney General urged the Board to pursue a policy of enforcement without criminal prosecution. Undeterred, the Board’s regulations enunciated its review standards:

1. Ridicule of any religious sect or peculiar characteristics of any race of people will not be approved.
2. Evil suggestion in the dress of comedy characters will be eliminated.
3. Infidelity to marriage ties will be eliminated.
4. Loose conduct between men and women, cigarette smoking by women will be eliminated, and, whenever possible, barroom scenes and social drinking.
5. A display of nude human figures will be eliminated.
6. Crimes and criminal methods such as give instruction in crime through suggestion will be eliminated or abbreviated.
7. Prolonged and passionate love scenes, when suggestive of immorality, will be eliminated.
8. Scenes of houses of ill fame, road houses and immoral dance halls will be eliminated.
9. The theme of white slavery or allurement and betrayal of innocence will be condemned.

In *Sinners Holiday*, scenes of ‘girls on a rack swinging backward showing legs and posterior’ were ordered excised. The producers of *Compromise* had to eliminate a scene with ‘girls sitting on man’s lap’ and a close-up of a ‘girl in wiggly dance.’ In the silent film *Oh, What a Nurse*, the title ‘Little Tosie is getting Hotsie’ was clipped. The *Gay Old Bird* had to change its title and a scene of a woman thumbing her nose was cut in *When a Man Loves*. Getting caught with one’s trousers down, a familiar shtick in slapstick, was ordered removed in the Laurel and Hardy movie, *Our Wife*.

In addition to sex, neither violence or disrespect of authority was tolerated. In *I Became a Criminal*, a woman shooting her husband was cut as were scenes of swinging nooses, gouging eyes, and men lying on floors after being shot. A drunken man ‘carrying [a] U.S. flag in a comical manner’ was cut from *Unknown Lover*. As movie advertisements also fell within the Board’s purview, out went an advertisement for the 1949 remake of *Little Women*, because Peter Lawford’s hand was a smidge too close to June Allyson’s breast.

Even highly acclaimed movies were not spared the censors’ knife. In the Academy Award winning Clark Gable/Claudette Colbert comedy, *It Happened One Night*, the Board ordered an excision of ‘Gable drinking from a [liquor] bottle and passing it to another man.’ It also shortened the Marilyn Monroe/Tony Curtis canoodling scene on the yacht in *Some Like it Hot*.

II. The Legal Challenges Commence

The Board’s rejection of *The Easiest Way* spawned the first legal challenge when the Wyandotte County District Court reversed the Board decision that the silent film was immoral. The movie examined the journey of Laura Murdock, an actress of easy virtue who will do anything, including taking ‘the easiest way,’ to see her name in lights on the Broadway stage. Hitching her star to moneyman Willard Brockton, her dreams come true but at the cost of losing the love of a poor newspaper man, John Madison, who is willing to overlook Laura’s unfortunate past. Conflicted, Laura commits suicide but, before she expires, is forgiven by Madison who—in an ironic twist—has struck it rich. The Kansas Supreme Court, reversing the district court, concluded that a court had no business substituting its judgment for that of the administrative agency. Absent a showing of bad faith or arbitrary action, the Board’s determination would be upheld.

In 1917, *The Birth of a Nation*—an epic silent film whose notoriety continues to this day—was reluctantly approved by the Board. Birth of a Nation, produced by D.W. Griffith and adapted from a screenplay called “The Clansman,” chronicled...
two families from opposite sides in the Civil War and the chaos spawned by Reconstruction.

Despite the fact that the film was viewed in the White House by President Woodrow Wilson, the film caused an uproar nationwide for some of the reasons mentioned in a letter from Governor Capper to the Board:

[to] picture the Klu Klux Klan, the worst cut-throats and murderers in all history, as a band of high minded patriots; to glorify the Southern rebels and traduce Lincoln's Union army; to make it appear that this nation had its real birth with the Klu Klux Klan cut-throats; to pervert history by saying the South was right and the North was wrong, impugning the motives of Lincoln and all others who fought to preserve the Union and free the slaves—if, I say, it is not immoral and debasing to picture all these things, then I must confess that I do not know what immorality and indecency is.

Four days after the Board’s decision, the members notified the distributor that the Board was recalling the film for “re-examination” as authorized by the statute.

Upon hearing of the decision, Governor Capper congratulated the members:

If there ever was a time when [we ought to] encourage our people in this country to stand together it is in the present crisis. To do anything that would tend to stir up race or class hatred, a thing the Kaiser, with his spies, is trying to do, borders on treason . . . Kansas, of all states, [should bar the film].

When the distributor refused to return the film to the Board, the Attorney General filed a mandamus action. The Court, rejecting the distributor’s argument that two of the members had been “adversely influenced by prominent and influential outside persons,” reaffirmed the presumption accorded to public officers that they “will do their duty and act fairly,” and ordered the reexamination of the film. To the surprise of no one, the Board banned the film’s exhibition.

In addition to motion pictures, the Board’s jurisdiction included review of the news reels that often preceded a film. Any film with a whiff of socialism was a goner. The Contrast—which depicted favorably the improvement of working conditions in union factories—was banned as was Friends of Soviet Russia, described as Soviet propaganda. March of the Years, a news reel of President Roosevelt urging the repeal of Prohibition, ran counter to Kansas’s ‘dry’ ethos as did a showing of the 1934 Primo Carnera-Max Baer prize fight which was deemed “cruel and immoral.” A news reel showing the winners of the 1937 Irish sweepstakes was rejected because gambling was illegal.

III. The Movie Industry Adapts

Finding no help from the courts and fearful of a proliferation of governmental censor boards, the motion picture industry attempted to get its house in order through self-censoring which took the form of an organization—the Motion Pictures Producers and Distributors Association (MPPDA) and an adoption of a list of “Don’ts” and “Be Carefuls” that later morphed into the Motion Picture Production Code. The Code prohibited scenes of childbirth, complete nudity, sex and venereal diseases. Ministers of religion could not be depicted as comic characters or villains. In a prescient nod to comedian George Carlin and his “seven dirty words,” the ‘Don’ts’ included the use of: “chippie,” “s.o.b.,” “God,” “Lord,” “Jesus Christ” (unless used reverently) and “Madam” in the context of prostitution.

Because of the iron grip of the five largest motion picture companies—all MPPDA members—with their ownership of 70 percent of theatres in large cities, producers and distributors fell in line. However, producers learned how to rejigger spicy scenes though a variety of techniques that included: innuendo (Mae West: “Is that a pistol in your pocket or are you just glad to see me?”); fading to black; or cutting to a tumescent moon or a train speeding through a tunnel from a scene with a couple in a tight embrace.

The grip loosened in 1948 when the U.S. Supreme Court, under the aegis of the Sherman Anti-Trust Act, upheld the Justice Department’s severance of the triumvirate of producers, distributors, and exhibitors in the distribution of first-run movies. More importantly, however, was Justice Douglas’s dictum that ‘moving pictures, like newspaper and radio, are included in the press whose freedom is guaranteed by the First Amendment.’

IV. The Times They Are A-Changin’

Justice Douglas’s dictum found favor four years later in a U.S. Supreme Court case—Joseph Burstyn, Inc. v. Wilson—striking a New York statute prohibiting exhibition of motion picture films that were deemed “sacrilegious.” The film in question was The Miracle, directed by Roberto Rossellini and starring Anna Magnani as a simple-minded goat herder who becomes impregnated by a bearded stranger whom she believes to be St. Joseph, her favorite saint. Ridiculed and tormented by the villagers, she leaves the village to live alone in a cave. However, when her time is near, she makes her way to the church in the village, accompanied only by her faithful goat. Once inside
However, when the film opened in New York, the National Legion of Decency, a private Catholic organization, objected as did Cardinal Spellman who issued a statement—read at all masses in St. Patrick’s Cathedral—calling on “right thinking citizens to unite in[ tightening] censorship laws.”

The film was shown at the 1948 Venice Film Festival to mixed opinion. The test would be whether the film would “contribute to racial misunderstanding . . . and [presenting] racial frictions at a time when all groups should be united against everything that is subversive.”

Rejecting the New York appellate court’s opinion that “sac- rilegious” was an adequately definite standard, the U.S. Supreme Court overruled its previous ruling in Mutual Film Corp. v. Indus. Comm’n of Ohio that motion pictures did not enjoy First Amendment protection.

It cannot be doubted that motion pictures are a sig- nificant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.

The Court left open whether a state could reject films for obscenity—limiting its holding to prohibiting a censor from having to wade through “a boundless sea . . . of religious views, with no charts but those provided by the most vocal and powerful orthodoxies.”

Confident that the Burstyn decision did not address films rejected on the basis of obscenity, the Kansas State Board of Review disapproved, in 1953, an Otto Preminger movie, The Moon is Blue, a frothy romantic comedy about two men—William Holden and David Niven—who vie to seduce a woman who is more interested in discussing the moral and sexual issues of the day than surrendering her virtue. The Board rejected the film because of “sex theme throughout, too frank bedroom dialogue; many sexy words; both dialogue and action have sex as their theme.”

The Wyandotte County Dis- trict Court’s decision—reversing the Board on the basis that the statutory standard was broad and vague—was rejected by the Kansas Supreme Court which distinguished Burstyn and reaffirmed its holding in Mid-West Photo Play Corp. that a court cannot impose its judgment for that of the Board. The U.S. Supreme Court, in a per curiam opinion relying on Burstyn, reversed the Kansas Supreme Court.

Burstyn was also cited by the U.S. Supreme Court in up- holding the right of French filmmaker Pierre Chenal to ex- hibit Richard Wright’s Native Son, a 1951 film about the accidental murder of a young white woman at the hands of the family’s black chauffeur, against the Ohio censors’ concern that the movie would “contribute to racial misunderstanding . . .”

On life support, the Board continued to censor but was stymied by the U.S. Supreme Court’s 1957 Roth v. United States ruling acknowledging that while obscenity did not enjoy First Amendment protection, sex itself was not “obscene.” Rather, obscenity was material which dealt with sex “in a manner appealing to prurient interest.”

The test would be whether the average person, applying contemporary community standards, concluded that the dominant theme taken as a whole appeals to prurient interest.

Application of the Roth test mandated reluctant approval of The Case of Dr. Laurent which championed the virtues of nat- ural childbirth in a frank depiction of an unwed mother giving birth. Unsurprisingly, the
Board was pummeled with complaints that the film was “filth” and “nothing no one but a married person should see...”64 The Reverend Ray Hutchison, President of the Chanute Ministerial Alliance, reproved the Board because “this kind of picture usually arouses passions and appeals to the baser nature of man” and “[tears] down the moral standards of [the] community.”65

The Roth test was tweaked in Jacobellis v. State of Ohio,66 when the U.S. Supreme Court concluded that ‘community standards’ would be evaluated on a national rather than a local basis. Applying that standard, the Court, after reviewing a French film, Les Amants (The Lovers), reversed the obscenity conviction of the film’s exhibitor. Justice Potter Stewart, in his famous concurring opinion, defined obscenity as “hard-core pornography.”

I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.67

Emboldened by favorable court decisions, the movie industry challenged the heart of censorship schemes: submission of films in advance of exhibition. In Freedman v. State of Maryland,68 the U.S. Supreme Court established the procedural hoops through which Maryland, Kansas and the other two remaining state censor boards69 would have to jump in order to continue their work. The burden of proving that the film was unprotected expression would now be placed on the censor. Moreover, the agency had a brief period to decide whether to approve the film or go to court for a judicial determination. No film could be restrained prior to its exhibition without a prompt judicial determination.

A little more than a month after Freedman, the Kansas State Board of Review adopted regulations codifying the Freedman safeguards.70 The Board’s action did not assuage Columbia Pictures which—after informing the Board that it would no longer submit films for review—began exhibiting Bunny Lake is Missing and Bedford Incident in Kansas theaters.71

Attorney General Robert Londerholm filed an injunction action and Columbia Pictures counterclaimed for a declaratory judgment that the Kansas system of prior review of motion pictures was an unconstitutional prior restraint under the First Amendment. As the statutory scheme clearly violated Freedman, the Attorney General urged the Court to consider the Board’s recently enacted regulations designed to comply with Freedman’s dictates. Rejecting the Board’s ‘Hail Mary’, the Kansas Supreme Court concluded that an administrative agency cannot breathe “constitutional life into a statute by rules and regulations.”72 If the Kansas Legislature wanted to comply with Freedman, it could do so by passing a statute—which the legislature chose not to do. Instead, the legislature did not appropriate funds for the agency and, in 1968, quietly repealed the act.73

VI. Conclusion

Justices Douglas and Black’s hope, in 1954, that “every writer, actor, or producer [be freed] from the censor”74 has been realized as evidenced by the internet’s great maw with its insatiable appetite for “content” that can be edifying, heuristic, entertaining, salacious and often hateful. Still, better we have the option of looking away than allowing government minders to cover our eyes.

About the Author

Mary Feighny is the deputy city attorney for the City of Topeka. In that capacity, she advises the planning, public works, and finance departments. Prior to joining the city legal department, she was the deputy attorney general overseeing the Legal Opinions & Government Counsel division of the Kansas Attorney General.

2. L. 2013, Ch. 294.
3. L. 2013, Ch. 294, §7.
4. L. 2013, Ch. 294, §5.
5. Id.
8. Id.
9. Id.
10. Id.
13. $2100 for the chairman; $1800 for the other two members. L. 1917, Ch. 308, § 10. Linda K. Warner, Movie Censorship in Kansas:
First Amendment follies: forbidden films and the Kansas State Board of Review

The Kansas State Board of Review (Thesis; Emporia State University)(May, 1988).
15. Id.
18. Id. at page 5.
21. Warner Bros. Date of review: 10-10-1930 (Box # 35-06-03-08; Kansas Historical Society).
22. Warner-Vitagraph Co. Date of review: 10-20-1925 (Box # 35-06-02-05; Kansas Historical Society).
23. Warner-Vitagraph Co. Date of review: 01-04-1926 (Box # 35-06-07-01; Kansas Historical Society).
24. Warner-Vitagraph Co. Date of review: 03-02-1927 (Box # 35-06-02-08; Kansas Historical Society).
25. Warner-Vitagraph Co. Date of review: 08-18-1927 (Box # 35-06-03-12; Kansas Historical Society).
26. List of films rejected; portions excised, January 1930-April 1931. Reed papers, Box 9, Folder Board of Review, Kansas Historical Society.
27. Warner Bros. Date of review: 2-19-1948 (Box # 35-06-02-11; Kansas Historical Society).
29. Bride of the Storm, Warner-Vitagraph Co. Date of review: 3-24-1926 (Box # 35-06-06-07; Kansas Historical Society).
30. Doorway to Hell, Warner Bros. Date of review: 10-20-1930 (Box # 35-06-02-06; Kansas Historical Society).
31. Warner-Vitagraph Co. Date of review: 10-1-1925 (Box # 35-06-07-06; Kansas Historical Society).
33. Columbia Pictures. Date of review: 03-05-1934 (Box # 35-06-02-11; Kansas Historical Society).
34. United Artists. Date of review: 3-11-1959 (Box # 35-06-05-01; Kansas Historical Society).
37. Id.
40. Id.
41. Governor Walter A. Huxman papers, Box 1 Folder, Board of Review, Kansas Historical Society.
42. Later known as the Motion Picture Association of America (MPAA).
44. https://en.wikipedia.org/wiki/Seven_dirty_words
47. Id. at 334 U.S. 166.
50. Frankfurter concurrence, 343 U.S. at 513.
51. supra note 6.
52. 343 U.S. at 500.
53. 343 U.S. at 504.
57. Id. at 112 N.E.2d 318.
62. 354 U.S. at 487.
67. Id. at 197.
69. New York, Virginia. Also, the cities of Chicago, Detroit, Fort Worth, and Providence. Id. footnote 5.
70. K.A.R. 18-1-6 through 18-1-16 (January 1, 1966).
72. Id. at 454.
73. L. 1968, Ch. 111.
law practice management tips and tricks

Holiday Gifts Worth Getting

by Larry Zimmerman

The holidays approach and the shopping days are running out. If you have any nice lawyers left on your list, consider the following:

DocuSign (docusign.com) – Now is the time to experiment with electronically signed documents with clients and opposing counsel. Getting signatures back electronically is considerably faster than paper and mail in an era of smartphones. Additionally, electronic agreements come with tamper-evident technology, admissibility certificates, and audit trails built in unlike wet-ink paper solutions. Lawyers should skip the personal plan ($10/month) and start with the $25/month plan which includes unlimited documents, access via mobile app, and adds reminders, personalized branding, and real-time comment and markup.

Klipfolio (klipfolio.com) – Lawyers have an abundance of tools available to monitor cases, deadlines, and clients. Significantly fewer tools are available which tell lawyers how the business is faring. Klipfolio is a cloud-based analytics tool which allows you to automatically upload key data about your business and then share that information as a visual dashboard for at-a-glance review. For example, a firm could track when bills are sent and record when those bills are paid to generate a visual dashboard indicator of average time to pay. A test drive is available at $49/month allowing up to five users to view up to five custom dashboards. It is one of the quickest and easiest ways to start with visual business analytics.

Fizzy Flight Insurance (fizzy.axa/en-gb) – Smart contracts based on blockchain technology and its inherent ability to automatically verify compliance are still just buzzwords to many lawyers. Fizzy offers an opportunity to see how such smart contracts work in real life. Enter your flight number and departure date and Fizzy will allow you to purchase insurance on covered flights. If your flight is delayed by two hours or more or cancelled, Fizzy knows automatically and you are paid without ever filing a claim. The terms are clearly defined and independently verifiable. The payment automatic and instant. Using something like Fizzy can help lawyers visualize how smart contracts can be designed and deployed for our clients.

Privacy (privacy.com) – Credit card fraud remains a big business for criminals and U.S. consumers are more than twice as likely to be impacted due in part to lackadaisical security measures by card issuers here versus abroad. Services like Privacy create a single-use credit card number subscribers can use for online, phone, and recurring charges that keeps your primary card out of the retailer’s hands. How you use your cards is also scrubbed by Privacy so your card issuer cannot use your payment history to sell ads and otherwise target you based on your habits. The service is free (funded by the interchange paid by merchants) unless you get into extensive use beyond 12 cards per month.

Zipwhip (zipwhip.com) – If you set an appointment with your dentist, she probably sends you a text message confirmation and then a reminder the day before. No one in her office is tapping away on their phone to send those reminders. It is automated through a service like Zipwhip which allows you to manage texting from the desktop just like email. Zipwhip allows automated messaging in addition to more one-on-one interactive options. The economy option starts at $35/month per line for unlimited texts and contacts for up to two numbers (devices) with reporting and apps included. Jump to the business package at $100/month per line and features like firm personalization, scheduled messaging, auto-reply, and integration with Clio is enabled. (Clio integration logs and preserves texts in the client file for billing and record-keeping purposes.)

Faraday Bag/Box (do-it-yourself or faradaybag.com) – I have never allowed Alexa or Google Home devices into the office as they feature always-on microphones recording what they hear to Amazon and Google servers. The electronic eavesdropping issue is not so simple, however. Recently I was discussing a case in my office with an intern and my Android smartphone chimed in with an unsolicited comment. This occurred despite my configuring it to disregard wake words and to only activate with a physical action. A Faraday box or bag shields a device like a phone or laptop from all radio frequencies so it cannot “phone home” or receive remote instructions. You can make a tinfoil hat for your phone yourself or buy something more professional-looking for $50 and up.

Date Night at Kansas Supreme Court Special Session (kscourts.org) – Assuming the Kansas Supreme Court continues its traveling dockets after Chief Justice Nuss’s retirement, it is well worth the experience of attending one of its special sessions away from the Judicial Center in Topeka. My wife and I have attended five special sessions now from Lawrence to El Dorado and have thoroughly enjoyed the experience every time. We are not invested in the cases heard but swell with lawyerly pride at seeing hundreds gather at a time to watch the process. Afterwards, the non-lawyer public debates thoughtfully and sincerely about the cases and acknowledges the challenging work lawyers and judges do. Just remember that you are a lawyer and a special session in a high school is still a court room; show up dressed appropriately as an officer of the court.

Six Minute Meditation for Lawyers (theanxiouslawyer.com) – As cheesy as it seems to some of us cynics, the data is in and meditation offers tangible health and mental benefits. Jeena Cho offers free guided meditation audio files broken up into 0.1 hour segments. I reluctantly submitted and have been pleasantly surprised with the results. I am not at peace but am more peaceful—and that is truly a gift.
The dog, the fur and the bar foundation auction: a Hallmark story

by Matt Keenan

It would be wise to disclose at the outset that this column has nothing to do with family law, oil and gas, product liability or premises liability. There is no CLE offered for the five minutes it will take to read this month’s column.

You will learn something, however. You will learn about Bernie, Hadley, Sunshine and one John Gerstle. Two dogs, a cat, and a prominent Johnson County criminal defense attorney whose dress style is reminiscent of iconic stores like Barney’s and Brooks Brothers.

Still reading? Good.

So permit me to start with the dogs. It was May 4, 2017 when our dog of sixteen years, a Wheaten Terrier named Bernie, went to the place where all dogs go. That left us the cat—a feline who was given the world’s most inappropriate name—Sunshine. Apparently Stormy, Windy and Blustery were taken. Sunshine was a rescue addition that our son Robert received from a female acquaintance during middle school. Robert’s “friend” left the family picture, but the four legged addition remained for another ten years.

I’m not a cat person. I guess I’m open to the notion that some cats like people. Just not Sunshine. She avoided humans and pretty much everything else. All dogs go to heaven. Cats?
Still under discussion.

But I digress.

The kids left, the college funds were drained, and for a brief moment, the house grew quiet. Sunshine lived upstairs and was seen on full moons. On rare occasion, my thoughts turned to Bernie and her blissful habits.

But then the day arrived. It was December 1, 2017. I had just walked in from work. My wife was sitting in the living room, and invited me to sit down on the adjoining couch. This was one of those times when a direct message was headed my way. I steadied myself.

She paused, extended her hand, and let me have it. “I want to get another dog,” she said. As anyone married can attest, with holy matrimony there are two kinds of discussions. Those you debate and lose, and those you don’t even debate. This was category two. Plus, deep down, I missed having a yes man. I went into negotiation mode. “If we get a dog, I’d like a winter dog,” I said. “A big dog. Something we can take to Colorado. Something that likes the snow.” She nodded. The ship had just left the harbor.

Eight weeks later, the new addition arrived at KCI. She came via Columbus, Ohio. A Bernese Mountain Dog–Poodle mix. They call them Bernedoodles. Her name, I was told, firmly, would be Hadley.

Hadley has been a welcome addition, with a caveat: she will not be ignored. If you even attempt it, she sits next to you and extends her paw and begins to tap your arm, leg, shoulder—whatever is closest. It starts gently and, if unheeded, progresses to a slug. Never a bark, a whine or anything that disturbs the house karma. But the message is singular: let’s go.

And the walks started. First thing in the morning, afternoon, evening. Rain, snow, sleet rain—no matter. A couple months later, Lori and I attended the Johnson County Bar Foundation dinner at Ironwood Parks in Leawood. The Bar Foundation is the charitable arm of the Johnson County Bar and helps the community by promoting good works that advance our local system of justice.

The organizers had a few auction items. One that got Lori’s attention was a full length fur coat. Think Joe Namath and Bachelors III club, circa 1969. A one year rental, they said. The coat’s owner was John Gerstle. Gerstle is a combat Vietnam veteran and criminal defense attorney of considerable note. Gerstle, it seems, bought the coat many years ago following a Christmas party. On that same shopping spree, he also picked up a Stetson hat. Alcohol, quite possibly, may have been involved.

So the coat had a history. “Back then I skied frequently and wearing my coat and western hat to Vail was the thing to do,” Gerstle told me. “During that period of time, I did a lot of representation of defendants charged with drug possession, and Judge Sarah Welch was the head of drug prosecution. She also was an animal rights advocate and a card carrying PETA member. When we had a case together, which was often, and I wasn’t faring well in negotiations, which was often, I would wear my fur and purposely walk by her office which was not unlike waving a red flag in front of a bull.”

The coat was stylish. It was elegant. It was also huge. I pondered it for a second, had a couple more sips of my flavorful beverage and didn’t figure it would belong in a closet brimming with polyester jackets purchased from Macy’s.

Plus fur isn’t exactly PC these days.

And then Lori nudged me. “It would be perfect for your morning walks with Hadley!” Five hundred dollars later, it was mine.

Winter came early last year. On Thanksgiving Sunday, Kansas City got eight inches of snow, breaking a record extending back to 1895. A billion flights were cancelled. The Weather Channel exploded. What did I do? Took a long walk with Hadley. It was delightful.

The winter continued unabated for a hundred days plus. Weather geeks tell us that there was a stretch of 133 days without the high temperature reaching 65 degrees at KCI. That broke the record set in 1912. And it snowed. Bigtime. Between Oct. 1 and March 3, Kansas City had over 19 inches of total precipitation; that’s the most in 131 years.

And every morning, I had two companions: Hadley and the fur.

Last May, the Bar Foundation had its 2019 auction. The fur was resold to Johnson County attorney Trina Nudson, who outbid everyone.

I couldn’t make it due to a conflict. Hadley needed a walk. ■

About the Author

Matthew Keenan has practiced with Shook, Hardy & Bacon LLP, Kansas City, Mo., since 1985.

mkeenan@shb.com
Where Does the Money Go?
Our designated charities for 2020 are:
• CASA (Johnson/Wyandotte Counties)
• Safehome and Hope House (domestic violence programs)
• Metropolitan Organization to Counter Sexual Assault (MOCSA)
• Kansas Bar Foundation
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On October 1, 2019, eleven members of the House and Senate Judiciary Committee met over two days to discuss abortion rights, caps on noneconomic damages and changes to judicial selection. While seemingly separate and distinct issues, these three controversial topics have the Kansas Supreme Court as its nexus. Earlier this year the Kansas Supreme Court found a constitutional right to an abortion in *Hodes & Nauser, MDs v. Schmidt*. The court also invalidated the statute that caps noneconomic damages in *Hilburn v. Enerpipe LTD*.

The KBA provided testimony in support of the current method for selecting Kansas Supreme Court Justices. Jim Robinson, a lawyer with the Wichita firm of Hite Manning, represented the KBA at the hearing and provided the committee with its most significant scholarly support for merit selection. (The full text of Robinson’s testimony follows this foreword in this issue of The Journal of the Kansas Bar Association.) The KBA took no other position at the hearing. The committee recommended that the issue be studied further in the 2020 session.

To be clear, altering judicial selection in Kansas remains a significant issue. Currently, SCR 1610, which would move Kansas to a Governor appoint/Senate confirm model, is available to the Committee of the Whole. However, this is merely the latest attempt to change how judges are selected in Kansas. Since 2011, there have been 19 proposals to alter merit selection in Kansas. The proposals run the gamut, but include the Federal Model, direct elections, direct partisan elections, altering the nominating commission, including lifetime appointment, including the Kansas Court of Appeals and, in one instance, allowing the Kansas House to select nominees.

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.

jmolina@ksbar.org
At the direction of its Board of Governors, the KBA has opposed every proposal and has fought to maintain the current merit selection process for both the Kansas Supreme Court and the Kansas Court of Appeals. Jim Robinson has provided a detailed review of the history of merit selection in Kansas and throughout the nation. To better understand the process and the position taken by the Kansas Bar Association, I encourage you to read his testimony submitted to the Special Committee on Judiciary, the full text of which begins on the next page.
TO: SPECIAL COMMITTEE ON JUDICIARY  
FROM: F. JAMES ROBINSON, JR.  
KANSAS BAR ASSOCIATION  
DATE: OCTOBER 1, 2019  
RE: JUDICIAL SELECTION IN KANSAS

Chairperson Rucker, Chairperson Patton, members of the committee, we thank you for the opportunity to appear today and comment on your review of the judicial selection process in Kansas. I am here today for the Kansas Bar Association.

If those who select judges for our highest courts are knowledgeable and insulated from partisan politics, focus on professional qualifications, and are guided by proper rules and procedures, they will choose good judges.

History of Judicial Selection

Before charting a course for the future, we must have a clear understanding of the past. Several times since the state’s founding, Kansans have had to rethink how to select Kansas Supreme Court justices. Early in this nation’s history, governors and legislators chose state court judges. Concerns that some judges received their judicial appointments as a reward for their previous work for political elites, party machines, and special interests led reformers around the time of Kansas’ statehood to propose judicial elections.1 The first Kansans preferred non-partisan judicial elections, while allowing the governor to appoint judges to fill vacancies. Early in the 20th century Kansans switched to partisan elections, but a few years later switched back to non-partisan elections. However, critics were not convinced that non-partisan elections cured the problems plaguing partisan elections. Political parties continued to play a role in selecting and supporting candidates.2

During the mid-part of the 20th century political scandals in some states prompted reformers to move to a system using independent non-partisan nominating commissions. First adopted in Missouri in 1940 after Missouri courts fell victim to the control of machine politics by notorious Democratic Party boss Tom Pendergast, merit selection was created as a means for selecting judges based on their professional qualifications and experience, not on their politics.3

2 Id.

About the Author

Forrest James “Jim” Robinson, Jr. is a business litigation partner in the law firm of Hite, Fanning & Honeyman, L.L.P., in Wichita, Kansas. He received degrees from Southwestern College (1980) and the University of Kansas School of Law (1983).

In 2018, he was appointed by the Kansas Supreme Court to serve as a member of the Kansas Judicial Council. He has held leadership positions in Wichita Bar Association (WBA) (Board of Governors; Chair, Legislative Committee; Past Chair, Professionalism Committee); Kansas Bar Association (KBA) (Chair, Legislative Committee, 2014-2018); Kansas Association of Defense Counsel (KADC) (President; Board of Directors; Chair, Legislative Committee); and Defense Research Institute (DRI) (Kansas State Representative; DRI Center for Law and Public Policy’s Judicial Task Force, and Issues and Advocacy Committee).

Jim has earned a great deal of recognition, including the KBA’s Philip H. Lewis Medal of Distinction in 2017.

robinson@hitefanning.com
Kansas was the second state to adopt the Missouri Plan. In 1956, the Republican party was deeply divided. Republican Governor Fred Hall lost the party nomination to Warren Shaw. Democratic candidate George Docking defeated Shaw in the general election. Chief Justice Bill Smith was Hall’s political ally. Smith was ill and wanted to retire but could not countenance an appointee by a Democratic governor. Hall negotiated a scheme to retire Smith. Smith retired on December 31. Hall resigned on January 3. Lieutenant Governor John McCuish held office for eleven days before Docking’s inauguration. McCuish’s only official act was to appoint Hall as Chief Justice of the Kansas Supreme Court.4

That scandal prompted super-majorities in the House and the Senate to approve a constitutional amendment establishing merit selection based on the “Missouri Plan.” Those who favored the move argued the Missouri Plan would lead to better qualified justices than in contested elections. Also, they believed the Plan would more effectively free judges from political pressure and influence. A Kansas Chamber of Commerce brochure5 from the 1958 campaign for merit selection argued:

**What’s Wrong with Electing Judges?** First, the partisan elective process puts the judiciary into politics. Candidates for legislative or executive offices may run on the basis of advocacy of certain policies; a judge should have no policy other than to administer the law honestly and competently. Judges should not be influenced by political alliances or political debts.

Kansas voters in 1958 overwhelmingly amended the Constitution to provide for merit selection.6

Unlike the Kansas Supreme Court, which was created by the Kansas Constitution, the Kansas Court of Appeals was created by statute. The selection process for its judges was amended in 2013 to allow the governor, with the consent of the Senate, to appoint a judge to fill a vacancy.

Today, 34 states and the District of Columbia use a commission as part of the selection process for at least some of their high court judges.7

A May 2019 study of nominating commissions by the Brennan Center for Justice at New York University School of Law finds that while “the work of commissioners varies only slightly from state to state,” the composition and selection of commission

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4 *Id.* at 772.
5 *Id.* (quoting brochure).
6 Jackson, note 1, 34.
members vary among the states.8 Governors appoint a majority of commissioners in 15 of the 35 commission jurisdictions. In 16 commission states no single authority appoints a majority of commissioners. In 26 jurisdictions, lawyers comprise a majority of commissioners, even though only 15 states require lawyer majorities. Nonlawyer commissioners comprise a majority of commissioners in just 6 states, and half of the seats in 3 states. Nearly two-thirds of the nonlawyer commissioners come from either private industry or the legislative or executive branches of government.9

No state has ever moved away from a constitutionally based merit selection process. Indeed, in 2012, voters in Arizona, Florida, and Missouri, by wide margins, rejected efforts to move away from merit selection.10

The Kansas Supreme Court Nominating Commission and Retention Elections

Article 3, Section 5 of the Kansas Constitution, as amended in 1958, provides for the non-partisan Kansas Supreme Court Nominating Commission. The Commission has 9 members. The Chair is an attorney who is selected based on a vote of licensed Kansas attorneys. One member from each congressional district is an attorney who is elected by the licensed attorneys in that district. One non-attorney member from each congressional district is appointed by the Governor.

The Commission’s composition ensures a balance between professional assessment of an applicant’s legal ability and the voice of citizens. Lawyer members understand the work of courts, can critique the applicant’s written materials, and are aware of the specialized knowledge and experience needed to serve as a judge. Citizen members appointed by the Governor provide public input, ensure accountability, and lend credibility and legitimacy to the process.

The rule governing the Commission’s makeup that denies the Governor the right to select a majority of the commissioners is designed to reduce political influence on the Commission. The Brennan Center’s study of nominating commissions finds that governors are likely to appoint commissioners “whose judgment they trust and with whom they share values or political preferences.”11

Recently, in Iowa and Florida, where the governor in each state appoints all the commissioners, the governors have “come under fire for appointing political allies and

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8 Douglas Keith, Judicial Nominating Commissions: An analysis finds that despite varying methods of selecting them, state commissioners are almost uniformly professionally homogeneous (Brennan Center May 29, 2019), https://www.brennancenter.org/publication/judicial-nominating-commissions.
9 Id.
10 https://ballotpedia.org/Arizona_Judicial_Selection_Amendment,_Proposition_115_(2012); https://ballotpedia.org/Florida_Supreme_Court,_Amendment_5_(2012); https://ballotpedia.org/Missouri_Judicial_Appointment_Amendment,_Amendment_3_(2012).
11 Keith, note 8, at p. 4.
donors to their states’ nominating commissions.”12 In Florida, the current governor is accused of interfering with the commission by insisting that one of the applicants be presented to him for consideration.13 Also, editorials have criticized the Florida governor for elitism and playing politics with the commission.14 In Iowa, the governor appointed her father to the commission.15

The Brennan Center study concludes, “power concentrated in the hands of one official makes it more likely that the commission will merely ratify that official’s preferences. Conversely, a mix of appointing authorities reduces the chance that a single political agenda will drive the commission’s work.”16

Political scientist Greg Goelzhauser studies nominating commissions. His recent book, Choosing State Supreme Court Justices: Merit Selection and the Consequences of Institutional Reform, concludes, “An analysis of the backgrounds of supreme court justices found that states using nominating commissions are less likely to have justices with ties to major political offices (such as former aides to the governor or state legislators) than states using an appointment system without nominating commissions, suggesting that nominating commissions do constrain the governor in appointing political allies.”17

As for the Nominating Commission’s work, its members screen and vet prospective justices based on qualifications, not party affiliation or connection. The commission presents a slate of three nominees to the governor, who must choose one.

Retention elections are an important part of merit selection. Unlike the federal process, Kansas does not grant lifetime judgeships. A Kansas Supreme Court justice

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12 Id.


16 Keith, note 8, at p. 4

serves a 6-year term. As the justice’s term is nearing the end, the justice is on the ballot in an unopposed “yes-or-no” retention election.

Retention elections were intended to give the people a voice in whether a state court judge deserved another term without the bruising characteristics of political attacks, partisan tactics, and competitive contests. These elections sought to evaluate a judge based on his judicial performance—has the judge committed a serious ethical indiscretion, or is the judge incompetent?—not the popularity of a single decision or whether the judge is too “conservative” or too “liberal.” Merit elections sought to remove partisan politics and special interests from the election process. Most importantly, they sought to insulate judges from shifts in public opinion that can undermine the consistency and fairness in the law. Judicial retention elections, then, were never meant to serve as a tool for judicial intimidation or payback for an unpopular, but legally sound, decision.

Even so, Kansas’ merit selection system cannot ensure the total elimination of politics from the process. Nonetheless, having an independent non-partisan commission select nominees for the governor’s consideration removes a threat to the fairness and impartiality of the judiciary. A justice, after all, should not owe his or her position to a governor who made the appointment as a reward for political accomplishments. And justices should not make promises the way politicians do. Their job is to remain impartial: to decide cases based on the law and the facts. Also, they must be free enough to make unpopular decisions while applying the law, doing justice, and respecting an individual’s rights.

The greatest political vulnerability in the merit selection system is the retention election. Even so, those elections subject justices to less political pressure than either contested partisan elections or political appointments. If a justice is ousted in a retention election, the Nominating Commission starts the process of taking applications and vetting applicants.


A strong scholarly view supports merit selection.

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19 Id.
21 See for example, Nuono Garoupa and Tom Ginsburg, “Guarding the Guardians: Judicial Councils and Judicial Independence,” 57 American Journal of Comparative Law 103, 104 (Winter 2009)
As for Kansas voters, in the most recent available poll in 2015 by 20/20 Insight LLC of likely Kansas voters, 46% of whom voted for Sam Brownback and 44% of whom voted for Paul Davis in the 2014 general election, 53% favored merit selection, 27% opposed merit selection, and 20% were undecided. 76% opposed changing the Constitution to allow selection by the governor and confirmation by the Senate, 14% favored the change, and 10% were undecided.22

Answering the Critics

Some critics argue our merit process is undemocratic. But they fail to recognize that merit selection was approved by super-majorities in the legislature and an overwhelming popular vote on the heels of a major political scandal. Having a process for the Kansas Supreme Court that focuses on an applicant’s fairness and impartiality, rather than politics or popularity, is an important consideration in selecting justices.

Some critics prefer a federal-style model for selecting justices—one where the governor appoints the justice (without the benefit of a nominating commission) and the Senate confirms the appointment. But the federal model has its own set of problems.

The federal model is not as transparent as the current Nominating Commission’s processes. Per K.S.A. 20-123(b)(1), the Commission is subject to the open meetings act, K.S.A. 75-4317 et seq. The Commission’s application form is available to the public. When a vacancy occurs, the Commission advertises the application process. The Commission publishes the names of all applicants and it releases to the public portions of the applicants’ applications. The Commission conducts public interviews. It publishes guidelines for the interviews and uses a statutorily mandated yardstick

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by which to measure applicants. Its deliberations are public, except when it goes into executive session. Its votes are public. The Commission then publishes the names of the three nominees when it sends those names to the governor.

By contrast, under the federal-style model for the Court of Appeals, the public learns per K.S.A. 20-3020(a)(3) who applied for the position, and who the governor appointed, but the governor is not required to say who, in addition to the applicants, were considered for the seat, what the appointee or the governor discussed during the interview, or what yardstick the governor used to measure the appointee. On this score, the Commission’s process is far more transparent than the federal-style model.

The federal model that appoints judges for life does not provide the same accountability measures as the merit selection process. In Kansas, retention elections allow for the removal of justices who do not meet fixed standards for job performance or ethics and assure keeping justices who properly perform their duties.

Further, the federal model opens the door to political appointments leading to the circus-like atmosphere of recent notable U.S. Supreme Court confirmation hearings. For those who think the states are immune from such antics, they need look no further than the recent 6 years-long battle in New Jersey to confirm Governor Chris Christie’s appointments to the Democrat-controlled New Jersey Senate.23

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Connecticut has encountered a similar problem. In Rhode Island, legislative confirmation has been used to extract concession on unrelated issues. Political wrangling over nominees leading to long vacant judicial seats can result in excessive caseloads for those who are on the bench, causing excessive delays in deciding cases.

Some who oppose merit selection argue the Commission is an elite group controlled by lawyers favoring liberal appointees. But that charge is not based on any study assessing the structure, function, and operation of the current Nominating Commission.

Empirical evidence is hard to come by. The most comprehensive study is the Inside Merit Selection national survey that was published in 2012 by the American Judicature Society. Professor Rachel Caufield, Ph.D. of Drake University led a team who surveyed 487 nominating commission members in 30 states, including Kansas. The study notes the non-lawyer members are “overwhelmingly” appointed by the governor while the lawyers are selected by some process involving other lawyers. The study shows that lawyer and non-lawyer commission members reject political considerations as part of their deliberations. More than 73% say that party affiliation is not considered. A majority of commissioners report they are not aware of candidates’ party affiliations. The survey finds, “[a]cross the board, we see consensus among survey participants that lawyer and non-lawyer members work well together and respect each other’s contributions.” The survey notes, “[l]awyers and non-lawyers tend to agree on the criteria for evaluation, the role of political influences, and the relationship between the governor and the Commission.” The survey concludes, “[a]rguments that merit selection systems are dominated by members of the bar appear to be unfounded, based upon the evidence offered by the Commissioners themselves.”

For those critics who argue that only judicial elections provide democratic legitimacy, we note the framers of the U.S. Constitution set up a federal system that insulates judges, once on the bench, from political accountability. Judicial elections for state supreme courts were established many decades after the nation’s founding.

A Fair and Impartial Judiciary is a Cherished Democratic Principle

By design, courts keep the government true to its Constitution. The Framers designed a democracy in which the legislative branch creates the law, which the

26 Caufield, note 21.
27 Id.
executive branch enforces. The judicial branch’s role is to interpret and apply the legislature’s statutes, declare the common law, and preserve and protect the Constitution.

The Framers equipped courts to act impartially. Thomas Jefferson wrote, “[w]hen one undertakes to administer justice, it must be with an even hand, and by rule; what is done for one must be done for everyone in equal degree.” 28 Retired U.S. Supreme Court Justice Sandra Day O’Connor observes the Framers founded the judiciary on the premise that “there has to be someplace where being right is more important than being popular or powerful, where fairness trumps strength. And in our country, that place is supposed to be the courtroom.” 29

Ensuring that democracy, liberty and the rule of law were not hollow promises, the Framers created a form of government aimed at avoiding the concentration of power in a single authority. They made the judiciary an institution “not under the thumb of the other branches of Government.” 30 James Madison, while introducing in Congress the amendments that became the Bill of Rights, eloquently noted that the judiciary “will be an impenetrable bulwark against every assumption of power in the Legislative and the Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.” 31

Alexander Hamilton described the judiciary as the only institution that can ensure the legislature and the executive do not violate the Constitution. Hamilton argued that “there is no liberty, if the power of judging be not separated from the legislative and executive powers . . . The complete independence of the courts of justice is . . . essential . . .” 32 As Hamilton explained, if the legislature judged the validity of its own laws, then its members would substitute their will for the will of the people, noting “the courts were designed to be an intermediate body between the people and legislature, in or order, among other things, to keep the latter within the limits assigned to their authority.” 33 Without judicial independence, Hamilton argued, “all the reservation of particular rights and privileges [as legal principles to the applied by courts] would amount to nothing.” 34 Hamilton argued that citizens “of every description” should value judicial independence because “no man can be sure that he may not be tomorrow the victim of a spirit of injustice.” 35

28 W. Cleon Skousen, The Making of America, 241 (Verity Publ.)
31 James Madison, Speech to the House of Representatives (June 8, 1789), in the Mind of the Founder, 210, 224 (Marvin Meyers ed., 1973).
33 Id.
34 Id.
35 Id.
The Framers thus plainly intended that judges should be free from political influence. As Hamilton noted, every care should be taken to ensure that the best qualified persons will be appointed, and that once seated the judge is expected to decide cases free from the effects of politics and the changing winds and passions of public opinion.36

It is also clear, then, that the Framers called on the judiciary to patrol the Constitution’s legal boundaries and preserve the rule of law not because they believed judges to be wiser or smarter than those in the government’s other branches; rather, the Framers believed that allowing the other branches to police themselves was too dangerous.37

Jurists, performing their basic role in American democracy, have throughout this country’s history required the other branches to take unpopular actions such as desegregating schools or mandating certain minimum standards for prisons. Often politicians have enough respect for courts that they are circumspect in their statements about unpopular decisions. Most politicians understand the value to the democracy of accepting decisions from the highest courts, even those they think are wrong. Former U.S. Supreme Court Justice John Paul Stevens warns that, “[d]isciplining judges for making an unpopular decision can only undermine their duty to apply the law impartially.”38 Preserving a high level of confidence in courts should be, as Justice Anthony Kennedy has noted, “a state interest of the highest order.”39

Conclusion

Retired Justice O’Connor observes, “[l]ike democracy itself, merit selection relies on a wide-angle view of our nation’s goals for its people and produces a systemic superiority that safeguards our most precious baseline values.”40

No selection method is perfect. Even so, the Commission uses a balanced, rigorous, and transparent process, in which the qualifications of the applicants are the determinative factor. That process continues to select highly qualified, non-partisan, fair and impartial Supreme Court justices. There is no compelling reason for Kansans to rethink their constitutionally based merit selection process

36 Id.
**2020 WINNERS**

**Grand Prize Winner**
J.B. Menager - “Niece in Summer”

**First Runner-Up Overall**
Mark Hutton - “St. Basil’s Cathedral”

**Second Runner-Up Overall**
Haley Claxton - “Sleeping Trains”

**Third Runner-Up Overall**
Matt Keenan - “IMG_2589”

**Winners in Individual Categories**

**Amazing Animals** - pets, domestic, indigenous or exotic, any kind, anywhere: Mark Hutton - “Pachyderm”

**Spectacular Structures** - buildings, bridges, towers, macro or micro, anything man-made: Mark Hutton - “St. Basil’s Cathedral”

**Lavish Landscapes** - at home or abroad, land, sea or city, the sweeping sights that make you gasp: Haley Claxton - “Sleeping Trains”

**Memorable Moments** - from the gaze of a grandchild to a family graduation or wedding to a celebrity encounter or any moment that moved you: J.B. Menager - “Niece in the Summer”

**Arts and Athletics** - bring to life your favorite sport, capture a breathtaking sculpture or dance, share your own achievements in sports and the arts: J.B. Menager - “Competitive Smiling”
Grand Prize: J.B. Menager
“Niece in the Summer”
Winner in “Memorable Moments” Category

2nd Runner-up Overall: Haley Claxton
“Sleeping Trains”
Winner in “Lavish Landscapes” Category

3rd Runner-up Overall: Matt Keenan
IMG_2589
2nd in “Memorable Moments” Category
2nd Annual KBA Photography Contest

First Place: Mark Hutton
“Pachyderm”
Amazing Animals Category

3rd Place: Brian Zuercher
“Lightning Strike”
Memorable Moments Category

First Place: J.B. Menager
“Competitive Smiling”
Arts & Athletics Category
2nd Place: Mark Hutton
“Jump Dance”
Arts & Athletics Category

3rd Place: Laura Ice
“Bazaar Cattle Pens”
Lavish Landscapes Category

3rd Place: Chris Golden
“Hippo”
Amazings Animals Category

More Winning Shots
Haley Claxton • Chris Golden • Paige Hungate
Mark Hutton • Laura Ice • Matt Keenan • Brian Kong
Jade Martin • J.B. Menager • Matt Merrill • John Smolen
Chris Standlee • Monte Vines • Willard Wade • Brian Zuercher

The 2019 KBA Photo Contest
Sincere thanks to our winning photographers, to all who participated and to our judges!

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Ryan John Purcell  
Designer, Kansas Bar Association

Father & husband, and a life-long Topekan with 10 years experience at the KBA. I love my family, cycling, and snowboarding. I mostly take photos of macros & landscapes, sprinkled in with some nice “captured moments” of friends and family.

Connect with me @RyanJohnPurcell
We are Kevin and Julie Kirkwood, owners of Kirkwood Kreations Photography. We are full time farmer/photographers residing in the beautiful country between Lawrence and Topeka. Our rural setting and love for photography allows us many opportunities to capture images of Kansas nature, landscapes, sunrises and sunsets, and often take off on photographic “boonie cruisin” excursions. We currently have long running photography exhibits in Juli’s Coffee and Bistro and Hazel Hill Chocolates in Topeka.

We also believe in the benefit of charitable contributions to non-profit organizations, and proudly donate time and images to organizations that include, RanchLand Trust of Kansas, Symphony in the Flint Hills, Big Brothers and Big Sisters and the American Cancer Society. Many of our images have won various contests and been selected to be displayed in locations such as The University of Kansas Hospital for the Kansas Rural Health Foundation and the Symphony in the Flint Hills.

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Nick Badgerow. You have seen his name in “The Journal” many, many times over the years. He is a prolific and excellent writer; Nick has authored some 60 articles, a number of which have appeared in The Journal. In fact, he authored the article that appears immediately following this column: “So Help Me God’ The Lawyer’s Oath of Admission and the Rules of Ethics.” And his name is synonymous with service—to his clients, no question—but to the legal profession in particular.

A partner with the Spencer Fane law firm in Overland Park, a position that would keep most lawyers busy enough, Nick has generously given of his precious time to actively participate for many years in a remarkable number of roles that have supported and improved the Bar. His efforts will continue to resonate and have an impact on the profession for years to come—long after Nick retires on December 31st of this year.

Included in his volunteer service to the Bar are the following:

• 16 years on the Kansas State Board of Discipline for Attorneys
• 23 years on the Kansas Judicial Council
• 30 years as Chair of the Johnson County Ethics & Grievance Committee
• 14 years as Chair of the KBA Ethics Advisory Opinion Committee
• Chairman, Kansas Ethics 20/20 Commission (2013)
• Member, Kansas Supreme Court Commission on Professionalism (2010 -2013)
• Co-Chair, Civil Justice Reform Act Committee, United States District Court – District of Kansas (1995 - 1998)

Where DOES he find the time? I’m guessing it is all about priorities. It is clear that Nick has set a very high priority on service to his colleagues in the profession. That which you treasure, you make time for….

Following is a bibliography of the articles authored by Nick Badgerow for The Journal of the Kansas Bar Association. Impressive, no? He sets an extremely high standard for all who share his passion for the law, for ethical practice of the law. Consider following in his footsteps.

On behalf of “The Journal of the Kansas Bar Association,” thank you, Nick. Thank you for your participation in and dedication to this organization, to your profession and to your colleagues. We wish you the very best of everything in your retirement, and look forward to continuing to work with you as an esteemed author. — pVs

Articles Written for the KBA by Nick Badgerow


“Can’t We All Just Get Along?”: A Review of Successful Partnering Between Inside and Outside Counsel, 70 Kansas Bar Journal 12 (March, 2001).

“May It Please the Court: A Tribute to Charles S. Schnider,” 71 Kansas Bar Journal 16 (September, 2002).


“Notarize This: The Notary’s and the Lawyer’s Liability for Forged Signatures,” 73 Kansas Bar Journal 18 (September, 2004).


“From Solo to Megafirm: You Need a General Counsel,” 75 Kansas Bar Journal 22 (January, 2006).


“Conflicts and Confidentiality: Duties When A Lawyer Changes Firms,” 79 Kansas Bar Journal 21 (January 2010).

“Tweet This: The Ethics of Social Networking,” 79 Kansas Bar Journal 17 (May 2010).


“Found Email Treasure: But Can You Use It?,” 81 Kansas Bar Journal 10 (January 2012).


“In House Counsel Beware: Corporate Attorneys and the Practice of Law in Kansas and Missouri,” 88 Kansas Bar Journal 44 (May 2019).


“So Help Me God”
The Lawyer’s Oath of Admission and the Rules of Ethics

by J. Nick Badgerow
Introduction

Lawyers are accorded a very special place in society. While often the subject of jokes and derision, lawyers are the first people called when clients encounter legal difficulties and need help. Only lawyers may represent clients in court and in a wide array of other settings, and lawyers and their clients are given the protection of their privileged communications.

But as obligations accompany rights, the privileges given to lawyers carry with them certain well-defined obligations. The very first obligation which every lawyer takes on is the oath of admission, a solemn promise to fulfill the very special duties and obligations imposed on lawyers in exchange for the privilege of practicing this profession.

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. . . . A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.1

The purpose of this article is to review the specific obligations undertaken by each lawyer in the oath of admission and to express the hope that each lawyer will review and renew the obligations undertaken in that oath.

A Special Privilege

As the Kansas Supreme Court has cogently stated, “The practice of law is a privilege rather than a right,”2 and the holders of this privilege should carefully guard and maintain it. Other courts have uniformly so held. “The practice of law is a privilege and not a vested right.”3 Indeed, “The generous trust and broad confidence of the public ought to prompt the most scrupulous conduct in every professional relation” of a lawyer.4

As the Mississippi Supreme Court has succinctly noted:

The practice of law is a privilege, not a property right, and a revocable privilege at that.” Mississippi State Bar v. Young, 509 So.2d 210, 219 (Miss. 1987) (citing Levi v. Mississippi State Bar, 436 So.2d 781, 786 (Miss. 1983).5

And the Oregon Supreme Court held nearly a century ago:

The right to engage in the practice of law is a privilege conferred or withheld, in accordance with the general policy of the state ex-
pressed by statutory enactment.” In re Application of Jesse Crum, 103 Or. 296, 204 P. 948, 949 [1922]. Further, as said in 6 C.J. p. 569, § 11, “the right to practice law is not a natural or constitutional right, but is a privilege or franchise subject to the control of the legislature, and limited to persons of good moral character with special qualifications ascertained and certified as prescribed by law.”

Before being allowed to practice, a lawyer is required to complete specialized and advanced education, meet standards for admission, including standards of moral character and mental and emotional fitness, take and pass a rigorous examination, and then take the oath.

In order for an applicant to establish eligibility to sit for the bar examination in the State of Kansas, the applicant must comply with the educational requirements and prove that the applicant possesses the requisite good moral character and current mental and emotional fitness to engage in the active and continuous practice of law.

Upon passing the bar examination, the lawyer must take the oath of admission in order to practice law, discussed in more detail below.

Then, once admitted to practice upon taking the oath, each lawyer is subject to the jurisdiction of the Kansas Supreme Court, which exercises authority over the lawyer, including the power to discipline misconduct under the Kansas Rules of Professional Conduct (KRPC).

The certificate of the lawyer’s admission to practice is representative of the lawyer’s qualifications and satisfaction of the foregoing requirements, and upon it “the public has a right to rely, and to presume its holder to be a person of integrity and honor.”

The public has a right to rely upon this court to maintain the integrity of the [legal] profession, to further the administration of justice, and ultimately to protect the clients of . . . lawyers. We have the responsibility to discipline lawyers whose conduct fails to meet the high standards that this court requires.

**The Lawyer’s Oath of Admission**

As noted, upon successful completion of the bar examination, every lawyer in the State of Kansas has taken the oath, set out (as amended over the years) in the form set out at Kansas Supreme Court Rule 720:

You do solemnly swear or affirm that you will support and bear true allegiance to the Constitution of the United States and the Constitution of the State of Kansas; that you will neither delay nor deny the rights of any person through malice, for lucre, or from any unworthy desire; that you will not knowingly foster or promote, or give your assent to any fraudulent, groundless or unjust suit; that you will neither do, nor consent to the doing of any falsehood in court; and that you will discharge your duties as an attorney and counselor of the Supreme Court and all other courts of the State of Kansas with fidelity both to the Court and to your cause, and to the best of your knowledge and ability. So help you God.

Violation of this oath by an attorney represents misconduct and subjects the attorney to discipline.

Regarding discipline of attorneys, Kansas Supreme Court Rule 201(a) (2017 Kan. S.Ct. R. 233) subjects “[a]ny attorney admitted to practice law in this state . . . to the jurisdiction of the Supreme Court and the authority hereinafter established by these Rules.” Kansas Supreme Court Rule 202 (2017 Kan. S.Ct. R. 233) explains the scope of this court’s disciplinary power by stating: “Acts or omissions by an attorney . . . which violate the attorney’s oath of office or the disciplinary rules of the Supreme Court shall constitute misconduct and shall be grounds for discipline, whether or not the acts or omissions occurred in the course of an attorney-client relationship.”

The power of the Court to disbar a lawyer for violation of this oath is an ancient one. In 1835, the Pennsylvania Supreme Court held:

It is not doubted that any breach of the official oath is a valid cause, for proceeding for the former [disbarment]; for the man who deliberately violates the sanctions of a lawful oath, proves himself to be unworthy of further confidence; society has no other hold on him. The most insignificant breach of the fidelity enjoined may, therefore, be visited with this measure.

Consider these harsh words from the Kansas Supreme Court in discussing a lawyer’s duties undertaken in his oath of admission:

To me the oath of an attorney means something. . . . I have never had much patience with the attitude of an attorney who evidently has studied law for the purpose of seeing the extent to which he himself can evade it, or advise his clients to do so. Considering this case and the history of defendant’s admission to the bar, which is well known to this court, I am convinced that the oath of an attorney does not mean much to him. Until
it does he would better occupy his time at some other vocation.  
Indeed, the lawyer’s oath of admission should be a talisman to guide the lawyer’s conduct as a lawyer and as a citizen.
And neither do we consider it necessary to write a treatise on the subject of professional ethics and grounds for disbarment in this state. Those matters are, or should be, well known to every member of the profession. We know of no better guidepost or authority on the subject than the wording of the oath, G.S.1949, 7-122, Supreme Court Rule No. 41, require[d] of every Applicant for admission to the bar, and the Canons of Professional Ethics found at 164 Kan. XI.  
This article will explore each important clause of this oath with the hope that each lawyer will review the oath and renew a commitment to fulfill it.

“Solemnly swear or affirm”
One who undertakes an oath or affidavit does so with the knowledge that s/he is obligated to tell the truth. Thus, while most lawyers excitedly view the oath as a mere formality -- the last step before officially becoming a lawyer -- the oath is in fact a serious one, not to be taken lightly.

All lawyers take an oath upon their admission to the bar. The oath is a solemn promise of competent and ethical conduct, which dates back to the beginnings of the legal profession. It is a venerable “tradition in both form and substance.”

Another court has observed:

An attorney’s oath on admission puts him under the solemn obligation to delay no cause for lucre or malice. He is put under equally binding obligation faithfully to serve his clients to the best of his ability. That implies that he shall have an equipment of learning and ability that will enable him to serve clients as they reasonably expect to be served.

“Support and bear true allegiance to the Constitution of the United States and the Constitution of the State of Kansas”
Supporting and defending the federal and state constitutions are central to a lawyer’s obligations as the standard-bearer for justice, as they have been for many years.

But it may be asked, if an attorney is not an officer elected or appointed, within the meaning of said act, how is it that he is required to take the oaths to support the constitution of the United States and of this State? It is answered that by the 3rd section of chapter 164, Code of 1860, every attorney is required to take the oath of fidelity to the State; the form of which was prescribed by the 1st section of chapter 13 of the same Code; and by the act of June 26th, 1863, chapter 13, of that Code is repealed, and the form of the oath of fidelity made to correspond with the requirement of the constitution of the United States and the constitution of this State.

One may not disdain and disavow the constitutions, and then validly swear to uphold them. In the case of In re Roots, a bar application was denied by the Rhode Island Supreme Court on the basis of the applicant’s stated beliefs which were critical of the United States Constitution:

For example, if a candidate for admission to the bar were to express the view that, in his or her opinion, the laws and constitution of the United States were illegitimate and, for that reason, unsupported, but that in the exercise of his or her office as an attorney or counselor, he or she still could and, therefore, would swear to support that constitution and those laws, then the committee and this Court would be entitled, we believe, to view that candidate’s professed oath-taking ability with some degree of skepticism—especially if the candidate were a convicted felon with a history indicating a recurring lack of truthfulness and candor. While it is possible to draw and maintain a sharp line between a lawyer’s personal beliefs and his or her professional conduct, a predictive assessment of a prospective lawyer’s ability to take and abide by the attorney’s oath is a fair subject for character review when considering an applicant for admission to the bar.

Failure to uphold the constitution and laws of the state represents misconduct and subjects the lawyer to discipline.

The oath of office requires that an attorney swear to support and bear true allegiance to the “Constitution of the United States and the Constitution of the State of Kansas.” Rule 704(i) (1993 Kan.Ct.R.Annot. 416). It then goes on to require that the attorney act in certain ways with respect to clients, be honest, and have fidelity to the court. The Model Rules of Professional Conduct, in addition to requiring that a lawyer be a representative of clients and an officer of the legal system, imposes a duty on the lawyer to be a public citizen with a special responsibility for the quality of justice. A lawyer’s conduct should conform to the requirements of the law in professional service to clients, in the lawyer’s business, and in the lawyer’s personal affairs.
Indeed, lawyers who decline to swear to uphold the constitution will rightfully be denied the privilege of a license to practice law.

“Neither delay nor deny the rights of any person through malice, for lucre, or from any unworthy desire”

The obligation to proceed with diligence in a client’s cause is essential to good representation.

The duty of an attorney in this, as in other matters, is clearly stated in the oath taken upon admission to the bar to “neither delay nor deny any man his right through malice, for lucre, or from any unworthy desire.” (Rule 27.) To attempt by all honorable means to purge the bar of a member honestly believed to be unworthy, after proper examination of his conduct, is praiseworthy, although it may be an unpleasant duty. The man who enters upon this undertaking should, however, be convinced of probable cause, and should not be actuated by sinister motives, but by a sincere purpose to secure and maintain justice, truth and honor.

Rule 1.3, KRPC provides: “A lawyer shall act with reasonable diligence and promptness in representing a client.” Comment [2] to this Rule intones:

Perhaps no professional shortcoming is more widely resented than procrastination. A client’s interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client’s legal position may be destroyed. Even when the client’s interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer’s trustworthiness.

And Rule 3.2, KRPC holds: “A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.” Comment [1] to this Rule explains:

Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party’s attempt to obtain rightful redress or repose.

Lawyers who fail to fulfill the duties of diligence and expedition, particularly for malice or lucre, may be subjected to discipline.

In the recent case of In re Dickens, the respondent was indefinitely suspended for, inter alia, violations of her duty of diligence under Rule 1.3:

The respondent failed to diligently and promptly represent G.C. in DA12309. The respondent repeatedly requested additional time to respond to discovery requests, motions, and claims. Additionally, the respondent failed to timely file discovery requests, motions, and answers.

Failures to expedite client matters in violation of Rule 3.2 have regularly formed the basis for disciplining lawyers. For example, in In re Coleman, the lawyer was disbarred for, inter alia, failing to close a client’s estate for 12 years. And in In re Jones, the lawyer was suspended (and then placed on probation) for, inter alia, allowing the statutes of limitations to run on no less than four client matters.

The pursuit of lucre—increasing the lawyer’s wealth—is often a justification for delaying a client’s cause. In In re Stanley, the Kansas Supreme Court disbarred a lawyer who mishandled client funds, holding, “As stated, the actions of the respondent are inconsistent with the ethical conduct required of lawyers and inconsistent with his oath of office.” And in In re the Disbarment of Learnard, the lawyer was held to have violated his oath of admission and was disbarred for converting client funds.

When a lawyer conducts himself so that confidence can no longer be placed in him with safety his usefulness to the court and state has ceased. Other offenses may perhaps be condoned, but conversion to his own use of the property of his client is an offense that cannot in any degree be countenanced.

“The not knowingly foster or promote . . . any fraudulent, groundless or unjust suit”

Some lawyers are justly criticized for filing and pursuing cases (or defenses) without merit. The filing and pursuit of groundless suits and claims is justifiably penalized. Rule 3.1, KRPC, provides:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

The Comments to this Rule explain:

The advocate has a duty to use legal procedure for the fullest benefit of the client’s cause, but also a duty not
to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed.40

Clearly, then, filing and pursuing non-meritorious claims or defenses subject lawyers to appropriate discipline. For example, in State v. Rome, the Kansas Supreme Court publicly censured the respondent attorney, holding:

An attorney may not divorce himself from his ethical obligations as an attorney when acting as a private citizen. He or she must always uphold the attorneys' oath not to bring “groundless or unjust suits.” Supreme Court Rule 702(i), 232 Kan. cxx.41

In the case of In re Disbarment of Gorsuch, the Kansas Supreme Court disbarred a lawyer for, inter alia, filing and pursuing a claim after receiving facts from his client demonstrating he had no claim, thereby violating his oath of admission as an attorney:

That in the county of Wyandotte and state of Kansas, and on sundry days during the years 1921 and 1922, the said accused willfully violated his oath and the duty imposed upon him as an attorney at law and committed acts unbecoming an attorney at law.42

Even in the absence of a judicial ruling in the underlying case that the filing of a lawsuit was frivolous, the Kansas Supreme Court sanctioned a lawyer in In re Dennis for filing and pursuing a meritless lawsuit.

The findings of fact pertaining to the Francis litigation demonstrate that Francis' FMLA claims were without merit from the beginning, and there was never any indication that further investigation would lead to a meritorious case. It was the respondent's duty, under KRPC 3.1, to familiarize himself with the facts and to refrain from filing if the case was frivolous. He did not do so. We hold that the panel's conclusion that the respondent violated KRPC 3.1 is supported by clear and convincing evidence.43

And, in the case of In re Boone, the lawyer was placed on probation after filing numerous frivolous motions in a number of cases in violation of Rule 3.2.44

“Neither do, nor consent to the doing of any falsehood in court”

Courts must rely upon the veracity of statements and representations made to them by the lawyers appearing before them.

Simply stated, courts must be able to rely upon what lawyers say—what they represent as to the facts or the law. Courts must also rely upon what lawyers do not say, for silence, when there is a duty to speak, may mislead the court and prejudice the administration of justice in the same way as a misleading, expressed statement.45

The oath of admission enshrines this duty.

The attorney’s oath which respondent took on his admission to the bar included the solemn oath he would neither do, nor consent to the doing of any falsehood in court.46

The lawyer's duty to “do no falsehood” dates back at least to the age of Justinian.47 And the duty of candor toward a tribunal is a strict one. Rule 3.3(a), KRPC, provides as follows:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.48

Lawyers who make misrepresentations to a court violate both this rule and their oaths of admission as lawyers. For example, in In re Disbarment of Staton, the respondent lawyer was held to have violated his oath of admission and was disbarred for:

deceiving the district court willfully and maliciously and in violation of his oath of office and his duties as an attorney at law, in knowingly misrepresenting and attempting to mislead the court.49

Kansas Supreme Court Justice Fred N. Six, in dissenting from an order of censure ordered against a respondent lawyer, and arguing instead for suspension of the lawyer found guilty of misrepresentation, wrote:

In a similar case, the respondent was held to have violated his oath of admission by making misrepresentations to a court.

Manifestly the failure of a lawyer in a case to report such action to the court, especially when the court interrogates him concerning it, constitutes a violation of the lawyer’s oath, of the duties imposed upon him and falls squarely under the second ground of the disbarment statute previously quoted.

Combining a disapprobation of lying with that of financial self-dealing (both violations of the lawyer’s oath), the Kansas Supreme Court has also stated:

False colors in court, when made by a member of the bar under oath as an attorney and under the code of ethics, cannot be tolerated especially when made for personal gain.

Again, unquestioned honesty is at the very heart of a lawyer’s expected conduct.

This misconduct goes to the core of an attorney’s oath: misrepresentation to a judge to gain an advantage in litigation. The public and the profession need to be protected from attorneys who engage in dishonest conduct.

“Discharge your duties as an attorney . . . with fidelity both to the Court and to your cause”

Finally, how can clients (as well as the courts and the public) trust lawyers if all members of the legal profession are not committed to the representation of those clients with competence and zeal?

Rule 1.1, KRPC, provides:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

So, lawyers owe their clients (and the legal system) the obligation to represent their clients as fiduciaries, with the highest fidelity.

[O]ne who is admitted to practice as an attorney at law is an officer of the courts and both by virtue of his oath of office and the customs and traditions of the legal profession, he owes to the courts the highest duty of fidelity.

This highest duty of fidelity inheres to, and is the result of, the attorney-client relationship.

[Q]he duty of fidelity and good faith imposed upon the attorney in dealing with his client is founded, not [solely] on the professional relation per se, but on the influence created by the relation. As noted in the oath itself, this duty of fidelity is owed not just to clients but also to courts and the legal system.

The lawyer’s duty is of a double character. He owes to his client the duty of fidelity, but he also owes the duty of good faith and honorable dealing to the judicial tribunals before whom he practices his profession. He is an officer of the court—a minister in the temple of justice. His high vocation is to correctly inform the court upon the law and the facts of the case, and to aid it in doing justice and arriving at correct conclusions. He violates his oath of office when he resorts to deception, or permits his clients to do so. He is under no obligations to seek to obtain, for those whom he represents, that which is forbidden by the law.

The Preamble to the KRPC restates the multiple masters to which each lawyer must answer:

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

“So help you God”

This phrase is added to demonstrate the seriousness of the oath, and to call upon The Maker of Heaven and Earth, the Final Judge, to witness the solemn vow which precedes it. The phrase is material to the entire oath, and should not be omitted. Indeed, the phrase goes back at least as far as the founding of our nation and was intended to imply the deeply solemn nature of the promise being undertaken in conjunction with the phrase.

The Framers acknowledged morality’s importance in taking oaths. Breaching the commitments one took under oath would constitute an immoral act, which a moral person strives to avoid. Even though the phrase “so help me God” introduces religious language into an oath, it would be a mistake to think of oaths as purely religious commitments. Instead, the Framers’ generation understood oaths as obligations taken subject to one’s own source of morality, whatever source that may be.

Indeed, the phrase “so help me God” was from the beginning, and is still, included in the oath administered to all federal judges (including Supreme Court justices).
The essence of the phrase [“So help me God”] is to emphasize that one means what one is saying or has said. It therefore implies greater care than usual in the act of the performance of one’s duty, such as in testimony to the facts of the matter in a court of law. The use of the phrase implies a greater degree of seriousness and obligation than is usually assigned to common conversation.63

The phrase “indicates its being a vow to fulfill despite odds and pain, not an ordinary promise much less not a thoughtless part of an inherited social ceremonial.”64

In the Kansas Supreme Court case of State v. Wright, the following exchange is quoted as demonstrating the competency of a witness to testify:

Q. You have been taught that God punishes those that tell untruths?
A. Yes, sir . . .

Q. Do you believe it is wicked to tell a lie?
A. Yes, sir.

Q. Do you solemnly swear—that means promise faithfully before men and God—that in this cause, this lawsuit now pending, you would testify to the truth, the whole truth and nothing else but the truth, so help you God? Now do you understand what that means?
A. Yes, sir.

Q. Just what does that mean, in your own words?
A. It means to tell the truth, not tell—

Q. Anything but the truth?
A. Yes.

Q. And that if you tell the truth, or an untruth, you—Who are you calling to witness that it is the truth when you say so help me God? Whom are you calling to witness that you tell the truth?
A. God.65

Thus, the phrase “so help me God” is an essential part of the lawyer’s serious and solemn oath to fulfill the promises which precede that commitment.

Conclusion

How many lawyers, in the joy and excitement of first being called to the Bar actually listened and considered the solemn words in the oath of admission? And how many lawyers have taken the time to go back and review those solemn words, to ponder their meaning, and to renew their pledge to follow and apply them in everyday life?

Despite the distractions of the busy practice of law, lawyers should keep before them the obligations taken on at the very outset of their practice in their oath of admission.

The general principles set forth in the oath should serve as a constant reminder to the members of the bar of the grave responsibilities cast upon them in the practice of their profession.66

It is hoped that, with this gentle reminder, we all might take a new look at the oath which we undertook in exchange for the privilege to practice law and renew the solemn obligations undertaken in that oath. ■

About the Author

J. Nick Badgerow is a partner with Spencer Fane LLP in Overland Park, Kansas. For 44 years, he has been a trial lawyer focusing on employment, construction, and professional responsibility. He served for 23 years on the Kansas Judicial Council, including Chair of the Council’s Civil Code Committee and the Antitrust Law Committee; 16 years on the Kansas State Board of Discipline for Attorneys; 30 years as Chairman of the Johnson County (Kansas) Bar Ethics & Grievance Committee; and 11 years as Chairman of the Kansas Bar Association Ethics Advisory Opinion Committee. Nick served as Chairman of the Kansas Ethics 2000 Commission and the Ethics 20/20 Commission, and as a member of the Kansas Supreme Court Commission on Professionalism. He is the editor and a co-author of the Kansas Bar Association Ethics Handbook, Third Edition (2015).

nbadgerow@spencerfane.com
Conspiracy to bribe a police officer in order to protect and promote

State, 119 A.3d 1283, 1292 (Del. 2015).

... [s]wearing, testifying, affirming, declaring or subscribing to any mate-

Perjury is intentionally, knowingly and falsely

Matter (neglecting client's case and lying to court – indefinite suspension).

Matter of Robertson, 256 Kan. 505, 507, 886 P.2d 806 (1994) ("We disagree with

In re Davis, 253 Kan. 836, 861 P.2d 1340 (1993) (lawyer suspended,

59. See, Crisp v. State, 21 Tex. Cr. R. 137, 220 S.W. 1104 (1920)(error to omit phrase “So help me God” from jurors’ oath, as it is material to the oath).

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Permission to Watch Puppy Webcams and Cute Cat Videos

You know those darling puppy webcams—or those cute cat videos? Turns out they might enhance your own well-being. (Well, as long as you don’t watch them all day). Watching them is one of the suggested activities on the Wheel of Well-Being circulated recently by the ABA Commission on Lawyer Assistance Programs and Center for Professional Responsibility. WAIT — watching cute animal videos is recommended by the Center for Professional Responsibility? How can that be? Here’s the connection as I see it: activities that enhance individual well-being also tend to foster a healthy lawyer; a healthy lawyer is usually a competent lawyer. Competent, healthy lawyers don’t often fall into ethical violations.

That approach caught the attention of some Kansas lawyers, and then the Supreme Court, which is supporting the Kansas Task Force on Lawyer Well-Being. Visit the new website here: www.Kslawyerwellbeing.com.

Just as a quick review, there was a National Report on Lawyer Well-Being issued in 2017 that documented a toxic legal culture with unsustainable levels of depression, anxiety and substance abuse. The Report recommended that individual states form their own task force and promote lawyer well-being. Many lawyers in Kansas have been meeting and working on implementing the Report’s recommendations. National and state task forces are encouraging activities that promote thriving in all six dimensions of well-being.1 So when you heard about all this maybe you even thought it was a good thing. “But I (you may have thought) am really way too busy to get into that stuff”. Or perhaps you thought, “That’s a great idea. I just wish I wasn’t so busy; I’d work on that stuff”. Or, “I need a quick, cheap and easy way to grow my own well-being.”

Well, somebody heard you. The ABA sponsored the creation of a Lawyer Well-Being Tool Kit with more resources and ideas than you’ll ever use: https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_well-being_toolkit_for_lawyers_legal_employers.pdf

But even that may be a daunting place to begin so somebody must have remembered that acronym KISS for the slogan that’s a slice of wisdom: Keep It Simple, Sweetie. And so
The ABA came up with 24 activities, ranging in length from one minute to 60—activities that even a really busy person can do and will almost always immediately feel better. The “watch a silly animal video or outtakes from a favorite show” idea is in the one minute section. A couple other one minute ideas are to encourage someone else and to just smile. Another easy one is to pause briefly at the door before entering a meeting. Take a breath, feel your feet on the floor and ground yourself in the moment. That one will also work before you hit “SEND” and could save you a regret.

There are lots of one minute ideas. Another is to engage your senses by identifying five things you hear, four things you see, three things you touch, two things you smell and one thing you taste. Or, take a minute to focus on your feet: is your weight balanced? What are your feet touching? Can you straighten your ankles?

Conquered those, did you? Ready to tackle a two minute suggestion? Close your door and do a power pose. Doing a pose that makes you feel stronger (think: Warrior you yoga practitioners) can help you navigate difficult situations.

Here’s a good seven to eight hour activity that undergirds all well-being: SLEEP.

Back to the easy, two minute ideas – another one is to drink a glass of water. Let it be a reminder to take time to care for yourself.

Got five minutes? A walk outside around the building. Or maybe just simple stretching.

Gratitude lists can be almost any length of time from thirty seconds to thirty minutes. And as simple as being grateful for getting to work safely, or having work, or enjoying family and friends.

Bet you haven’t thought of this 15-minute social well-being activity: make a monthly calendar of obscure holidays and find a way to celebrate them. Who doesn’t like National Doughnut Day? Plenty of time to get June 5, 2020, on your calendar. Coming up sooner is National Roof Over Your Head Day on December 3rd. It is listed as a day of appreciation for the things we have, starting with a roof over our heads. Want to add a spiritual or emotional well-being dimension to that day? Make a contribution to a homeless shelter.

The point of all these activities is to actually do things that will enable us to not just survive, but thrive as lawyers and human beings. And the challenge of this article is two-fold: 1. For each of us to do some or most of them often; and 2. To explore, and do, all the other thousands of ways we can each enhance our own well-being in all six dimensions.

About the Author

KALAP relinquished its column space this month to allow this article about the Kansas Task Force on Lawyer Well-Being. Anne McDonald was involved with the initial surveys conducted by the ABA Commission on Lawyer Assistance Programs that led to the National Task Force Report and she was a member of the initial Kansas Ad Hoc Committee that has now become the Kansas Task Force. She maintained membership on the Kansas Task Force Executive Committee after her retirement as Executive Director of KALAP in 2018.

1. Occupational, emotional, physical, intellectual, spiritual and social are the six dimensions of well-being discussed in the National Task Force Report.
Growing up in the sister cities of El Paso, Texas, and Ciudad Juarez, Chihuahua, made commuting between both Mexico and the United States a normal day to day activity for most people living in the area. “Let’s go shopping to El Paso!” “Let’s go to Toy R Us to pick out your Christmas gift!” “Let’s go visit your cousins!” I always thought it was normal to go back and forth and everyone could do it. In the early 2000s I would simply cross by saying “American Citizen.” At times the Customs Officer would ask for my birth certificate, but other than that, I never had a problem crossing, nor was I ever denied entry.

As a young child, I loved living in Ciudad Juarez. My mom would always take us to watch the latest movies, every Sunday we would go out to eat. We had the luxury of getting authentic Mexican food in a taco stand close to home, because believe me, everything is so much better when it comes from a food stand, and I was close to my other family members. My mom tried to keep us busy with activities she believed would benefit us in the future. From a young age my mom taught us the importance of education. She knew we were beginning to live in an era where being bilingual was important, so even though she did not fully speak English, she made sure we did. She enrolled us in bilingual schools and took us to English classes in the afternoons. Like any other parent, she wanted for my sisters and me to have better opportunities.

My family was a middle-class family who, like anyone else, struggled when our dad did not have a job and our mom had to help with the expenses. Yet, if there was something my parents taught us even through adversities, it was to work hard and never give up. Along with working hard, I grew up knowing that everyone was the same. Everyone was meant to be treated with the same respect. Skin color did not distinguish anyone, and being from a different country did not make anyone superior or inferior.

When violence spiked in Ciudad Juarez, my parents opted to migrate to the United States for our safety. Even though we never had firsthand experience with any kind of threats or violence, we knew we were not safe. When we came to the United States, we went to a community that was on the outskirts of El Paso and was beginning to expand. This was my first time attending a school in the United States and the school system was completely different from what I had been exposed to. This was also the first time I was exposed to the struggles many immigrants were facing.

For the first time in my life, I began understanding that not everyone could come in and out of the country the same way I did. Just like my family, many other families were migrating due to fear, the only difference was that they were not coming to the United States legally. Some came with a visa and overstayed, some parents did not have status but their kids
did, and many others came with no kind of visa whatsoever. Besides escaping the fear of violence, many now feared being caught in the U.S. with no status. I still did not fully understand why some were allowed to be in the U.S. while others were not. Why did someone have to be scared while driving their kids to school? Why should kids be scared that their parents might not be home when they got home from school?

It was also during this time when I began making significant educational decisions. While in Middle School, I was given the option of attending an early college high school. I would have the opportunity to complete my Associate's Degree while completing my high school diploma. When I began high school, I was faced with a decision that many 14-year-olds don't have to make. I had to pick my major. I was not sure what I wanted to do. All I knew was that, like anyone else, I wanted to be a hero and help those in need. How? I had no idea.

Later, I became interested in becoming an attorney. It had been in my mind before, but I never actually envisioned it. My parents had only completed their Associate's degree, other family members had only graduated high school, and only a few distant family members had actually pursued higher education, so I did not know how to navigate the system. I did not have anyone who I could go ask questions about what being an attorney was like. However, I've always had my parents' support.

I graduated with my Associate's degree before obtaining my high school diploma, and I later obtained my Bachelor's degree at The University of Texas at El Paso. With law school in mind, I started thinking about what I would do with a law degree. The immigration situation still bothered me, so I began considering immigration law. While in undergrad, I completed a law school preparation program, through which I obtained an internship with an immigration non-profit firm. Through my internship I began learning about many misconceptions that even I had. There was an extremely high need for help. Many immigrants were coming for need. The immigration situation still bothered me, I started feeling a fire that was motivating me to work hard because now more than ever, my community needed help. They needed a voice.

With the new president, stricter immigration policy followed. The number of visas being offered and given decreased rapidly. With the constant changes, negative labels were given to the immigrant community. Videos started becoming viral about people being discriminated against simply because they would speak Spanish in public. "Go back to your country. You don't belong here. Stop stealing our jobs." These sentiments were becoming alarmingly common. Ignorance came to the surface through the constant comments and acts of superiority over another race or ethnicity. The country now had a divided mentality.

I am part of this community; I felt every insult and every hurtful word. As the discussions about the wall continued, I could not help but think about how many people were not aware about an already existing wall on the border. Being from El Paso, I could see it every day when I drove to school. Many people did not know my city or the people they were criticizing. The biggest problem we have is ignorance. There are many misconceptions about immigration processes. For example, many people think it is easy to obtain a visa. However, obtaining a visa is not as easy as it seems. Many visas have a waiting line. When you apply for certain visas, such as immigrant visas for employment or family based, you have a waiting period of up to 20 years or more to be able to obtain a visa. Many people also fail to understand the asylum application process. For asylum, applicants should not have to wait outside the United States. To ask for asylum a person has to be in the United States or at the border. The current MPP (Migrant Protection Protocol) program forces many applicants to wait outside the U.S. during their legal proceedings. This puts many applicants at risk because they are being sent to a country where they often suffer from physical abuse, rape, theft, and even kidnapping. Many people think that this is okay since it should not be the responsibility of the U.S. to protect them. Yet, these people are following the proper protocol to petition for asylum; by being in the United States and asking for asylum in the country. The risks of being part of the MPP, also known as "Remain in Mexico", are so extreme that some people would rather be detained than continue living in fear.

People are dehumanized and given a number, which they are identified with. When a person is detained, it can be close to impossible to locate them without knowing what their
Alien (A) number is. Conditions in detention centers often go unnoticed. At times, people are living under uninhabitable conditions. Some people have been detained and denied a shower, for days, even weeks. They often lack access to hygiene items such as toothbrushes or soap. While in detention, many people are getting sick and have no access to medical care. Members from the LGBTQ community, more specifically, transgender individuals, often lack access to medication and their needs are often neglected. Many centers are so overcrowded that people cannot sit down or lie down. While in detention centers, individuals can be transferred without any prior notice to anyone, not even their attorneys. In many occasions, some people are given forms to sign, but they sign without knowing what the document actually says. Failure of understanding the language leads to people waiving their rights to bonds and appeals. Detainees are at times taken to court with no prior knowledge, leading to failure of obtaining legal representation and presenting themselves with no chance to justly fight for themselves. The constant policy changes present an enormous challenge because you need to be on your toes and informed every single day about a different decision that might affect current cases or applications. This presents a challenge for attorneys, and even more so, to those immigrants with no legal representation. A new policy might be introduced and come into effect a few days after it is proposed. You simply have to act fast to file motions and applications before the new policy can make it impossible or bar an applicant from applying or even obtaining bond or parole.

Knowledge is truly key. How is it possible to claim on national television that there are three Mexican countries?\(^1\) There is only one Mexico. “Are you going to Mexico during your break?” “Well, actually I am going back home to El Paso.” “Well, same thing.” No. El Paso and Ciudad Juarez are not the same. They are two different cities, from two different countries. Even though they are known as sister cities, they still are two different cities. From a cultural perspective, they are two different cultures and we should stop stereotyping and feeling superior to other races. I am a proud Mexican American woman who is working towards becoming part of the two percent of Latinas who are American lawyers to help fight against stereotypes and injustice against vulnerable people. My community has always welcomed me and it is time for me to give back to them.

As a community, there are many ways to help. You can contact your representatives to get involved and express your interest and opinions regarding policy changes. Many organizations are also working zealously, but have limited resources. One thing we can do is donate or get engaged. Due to the high demand of cases, help is needed and many people can participate by translating, helping with intakes and consultations, helping during school breaks, or participating during the school year in a local organization. This can also benefit students by obtaining pro-bono or community service hours.

We need to be better informed about the current situation of our country and instead of attacking one another, we should be embracing our differences. We benefit from shared cultures and we should stop stereotyping and feeling superior to other races. I am a proud Mexican American woman who is working towards becoming part of the two percent of Latinas who are American lawyers to help fight against stereotypes and injustice against vulnerable people. My community has always welcomed me and it is time for me to give back to them.

How is it possible for someone to drive for hours to El Paso to attack the Hispanic Community? I believe we have all witnessed many of the negative impacts of a divided nation. On the other hand, it has also influenced many to act and support one another. After my hometown was attacked, I saw the pain and disbelief in everyone’s eyes, but I also witnessed something that gave me hope. Unity. The unity and love to help those donating blood, to support the families of the victims, to stand together as a city. I witnessed people from other states and countries standing in unity with our city. Even through the midst of all the barriers and divisions that have been created, I have also witnessed the strength and love of many willing to take on the hard fight.

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About the Author

Claudia Chavarria is a 2L who grew up in the border cities of Ciudad Juarez, Chihuahua, and El Paso, Texas. She completed her elementary education in Ciudad Juarez and then moved to El Paso where she received a Bachelor of Arts with a major in political science and minor in legal reasoning from The University of Texas at El Paso. She currently is the Vice-President of the Hispanic American Law Student Association and Secretary for the Deans Diversity Leadership Council. She aspires to continue working to help the immigrant community and break stereotypes imposed on minorities.

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Independent contractors and employees may be difficult to distinguish at a glance. The uninformed may consider them similar, which can create confusion because different tax considerations attach to each classification. Businesses may face situations that pose a genuine question regarding the appropriate classification of a worker. However, most of the time, there is no credible controversy whether a worker is one or the other. Attempts to misclassify the worker are actually impermissible attempts to lower taxes.

Independent contractors are in business for themselves, and usually work for various clients using their own expertise and experience. Independent contractors pay self-employment taxes and are able to lower their taxable income through deductions for amounts incurred while carrying out their trade or business. Employees typically work for one employer and use their skills in a manner dictated by the employer.

**Why Does the Distinction Matter?**

After the Tax Cuts and Jobs Act, employees likely have little to no deductions available to them for costs incurred relating to employment. Conversely, independent contractors are still allowed to deduct ordinary and necessary expenses incurred carrying on a trade or business.

Employers incur payroll taxes, or more accurately the law dictates that employers and employees each pay a 7.65 percent payroll tax. Research, however, demonstrates the true incidence of a payroll tax is borne mostly by employees in the form of lower wages. Businesses using the services of an independent contractor do not have to pay this tax. Employers must also pay social security and Medicare taxes on employee income, are responsible for state and federal unemployment insurance, and must withhold and remit employee income tax payments on the remuneration paid for each pay period. Depending on the type of business, the owner might also have to pay excise taxes.

**Employees**

Whether or not someone is an employee is a question of fact. No one factor is determinative, rather the analysis is based on the totality of the circumstances. Control is the most important consideration in determining the relationship, and there are numerous ways to demonstrate control. Generally, if the payor has the right to direct only the result of the work, the individual is an independent contractor. Employees are characterized by the ability of the payor to direct or control the work and the manner in which it is done. This is true even
if the payor does not exercise the right to control—it is sufficient if the right exists. Other factors that weigh towards classifying a worker as an “employee” are control over financial aspects of the work and the relationship established between the parties.

**Control Over the Work Done**

To determine whether a worker controls the work done, courts consider whether the worker had to be trained for the job, including periodic or on-going training that addresses procedures or methods by which the work is completed. The type and extent of instructions given to a worker also come into play, because more extensive instructions on when to work, where to work, tools to use, suppliers to use, etc., indicate the worker is an employee. If, for example, the payor expects a worker to be on the payor’s premises during scheduled shifts, with scheduled lunch and break times, this indicates an employee classification. The degree of instruction also matters, because greater instructions on how to work weigh toward an employer-employee relationship. This is also true of evaluations—employers evaluate employees and how they do their work, while independent contractors are evaluated on the quality or sufficiency of the end result. Generally speaking, independent contractors need very little training on what is to be done, with a focus only on the end result.

**Control Over Financial and Business Aspects**

Courts consider who has the right to control or direct the financial and business aspects relating to the work in question. Independent contractors, as business owners, typically have the opportunity for profit or loss, as opposed to just profit. Employees, on the other hand, are normally guaranteed a set amount of compensation for a specified time period (hour, week, etc.), and the risk of loss is limited to the credit-worthiness of their employer and their ability to cover the costs for specific time periods (it is rare for an employee to work for months without regular pay). Independent contractors tend to be paid for a job with a flat rate (or a formula based on something other than just hours spent on a project). Independent contractors also generally offer services to the marketplace without restriction, or at least in such a manner that the payor is not the only possible client.

Courts also consider equipment ownership. Independent contractors typically own their own tools or equipment and make investments in those tools for use with many clients. Employees typically use equipment provided by the payor, who retains ownership over the equipment and is entitled to tax attributes like depreciation or deductions. Employers tend to reimburse expenses incurred by an employee while carrying out their job. Typically, expenses incurred by an independent contractor are not reimbursed by the payor, but are deductible expenses paid or incurred in carrying on a trade or business and claimed on Schedule C of their income tax return.

**Relationship Considerations**

Contracts that define a worker as an independent contractor are not deterministic in establishing the relationship classification. Courts look at the substance of the relationship rather than the form designated by the parties. Contracts are considered by courts in weighing the facts and circumstances to determine the relationship type. For example, if a relationship is expected to continue indefinitely, rather than for a finite project or period, this indicates the establishment of an employer-employee relationship. Payment under the contract of expenses typically associated with “benefits,” such as health insurance, retirement contributions, vacation pay, personal leave, and sick pay also weigh in favor of an employee classification. In addition, courts examine the relative importance of the services provided by the worker in the context of the payor’s regular business. If these services are considered a key part of regular business, this points toward an employer-employee relationship.

**Misclassification of Workers**

If a payor misclassifies a worker as an independent contractor, the payor may be liable for substantial penalties. While the low chance of audit may lead a business owner to lean towards misclassifying a worker, employers can trigger a potential audit by filing Form 8919 Uncollected Social Security and Medicare Tax on Wages. In situations where a genuine question exists about the appropriate classification to use, businesses can start by looking at Form SS-8. If the business loses in the audit process, it may have to pay all unpaid tax, both employer and employee, plus a civil penalty equal to the unpaid taxes. The consequences of such a heavy penalty will often push the business into insolvency. The business is not the only party with exposure for failure to pay employment related taxes. Any person responsible for collecting and remitting taxes may be held personally liable for the taxes and the penalty. If failure to collect or remit taxes is willful, criminal penalties may include up to five (5) years in jail.

**Relevance to Legal Practice**

Lawyers and law firms persistently misclassify law student clerks or summer associates as independent contractors rather than employees. One firm incorrectly instructed a student clerk that the wages she earned did not need to be reported. While there may be outlier students who worked as paralegals or law clerks prior to law school, few law students qualify as independent contractors. Students should be under the control of lawyers in the firm. Summer associate and clerkship positions are great opportunities for law students to gain experience handling real cases and doing research for actual clients, but rarely can they hit the ground running as autonomous workers. Typically, a firm provides a clerk with assignments. When problems arise, the supervising attorney is notified to assist and help the student learn from the problem. The work is non-delegable and services are provided under
the firm’s name, not the clerk’s name. The firm is responsible for the quality of work performed and has the right to direct and control the clerk to protect its business reputation, client relationships, and financial investments. A recent IRS determination letter considered this very issue: a law student clerk for a law firm was found to be a common office employee, despite the firm’s efforts to categorize her as an independent contractor.

Those who engage services of workers need to be careful in determining their classification. It may be tempting to take the “cheaper” route and categorize these workers as independent contractors. In the long run, it is far cheaper to do the ethical thing; Classify workers appropriately based on the level of control available to the parties. It is unlikely (although not impossible, depending on their past experience and qualifications) for student clerks or associates to exercise enough independence to be anything but an employee. Encouraging improper classification amongst these law students is unethical. If a student has not taken an introductory tax or employment law class, the student may not realize they are in contravention of the law. However, a practicing attorney or a law firm has a duty to know and behave better.

Care must be taken so all legal requirements are met when classifying workers. It is especially important for law firms to provide a good example when classifying student workers; faith in our profession depends on it. ■

1. See John Olson, What Are Payroll Taxes and Who Pays Them?, Tax Foundation (July 25, 2016), https://taxfoundation.org/what-are-payroll-taxes-and-who-pays-them/; also Kyle Pomerleau, A Comparison of the Tax Burden on Labor in the OECD, 2014, Tax Foundation (June 19, 2014), https://taxfoundation.org/comparison-tax-burden-labor-oecd#_ftn6, at footnote 8, which states “while the employee-side payroll tax is a combined 7.65 percent, the effective tax rate on total labor costs is reduced by 1-8.9 percent to account for the reduction in the worker’s taxable income.”

2. Excise taxes may have to be paid if the business manufactures or sells certain products, operates certain types of businesses, use various kinds of equipment, facilities, or products, or receive payment for certain types of services. These are outlined in detail at https://www.irs.gov/businesses/small-businesses-self-employed/business-taxes.

7. See https://www.law.cornell.edu/uscode/text/26/7202.

About the Authors

Lori A. McMillan is a Professor at Washburn University School of Law where she teaches Business Associations, Comparative and International Taxation Law, International Taxation, Law and Economics, Taxation of Business Enterprises, Taxation of Individual Income, and Tax Policy. Professor McMillan received a Master of Laws in International Taxation from New York University School of Law, J.D. from Queen’s University at Kingston, and is substantially finished with a Doctorate of Jurisprudence in taxation from Osgoode Hall Law School in Toronto. She has worked extensively in and with foreign legal offices and clients, involved in tax planning for inbound and outbound transactions, both from a domestic U.S. and Canadian tax perspective, as well as from an international and tax treaty standpoint.

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Lindsay Bayles is a second-year law student at Washburn University School of Law. She is Professor Lori A. McMillan’s Research Assistant, Director of the 2019-2020 Volunteer Income Tax Assistance (VITA) program, and Vice-President of the Tax & Estate Planning Association. While also completing the Booth Honors Program at Dixie State University, Lindsay graduated Magna Cum Laude with a Bachelor of Science in Communication Studies. Over the summer of 2019, Lindsay served as a Steiger Fellow for the American Bar Association’s Janet D. Steiger Fellowship Project and was placed in the Consumer Protection and Antitrust Division of the Kansas Attorney General’s Office.

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Members in the News

New Positions

Heather Alwin, a Colby attorney, was hired in September by the City of Oberlin to serve as its municipal judge. Alwin’s practice has focused mainly on criminal matters and on child welfare cases. She received her undergraduate degree from the University of Wyoming and earned her J.D. from Baylor University, with a criminal practice concentration. Judge Alwin served in the U.S. Air Force for five years as a lawyer, including a deployment to Baghdad to support the Iraqi criminal court.

Susan Carden was awarded the Distinguished Member Award by the Kansas Court Reporters Association. She has been a court reporter with the Reno County District Court system for 40 years. Carden has served the KCRC in many capacities, including as treasurer, president, on its membership committee and as coordinator of its annual convention. She was awarded the KBA’s Liberty Bell award in May of this year.

Dom Cavicchia has joined the Graber & Johnson Law Group, LLC as an associate attorney in its Manhattan office. Cavicchia earned his Juris Doctor from Washburn University School of Law where he received certificates with distinction in both Estate Planning and Tax Law. His practice will focus on Estate Planning, Tax Law and Medicaid Planning.

Ashley Comeau has joined the law firm of Jeter Turner Sook Baxter LLP in Hays, Kan., as “Of Counsel.” Her practice encompasses a range of civil matters, including estate planning and elder law. She will work with the firm’s business and individual clients. She graduated from the Washburn University School of Law completing undergraduate work at Fort Hays State University. A member of the KBA, Comeau is also in KWAA, Ellis County Bar Association and the Rooks County Bar Association. She is admitted to practice in state and federal courts in Kansas.

Jeremy J. Crist has joined Realty Executives Weis Real Estate Company in Manhattan as a member of its listing and sales team. He received his undergraduate degree at Kansas State University, majoring in business administration and gerontology. He earned his law degree from Washburn University. Crist served 12 years as a Riley County assistant county attorney prosecuting criminal and traffic offenses. A member of the KBA and the Riley County Bar Association, Crist is also a member of the National Association of Realtors, the Kansas Association of Realtors and the Flint Hills Association of Realtors.

Timothy Joseph Demel was sworn in this fall, taking the state and federal oaths. A graduate of Washburn Law School, he also holds a bachelor’s degree from Kansas State University. Demel works at the Jerry Harrison Law Office in Beloit, where he has a general practice of law. He interned with several Kansas firms and participated in the Washburn Law Clinic.
Gibson Watson Marino LLC has been hired to serve city attorney duties for the City of Andale. The Wichita law firm succeeds Austin Parker in that role. The firm was unanimously elected by the Andale City Council.

Michael J. Kelly has joined Husch Blackwell in Kansas City as senior counsel in the Real Estate, Development & Construction group. His practice is focused on complex construction and engineering matters. Kelly earned his J.D. from University of Kansas School of Law and his B.A. from Kansas State University. He currently serves as Mayor of Roeland Park, Kan. He also co-founded and leads Climate Action KC.

Mike Pepoon was named Sedgwick County Counselor in September after serving as the interim in that role for 10 months. Pepoon has a long record of serving in municipal government, having worked for Sedgwick County as a lawyer or lobbyist for 31 years. He has also served brief stints as a Wichita assistant city attorney and as interim general counsel of the Kansas Association of Counties.

Amy Ryan and Greg Todd have joined Martin Leigh as shareholders. Amy is Martin Leigh’s partner in its St. Louis/Clayton office and has been with the firm since 2007. She manages the St. Louis office and staff while maintaining her litigation practice for Martin Leigh’s clients. Greg, a partner in the Kansas City office, has been with the firm since 2014 and manages the Missouri creditor’s rights practice and the firm’s bank transactional work. Greg Todd and Amy Ryan join shareholders Steven M. Leigh, Thomas J. Fritzlen, Jr., and Beverly M. Weber in the executive leadership of Martin Leigh PC.

New Locations

Vance C. Preman announced the relocation of Vance C. Preman, P.C. and Kansas City Mediation & Arbitration Services to Corporate Woods, 9393 W. 110th Street, Bldg. 51, Suite 500, Overland Park, KS 66210 effective October 1, 2019.

Notables

J. Eugene Balloun, retired partner in the Shook Hardy & Bacon law firm in Kansas City, was selected by Voice for Adoption—a national adoption advocacy nonprofit—for its 2019 Breaking Barriers Adoption Award. The award recognizes Balloun’s efforts in overcoming barriers to adoption, including age, geographic location and special needs of children from foster care. Balloun was recognized at VFA’s 15th Annual Adoptive Family Portrait Project Display and National Adoption Month Briefing in Washington D.C. in November. Though retired, Balloun continues to perform pro bono work. Balloun and his wife have been foster parents to 29 children, and they adopted a son and a daughter who had been in foster care.

Dennis L. Gillen, Member/Attorney with Depew Gillen Rathbun & McInteer in Wichita was recognized in the 2020 Edition of Best Lawyers in America as a Best Lawyer in Arbitration and Mediation.

Rick Guinn was recognized in the Lindsborg News-Record for his success on the tennis court during his college years. He was a member of conference championship tennis teams from 1975-77, played number one singles and was a number one singles finalist in the 1976-77 KCAC Championship. His team qualified for the NAIA Nationals in 1976-77 and he was named 1977 Bethany College Athlete of the Year. Rick is a partner with the law firm of Colantuono Bjerg Guinn Keppler LLC, practicing employment law and business litigation. He graduated from Bethany and earned his law degree from Washburn University Law School. He is a member of the KBA and is a past president and current board member of the Johnson County, Kansas Bar Association. He is also a member of the Johnson County, Kansas 10th Judicial District Nominating Commission, a former ADA for Johnson County and a former Assistant Attorney General.

Kurt A. Harper, Attorney of Counsel at Depew Gillen Rathbun & McInteer was recognized as a 2020 Best Lawyer in Bet-the-Company Litigation and Commercial Litigation.

Camilla Klein Haviland, the first female judge in Ford County, was inducted into the 2019 Ring of Honor by the Dodge City High School Alumni Association. Haviland, Class of 1944, was active in a number of organizations while in high school, and she went on to attend Monticello Women’s Seminary in Illinois and Radcliffe College in Concord, Mass. Ms. Klein Haviland received her juris doctor from the University of Kansas in 1955 and was a member of the University of Kansas School of Religion, Anthropology Department of Wichita State, the KBA and the ABA. She became an attorney with the Calvert and White law firm, argued several cases before the Kansas Supreme Court, Served as president of the Southwest Kansas Bar Association and the Ford County Bar Association.

Ross A. Hollander (Wichita), was honored by Missouri & Kansas Super Lawyers 2019. Hollander is co-chair of Joseph, Hollander & Craft LLC’s Civil Litigation and Employment Law Division. He has practiced employment, labor and commercial law for more than 40 years. Hollander is a past president of the Wichita Bar Association, past president of the Kansas Bar Association’s Employment Law Section, and past president of the Wesley E. Brown Inn of Court. A graduate of Wichita State University, Hollander received his Juris Doctor from the University of Kansas School of Law. He also served as an adjunct professor at Friends University Master’s Program, teaching Management Labor Relations. He is a member of the Wichita, Kansas and American Bar Associations, and other professional associations.
Christopher M. Joseph (Topeka/Lawrence), was honored by Missouri & Kansas Super Lawyers 2019. Joseph is the managing member of Joseph, Hollander & Craft LLC. His practice focuses on the defense of individuals and businesses facing criminal charges in federal and state courts as well as complex civil litigation and defending professional licensure. A graduate of Wichita State University and the University of Kansas School of Law, Joseph is admitted to practice in Kansas and in the Western District of Missouri. He is a lifetime member of the Kansas and National Associations of Criminal Defense Lawyers, and in May 2019, he was selected to serve on the Kansas Judicial Council’s Criminal Law Advisory Committee.


M. Kristine Lawless (Joseph, Hollander & Craft LLC, Topeka) was honored by Missouri & Kansas Super Lawyers 2019. Lawless has extensive experience in complex federal and state criminal cases, including appeals. Her primary practice focuses on family law, and she is certified by the Kansas Supreme Court to perform mediation in domestic cases. Lawless was formerly Chief of the Northeast Kansas Conflicts Office and served as an Assistant Appellate Defender and Public Defender in Shawnee County. A graduate of Wichita State University, Lawless earned her Juris Doctor at Washburn University School of Law. She has been an adjunct professor for the law school and has served as Judge Pro Tem in the Shawnee County District Court.

Monnat & Spurrier, Chartered has been recognized by U.S. News & World Report and Best Lawyers as one of the five “Best Law Firms” 2020 Rankings for the Wichita area in the sectors of General Practice Criminal Defense, White-Collar Criminal Defense, Appellate Practice, Bet-the-Company Litigation, and DUI/DWI Defense. “Best Law Firms” Rankings are based on a rigorous process that includes evaluations by clients who are asked to rank firms for their expertise, responsiveness, cost-effectiveness, civility, and whether they would refer others to the firm. Additionally, Best Lawyers conducts an independent analysis of each firm and surveys attorneys in similar practice areas to compile its final list of rankings.

Carrie E. Parker (Joseph, Hollander & Craft LLC, Lawrence) received the prestigious Super Lawyers Rising Star designation for 2019. Parker practices primarily in the areas of criminal defense and civil litigation. Her criminal law practice includes representation during the investigation and prosecution of criminal charges, while her civil practice focuses on representation of individuals and businesses involved in complex civil litigation, civil matters related to constitutional and criminal law, and defense of licensed professionals subject to disciplinary proceedings. Parker received her juris doctorate from the University of Oklahoma College of Law, where she was a member of the Phi Delta Phi legal fraternity and earned admission to the Order of the Coif. She completed her undergraduate studies at Washington and Lee University in Lexington, Virginia.

Rachael K. Pirner, of Wichita’s Triplett Woolf Garretson, LLC, was profiled in the Sept. 27 Wichita Business Journal discussing her leadership style, mentors and role models. Pirner recognized her partner Jim Walker and colleague Linda Parks for mentoring her. She pointed to Gloria Farha Flentje, Honorable Marla Luckert and Honorable Karen Humphries as female leaders she admires.

Randall K. Rathbun, a member/attorney with the Wichita Firm of Depew Gillen Rathbun & McInteer was recognized as a 2020 Best Lawyer in Employment Law—Individuals and Litigation—Environmental.

Rebecca Rookstool, a solo attorney in private practice in Westmoreland was profiled in the Oct. 29 issue of the Wamego Smoke Signal. A farm girl who grew up raising sheep and cattle in Butler County, Rookstool’s future took a turn after she worked for a veterinarian as an undergrad. Although it was completely foreign to her experience, she opted for the law. Rookstool enjoys working for herself and the variety of cases that private practice allows her to take. She pointed out that one can choose the law no matter their undergraduate degree, saying, “Mine was in animal science…work hard and get good grades.”

Stephanie Scheck, a partner and attorney at Stinson LLP in Wichita, was profiled in the Sept. 27 edition of the Wichita Business Journal. She acknowledged her law partners and Stinson’s current Deputy Managing Partner Allison Murdock for their influence and inspiration. When asked what female leaders she admired, Scheck mentioned Ruth Bader Ginsburg—for her relentless pursuit for gender equity, her dedication, perseverance, intelligence and optimism. She also gave a nod to Michelle Obama who has the same qualities and who leads with grace. Seeking out strategic leadership opportunities through the years (serving on the firm’s Diversity Committee, assisting legal counsel, serving as chair of the Employment, Labor and Employee Benefits Division) laid the groundwork for her position on the Stinson Board of Directors and its six-person Executive Committee.
Dionne M. Scherff (Joseph, Hollander & Craft LLC, Overland Park/Kansas City) was honored by Missouri & Kansas Super Lawyers 2019. Scherff is an experienced litigator and one of only a few lawyers qualified by the ABA to handle death penalty cases. Her criminal defense practice represents clients charged with some of the most extreme criminal offenses. Scherff received her juris doctorate from the University of Kansas School of Law, where she now serves as an adjunct professor. She is a member of the Johnson County Bar Association, Wyandotte County Bar Association, Kansas Bar Association and Kansas City Missouri Bar Association, and the Kansas Association of Criminal Defense Lawyers.

Brooks Severson, an attorney with Fleeson, Gooing Coulson & Kitch, LLC, in Wichita was profiled in the Sept. 27 Wichita Business Journal. Severson credited her involvement with the Wichita Bar Association Young Lawyers group and the KBA's Young Lawyers Section with helping to develop her leadership ability and style. She acknowledged her partner Chuck Millsap for mentoring her as an associate and throughout her career. Brooks has taken on a mentorship in her firm and served in recruitment and hiring for her firm to encourage diversity.

Sherri Schuck, Pottawatomie County Attorney, was recently profiled by the Wamego Smoke Signal. Schuck was a police officer for seven years before pursuing law school. Through that experience, she knew she wanted to be a prosecutor. In her public practice, Schuck’s cases are mainly criminal. Although she considers herself to be fortunate to live in a relatively safe community, she disclosed that the few homicides have been among her most interesting cases. Her gender has rarely ever been a factor in her professional life, either as a police officer or prosecutor; Schuck said she had great support from most of her male colleagues.

Thomas R. Stanton, Deputy Reno County District Attorney, was honored by the Kansas County and District Attorneys Association with its Lifetime Achievement Award. Stanton is a graduate of the University of Kansas and of the University of Kansas School of Law. Before attending law school, Stanton worked as a police officer in New Mexico and at KU. He served 10 years with the Saline County Attorney’s Office before joining the Reno County DA’s office. He’s been a two-term president of the KCDAAA, and has earned a number of other honors and served in many leadership positions associated with his profession. Most recently, he was the Kansas narcotics Office Association 2018 Prosecutor of the Year.

Charles C. Steincamp, managing member/attorney with the Wichita firm of Depew Gillen Rathbun & McInteer has again been recognized in the 2020 Edition of Best Lawyers in America as Lawyer of the Year in Environmental Law. This is the sixth time Steincamp has earned the recognition since 2104. He is also listed as a Best Lawyer in the area of Litigation—Environmental law.

J. Corey Sucher of Brad Pistotnik Law, P.A. was recently selected for promotion to the rank of Lieutenant Colonel in the U.S. Army Reserve Judge Advocate General’s Corps. Corey, a personal injury litigator, has been balancing his civilian and military legal duties since 2004, when he first entered the JAG Corps. Since then, he has deployed to Iraq, served numerous active duty periods of service, completed Airborne school and Air Assault school, earned a LL.M. in military law, and graduated from the Army’s Command and General Staff College.

John Vering, a shareholder with Seigfreid Bingham, PC in Kansas City has been elected as a Fellow of the College of Labor and Employment Lawyers. This is the highest recognition by an attorney’s colleagues and reflects sustained outstanding performance in the profession, exemplifying integrity, dedication and excellence. Vering was formally installed at the organization’s convention in November. Vering has been given other professional accolades, including being recognized as a Kansas/Missouri Super Lawyer.
Obituaries

George E. Burket III (5/6/1942 - 10/31/2019)

George E. Burket III, retired abstracter and attorney in Kingman, Kansas, passed away on October 31, 2019, at the age of 77. George was born May 6, 1942, at Kingman Memorial Hospital to Dr. George E. Burket Jr and Mary Elizabeth Wallace Burket, both natives of Kingman, Kansas. George grew up in Kingman and graduated from Kingman High School in 1960. He attended the University of Kansas, where he was a member of the Sigma Phi Epsilon fraternity and graduated with a degree in biological science in 1965. After graduation, he began work for the US Public Health Service in Detroit, Michigan, leaving in late 1966 to enlist in the United States Army. He went through basic training and officer candidate school at Fort Knox, Kentucky, receiving his commission as a 2nd lieutenant (armor) in November, 1967. He served as an armored platoon leader, company commander, and aide-de-camp to the commanding general of the 24th Infantry Division. During his service he attained the rank of captain. While stationed at Fort Riley, Kansas, he met and married Linda M. Rembleske, a native of Wichita, Kansas. They married on December 28, 1968, and celebrated 50 years of marriage this past year. George enjoyed flying and obtained his private pilot’s license while serving in the army. After his army service, he continued his education at Washburn University School of Law, graduating in 1972. Upon graduation he joined the Charlson & Wilson Title Company in Manhattan, Kansas. Then in 1974, moved to Kansas City where he worked as a member of the legal staff for Chicago Title Insurance Company. In 1977, George and Linda moved to Kingman where George purchased the Kingman Abstract and Title Company. George was owner and president of the company until his retirement in 2006. He served as president of the Kansas Land Title Association and received the Association’s distinguished service award in 1989. George was committed to the community in which he lived. He served as a member of the board of directors of the Citizens Bank of Kansas for 34 years; he was a member and past president of Kingman Chamber of Commerce; and he was a member of the Kingman Community Hospital Board of Trustees, serving as chairman of the board for several years. He was a member of Lions Club, a director and past president of the Kingman County planning and zoning board, and a member of the board of directors of the Kingman Housing Authority. George was a co-founder, director and past president of the Southcentral Community Foundation. He was a member and trustee of the First Presbyterian Church. An avid outdoorsman, he was a co-founder of the Kingman County Chapter of Ducks Unlimited. George enjoyed spending time with his family, making many wonderful family memories traveling to Hawaii, Grand Cayman, Florida, and Colorado. His children made him happy and proud, and he attended many of their sporting events, recitals, competitions, and stage productions. In addition, George often enjoyed both golfing and traveling with family and friends. George supported his alma mater, the University of Kansas, and was a dedicated KU sports enthusiast. He was a lifetime member of the University of Kansas Alumni Association, of the Washburn University School of Law Alumni Association, the Kansas and Kingman County Kansas Bar Associations, and Sigma Phi Epsilon Fraternity. George was preceded in death by his parents. He is survived by his wife Linda; his children, daughter Lindsey Burket Metzler (Rob) of Clearwater, FL; and son Christopher Burket of North Hollywood, CA; and sisters Carol Burket of Kingman and Christine Poole of Wichita, KS, as well as many nieces, nephews, cousins and relatives. George was the definition of friendship, and his friends will miss his quick wit and sense of humor. Many thanks to his friends for their prayers and support through his illness and to the staff of Rivercross Hospice. Private burial will be at Walnut Hill Cemetery. Memorial service was Friday, November 8, at First Presbyterian Church. Family and friends were invited to the Kingman Country Club following the service. Memorials may be made to the First Presbyterian Church in Kingman, the Kingman Community Hospital Foundation, or Rivercross Hospice, all in care of Livingston Funeral Home, 1830 N. Main, Kingman, KS, 67068.
Ray “Pat” H. Calihan (1/8/1927 - 10/18/2019)

Ray H. Calihan, 92, passed away peacefully at his home on October 18, 2019 in Gold Canyon, Arizona.

Born January 8, 1927 in Garden City, Kansas to Ray and Winifred Calihan. Pat was known for his sense of humor and wit; his name brings a smile to all who knew him. In 1949, he married the late Roselle Yakle and raised a son, Mike, and three daughters, Cathi, Janice and Boni. In 1981, he married Lillian Valenzuela.

Pat enlisted and served his country as a Sergeant in the army during WWII. Following his service in the Army, Pat graduated from both the University of Kansas and Washburn Law School. He was appointed by the Attorney General of the State of Kansas as a Special Investigator in 1949. He practiced law for 45 years in Garden City and was elected as Finney County Attorney in 1954. In 1973, he served as United States Magistrate for southwest Kansas, under the appointment of the U.S. District Court. He was Garden City’s Mayor in 1974 and City Commissioner for several years. Pat was admitted to the Bar of the Supreme Court of the United States in 1997.

Pat enjoyed golfing, traveling and was quite an entertainer. He loved being surrounded by his family and friends and always had a good joke to tell. In his younger days he was an accomplished horseman and musician.

He is survived by his three daughters, Cathi Vincent (Dave), Albuquerque, NM, Janice Williams (Brad), Gilbert, AZ, and Bonnie Burkhardt (Darwin), Wichita, KS, and step-daughter, Robin Valenzuela (Jeff), of Garden City. He was predeceased by his wife Lillian, son Mike Calihan of Garden City and his step-son Rudy Valenzuela of Kansas City.

A Memorial Celebration is planned for Saturday, October 26th, at Gold Canyon Methodist Church, in Gold Canyon, Arizona, at 11:00am.

Pat’s final days were brightened by his wonderful staff of caregivers. The family offers their sincere appreciation to these compassionate individuals, along with the staff of Hospice at Home of Arizona. Memorials may be sent in Pat’s name to Hospice at Home of Arizona or Gold Canyon United Methodist Church.

Michele Marie Chollet (8/9/1951 - 5/22/2019)

Michele Marie Chollet, of Kansas City, Mo., died on May 22, 2019, at the home. Born on August 9, 1951, to Mary Regina Chollet and Thomas Michel Chollet in St. Louis, Mo., she grew up in Kansas City, Mo. Michele graduated from St. Therese Little Flower in 1965 and Bishop Hogan High School in 1969. In 1973, Michele graduated as class salutatorian from Kansas City General Hospital as an R.N. Michele went on to numerous additional academic achievements. In 1980, she received a BSN from Avila University, a Master of Pastoral Studies from Loyola University in 1987, a Master of Public Health from the University of Kansas in 1998, and a Juris Doctor from UMKC in 2003. She was a member of the Bar in Missouri and Kansas. Michele was actively involved with the service community in Kansas City. For many years, she was the Tuesday night cook at the Holy Family Catholic Worker House. Michele served on the boards of the Truman Medical Centers and the Homeless Services Coalition of Kansas City. Michele’s commitment to service was greatly influenced by her strong Catholic faith. She was deeply involved in her faith communities at Saint Peter’s and Visitation Parish, as well as the larger interfaith community in Kansas City. Michele and her husband Dan shared their faith amongst friends and family, most notably with their Renew group, which included dear friends Cindi Braun, Jane and Mike Curran, Mary and Tom Grimaldi, Patricia McCarty, and John Swartz. Michele was a lover of the arts, frequently attending the Kansas City Lyric Opera and the Friends of Chamber Music Society. She was a longtime member of the Nelson-Atkins Museum and Kemper Museums. For much of her life, Michele was an avid member of the running community of Kansas City, annually running in the Trolley Run. Michele loved to garden and maintain her rose bushes and was a member of the Loose Park Rose Society. Michele loved the outdoors and visited many National Parks with her husband Dan over the course of their marriage. Michele loved good food and was a talented baker, famous for her chocolate chip cookie bars. Michele is survived by her husband of 34 years, Dan Devine. Michele was a proud mother of three sons, Timothy Cummings (Jessica), Timothy Devine and Joseph Devine (Christine). Michele is survived by six grandchildren, Laura, Aidan, Evelyn, Francis, Connor, and Conrad, and by sisters Annette (Greg Grove), Cathy, Melissa (Marty Blackmore) and Jessica (Robert Cook), as well many nieces and nephews. Michele was predeceased by her parents and her brother Greg. The family is very thankful for Michele’s devoted caretaker Margaret Curtis. Michele was incredibly blessed to have a circle of devoted friends, many of whom shared their time with her, especially during the last years of her life. Her family is most grateful to the support of Judy and Ron Robinson, Marcia and Bill Tammeus, Julie and Mike Spaeth, Sandy and Gerry Handley, Sr. Annie Loendorf, Paula Duke, Birdie Miller, Pauline Dolan, Nancy Caccamo, and Jane Brummel. Michele was diagnosed with frontotemporal dementia (FTD) in 2013. Thereafter she lived gracefully with her illness. Michele’s husband Dan was a steadfast, kind and loving husband to Michele during her journey. Their devotion to each other was evident throughout the years of her illness and through her last days. A wake was held on Sunday, May 26, at Visitation Church with a Rosary following. A Mass of Christian Burial was held on Memorial Day, May 27. In lieu of flowers, the family requested donations be made in Michele’s memory to the Association for Frontotemporal Degeneration: www.thefaultd.org.
Richard Lee Dickson (10/13/2019)

Richard Lee Dickson, age 71, Attorney at law, passed away peacefully in his sleep at home on Sunday, October 13, 2019. Visitation and funeral service were held October 23, at Lakeview Funeral Home in Wichita, Kan. Richard is preceded in death by his father, James Darwin Dickson and his mother, Fanchion P. Pitman. Survivors include his daughter, Amanda Lea Dickson; son, Brian James Dickson; daughter-in-law, Lessie Vermillion-Dickson; brothers, John Dee Dickson and James Darwin Dickson; and grandchildren, Diego André Dickson, Jin Kai Dickson, and Lily Ann Dickson.

Robert Wayne “Rip” Hedrick (1933 - 2019)

Robert Wayne “Rip” Hedrick, our hilarious, witty, kind, and loving husband, Dad, and Grampy is making things a little more stylish and lively in heaven.

Robert Wayne “Rip” Hedrick, our hilarious, witty, kind, and loving husband, Dad, and Grampy is making things a little more stylish and lively in heaven. He died suddenly on Sept. 5, 2019, in Fort Worth, Texas.

Born in Leavenworth, Kansas, in 1933 to Ina and Jesse Hedrick, Rip began his education attending Bain City School and graduated from Leavenworth High School. He attended Kansas State University for one year, and then enlisted in the U.S. Army and served at Fort Bliss in El Paso, Texas. Rip returned to Kansas after the army and using his GI Bill earned his Bachelor's and Juris Doctorate from the University of Kansas. Rip was an avid KU Jayhawk fan throughout his 55-year law career. He was a member of the Kansas Bar and the Texas Bar, as well as, the Texas Trial Lawyers Association, Kansas Trial Lawyers Association, and the 5th and 10th United States Circuit Courts of Appeals. Rip served as district attorney for the 90th Judicial District of Texas during the 1980s. Prior to moving to Texas with his family in 1978, Rip served as City Attorney in Leavenworth, Kansas in the mid 1960s and was a member of the Kansas House of Representatives for the 37th District in 1969 and 1970.

Rip was an avid reader. He enjoyed golfing with his sons-in-law, duck and bird hunting, bass fishing, and traveling with his wife.

Hedrick is survived by his beloved wife of 58 years, Marty Hedrick, who he fondly called Marthabelle, my little darlin'; his three daughters, Sara Arispe, and her husband, Albert; Margie Solomon, and her husband, Steve; and Mary Klemm; and grandchildren: Alex Arispe; Zack Bone; Erin Arispe-Daigle, and her husband, Christian; David Mock; Holly Mock; Shawn Klemm; Savannah Klemm; Shelby Lowery, and her husband, Chris.

Rip was predeceased by his first granddaughter, Danni Mock.

Rip is also survived by his first cousin, Virginia Schalipp, Leavenworth, Kansas.

Myron Ladd Listrom 1/12/1926 - 8/14/2019

Myron Ladd Listrom, 93, of Hot Springs, Arkansas, passed away August 14, 2019. He was born January 12, 1926, in Parkville, Missouri, to Joy and Corinne Listrom.

Myron was preceded in death by his parents; first wife, Mary Helen Listrom; second wife, Kathleen Listrom; son-in-law, Franklyn Kimball; brother, Lowell Huntley Listrom; and sister, Marilyn Davidson.

Survivors include son, Randall Listrom of Hot Springs; daughter, Linda Listrom of Chicago, Illinois; grandchildren, Matthew Colman (Vanessa), Shannon Kimball (Iain Macdonald), Dr. Heather Calvert (John); four great-grandchildren; and special friend, Nora Griffith.

Myron grew up on a family farm, where he learned the importance of hard work. In 1943 he enlisted in the United States Navy and served on naval transport ships in the Atlan-
tic and Pacific until his honorable discharge in 1945. After the war, he attended William Jewell College in Liberty, Missouri, where he earned his B.A. degree and was an accomplished debater on the college team. He attended Washburn University Law School in Topeka, Kansas, where he earned his law degree in 1951. He served as Assistant County Attorney of Shawnee County from 1953-57 and City Attorney for the City of Topeka, Kansas from 1957-1959. In 1962 he joined the law firm Sloan, Listrom & Sloan as a partner. The firm grew, and became known as Sloan, Listrom, Eisenbarth, Sloan and Glassman, one of Topeka’s largest law firms. A prominent and successful trial lawyer, Myron tried cases throughout Kansas and the Midwest. He also served as managing partner of his firm and as President of the Topeka Bar Association before retiring in 1998.

Myron was a devoted husband and father. In 1950 he married his college sweetheart, Mary Helen Kennedy, and they had two children, Linda and Randy. Following Mary Helen’s death in 1995, he married Kathleen Stiffler, and his family expanded to include her three adult children - Janet, Eric and Dan - and their children. Myron and Kathleen retired to Hot Springs in 1999. He loved spending time with family and friends. He also loved fishing, dancing and Glenn Miller’s music.

Services in Hot Springs were held August 22nd at Country Club Village (1925 Malvern Ave). A service was to be held later in Topeka, Kansas.

In lieu of flowers family suggested donations to Westminster Presbyterian Church (3819 Central Ave, Hot Springs, AR 71913).


Published in Topeka Capital-Journal from Aug. 18 to Aug. 19, 2019

Ted R. Morgan (11/14/1940 - 9/17/2019)


He married Dorothy E. Povenmire on April 8, 1952, in Topeka. Ted attended school in Hugoton and graduated from Washburn University in Topeka with a bachelor’s degree in 1953, a bachelor of laws degree in 1956, and a Juris Doctor degree in 1970. He was admitted to practice law in the Kansas Supreme Court and the U.S. District Court in 1956, The U.S. Tax Court in 1976, the U.S. Supreme Court in 1981 and the U.S. 10th Circuit Court of Appeals in 1983.

He was an associate attorney with the Addington, Jones, Davis and Haney law firm in Topeka from February 1956 to August 1958. In 1958, he and his family moved to Lakin and he became Kearny County attorney and opened a private law practice, retiring 38 years later in 1996.

He was elected Kearny County attorney eight times and served 16 years. He was elected county commissioner two times, serving eight years. He was appointed to the following offices: Lakin city attorney for 32 years, Lakin school attorney for 27 years, Deerfield school attorney for 27 years and hospital attorney for 27 years.

He was a legal seminar instructor and speaker for the Kansas County and District Attorneys Association, the Kansas City Attorneys Association, the Kansas School Attorneys Association, the Kansas Bureau of Investigation, the KU Law School, the Washburn Law School and the 1972 Western Conference on Crime International School held in Wichita.


He is survived by his wife, Dorothy; his son, Ron R. Morgan; his daughter, Deanna Siemsen; two grandchildren; and his sister, Kaye Andrews.

Memorial service was held at the United Methodist Church in Lakin. Memorials are suggested to Lakin Golf Course, Lakin Recreation or United Methodist Church in care of Garness Funeral Home. Condolences may be posted at www.garnessfuneralhomes.com.


John Edwin Morrison, 76, of Wilmington, NC passed away on Friday, September 17, 2019 after a serious stroke at the Bradley Creek Health Center in Wilmington, NC. He was born in Richmond, VA on October 5, 1942 to the late John Allan “Jack” Morrison and Shirley Ann Sawyer Morrison. He was also preceded in death by his younger brother, Joseph Allan Morrison. John graduated from Yale University in 1964 and the University of Michigan Law School in 1967. He joined the law firm his grandfather started and father was expanding into Corporate Law. John’s interest was Land Real Estate and Mortgage Law. He was very active in his community wherever he lived. After he retired to Leland, NC, Brunswick Forest, he was active in the Gardenwood HOA, serving as President for almost 2 years but always active es-
especially in Contract Law, as he retired from 20 years of Contract Law at FDIC in Washington, DC, Kansas City, MD, VA and NC. John was very enthusiastic about being a trained group leader in relationship counseling and for over 30 years led numerous workshops, speeches and informal talks, as well as working with individual and young couples regarding relationship issues. He was kind, intelligent and listened so well, he became a friend to many. Interment will be held at Forest Hills Cemetery in Kansas City, MO and Funeral Service will be held at the 2nd Presbyterian Church on Saturday, October 12, 2019. He is deeply missed by his wife Linda Ann Morrison of Wilmington, NC; sister, Ann Morrison Phebus (Skip) of Palm Harbor, FL; daughter, Sara Louise Morrison, PHD (Mike Allmayer) of Kansas City, MO; son, Richard Griffin Morrison (Julie); twin grandchildren, Kate Elizabeth and Griffen of Alpine, CA; step son, William “Scott” Smullen (Christine Fletcher) of Arlington, VA; step daughter, Leanne Marie Smullen (Julian Parish); step grandchildren, Emma Elizabeth Smullen of Fairfax, VA and Brigid Ann Smullen of Nashville, TN. He will be missed by many, nieces, nephews, cousins and many long term friends, neighbors and associates. In lieu of flowers, memorial donations may be made to Michael J. Fox Parkinson Disease Foundation or the American Heart Association. Condolences may be offered at www.coblewardsmithwilmington.com

Published in the Wilmington Star-News on Oct. 1, 2019

Ernest Lee Tousley (10/19/2019)

Ernest Lee Tousley, 78, retired Attorney and former KFDI Ranch Hand, passed away Saturday, October 19, 2019. A Celebration of Life Luncheon will be held in Newkirk, OK, date pending. He was preceded in death by parents, Dale Tousley and Violet Karnes; son, Ricky D. Tousley; sisters, Beverly Tally and Bonnie Jean Taylor; and step-parents, Bonnie Lou Tousley and Kenneth Karnes. Survivors include companion, Naola Weber and “best friend”, Libbi; daughter, Patti (Scott) Eleeson; and grandchildren, Stephanie (Tyler) O’Connor and Connor Eleeson. Share condolences at www.CozineMemorial.com. Arrangements by Broadway Mortuary.

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Education Law

Clifford A. Cohen
Attorney at Law

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PUBLISHED CENSURE
IN RE JOSHUA T. MATTHEWS
NO. 120,924—SEPTEMBER 27, 2019

FACTS: After a stipulation was made, a hearing panel found that Matthews violated KRCP 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), 8.4(g) (conduct adversely reflecting on lawyer’s fitness to practice law), and Supreme Court Rule 211(b) (failure to file answer in a disciplinary proceeding). Matthews failed to satisfy the CLE requirements for the 2017 reporting year. In an attempt to come into compliance, Matthews enrolled in a day-long program in Missouri. While attending the live programming, Matthews watched on-demand CLE programs over the course of five hours. The affidavits submitted showed that Matthews attended more than eight hours of CLE in one day, which is not permitted by Kansas rules. When questioned, Matthews initially denied watching video on-demand programs while also attending in-person programming. After his inaccuracies were questioned, Matthews self-reported his conduct to the disciplinary administrator.

HEARING PANEL: Matthews stipulated to the rule violations. Matthews had prior rule violations and the panel found dishonest actions after lying about his attendance. Based on the nature of the misconduct, the disciplinary administrator recommended that Matthews receive a public censure. Matthews asked that he be informally admonished.

HELD: The hearing panel’s findings of fact and conclusions were accepted. In light of his prior discipline, the court rejected Matthews’ request for an informal admonition. The court accepted the disciplinary administrator’s recommendation for published censure.

ORDER OF SUSPENSION
IN RE KEVIN P. SHEPHERD
NO. 120,875—SEPTEMBER 27, 2019

FACTS: A hearing panel determined that Shepherd violated KRPC 1.1 (competence), 1.3 (diligence), 1.4(a) (communication), 1.15(a) (safekeeping property), 1.15(d)(1) (preserving client funds), 1.16(a)(1) (withdrawing from representation), 8.1(a) (false statement in connection with disciplinary matter), 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), and 8.4(d) (engaging in conduct prejudicial to the administration of justice). Complaints arose regarding Shepherd’s conduct after he failed to file an appellate brief, causing the appeal to be dismissed. Despite repeated promises that he would seek to have the appeal reinstated, Shepherd failed to act. Shepherd also had business checks returned for insufficient funds in diversion cases. This prompted an audit of his bank accounts, which revealed irregularities.

HEARING PANEL: The hearing panel found evidence sufficient enough to sustain violations of the KRPC. When considering the appropriate discipline, the panel noted that Shepherd had a history of prior offenses, including one from 2009 which resulted in a three-year suspension of Shepherd’s license. There were also substantial mitigating factors present, including mental health struggles which contributed to the misconduct. Shepherd made restitution to his clients and enjoys the support of his local bench and bar. The disciplinary administrator recommended that Shepherd be indefinitely suspended. Shepherd asked that he be placed on probation, and he began working on some of his proposed probationary terms prior to the hearing. The hearing panel determined that Shepherd’s dishonest conduct could not be cured by probation. Rather, the hearing panel recommended that Shepherd be suspended for two years, and that he be allowed to apply for reinstatement after one year.

HELD: The hearing panel’s findings of fact and conclusions were deemed admitted. At the hearing, citing Shepherd’s notable progress, the disciplinary administrator asked that Shepherd be indefinitely suspended but that the suspension be stayed to allow Shepherd to serve a five-year term of probation. The court found that Shepherd’s misconduct was too serious to be cured by probation. A majority of the court imposed a two-year suspension, but stipulated that Shepherd should be allowed to seek reinstatement after one year. Other members of the court would impose either a more or less severe punishment.
CIVIL

DUTY—IMMUNITY—LAW ENFORCEMENT
WILLIAMS V. C-U-OUT BAIL BONDS
JOHNSON DISTRICT COURT—REMANDED
COURT OF APPEALS—REVERSED,
NO. 116,883—OCTOBER 11, 2019

FACTS: Agents from C-U-Out Bail Bonds came to the Williamses’ home in search of the Williamses’ daughter-in-law. Mrs. Williams told the agents that the woman they sought was not in her home. It was late at night, Williams was caring for her elderly and ill mother, and she denied the agents’ request to enter the home. The agents attempted to enter the home by force, and Williams called the police. After the police arrived, agents forced their way into the home. The police officers on scene stood and watched and refused to assist Williams. The Williamses sued both C-U-Out and also the City of Overland Park, claiming the officers committed the tort of “negligent failure to protect.” The district court granted the City’s motion to dismiss, finding that the City was immune from liability under the Kansas Tort Claims Act and also finding that the City owed no duty to the Williamses. The Court of Appeals agreed that the City owed no duty to the Williamses. The panel also held that the City was immune under the discretionary function exception. The Kansas Supreme Court granted review.

ISSUES: (1) Sufficiency of facts to support illegal conduct; (2) existence of a duty; (3) discretionary function immunity

HELD: The issue of whether C-U-Out’s agents acted lawfully was, in part, a factual question. The Court of Appeals erred by disregarding factual allegations made in the Williamses’ petition. Generally, law enforcement owes a duty only to the public at large. To succeed here, the Williamses had to prove that the City owed them a duty because of a special relationship or a specific circumstance. Although the existence of a duty is a question of law, where a duty is predicated on an affirmative act, there is a threshold factual question of whether the defendant’s behavior could have triggered a duty. The district court erred by granting the motion to dismiss because of a lack of duty. The question of whether discretionary function immunity exists is high contextual. The district court erred by granting a motion to dismiss on these grounds.

STATUTES: K.S.A. 2018 Supp. 60-212(b)(6), 75-6104, -6104(e); K.S.A. 22-2809

JURISDICTION—WORKERS COMPENSATION
VIA CHRISTI HOSPITALS V. KAN-PAK, LLC
WORKERS COMPENSATION BOARD—AFFIRMED
COURT OF APPEALS—REVERSED
NO. 116,692—OCTOBER 25, 2019

FACTS: Darin Pinion was severely burned while working at Kan-Pak. Via Christi provided medical care; his total bills exceeded $1 million. Kan-Pak’s workers compensation insurance was provided by Travelers, who contracted with Paradigm to coordinate complicated cases. Paradigm paid only $136,451.60 of Pinion’s considerable bill, under the 2011 Schedule of Medical Fees. For the 2011 Maximum Fee Schedule, language was added which allowed insurers to pay the lesser of the 70% stop loss calculation or the MS-DRG formula. It is unknown how the “lesser of” language ended up in the statute, as no one from the agency claimed knowledge of the addition. Via Christi requested reimbursement of 70% of Pinion’s total bill. An ALJ found that the language in the regulation controlled and that it was without authority to ignore the “lesser of” language. The Board agreed and Via Christi appealed. The Court of Appeals reasoned that if no one at the agency knew that the “lesser of” language was added, that change was not properly promulgated and was ineffective. The Court of Appeals was unwilling to enforce an accidental rule, believing the outcome would be arbitrary and capricious. Paradigm’s petition for review was granted.

ISSUES: (1) Jurisdiction; (2) effectiveness of the 2011 regulation

HELD: Jurisdiction exists to hear the merits of the case. The director of workers compensation is ultimately responsible for preparing the fee schedule. He is not a party to this action and the faulty rulemaking was not raised as a cause of action. The issue of rulemaking by the director—accidental or otherwise—was never properly before the Board on appeal from the hearing officer. These proceedings were initiated as a fee dispute under a narrowly-drawn statute. It was not arbitrary or capricious to follow a plainly-worded regulation and enforce it as written.

STATUTES: K.S.A. 2018 Supp. 44-510i, -510j, 77-603(a), -614, -614(b), -614(c), -621(c), -621(c)(8); K.S.A. 44-556, 77-602(j), -606

DAMAGES—PRODUCTS LIABILITY
CORVIAS MILITARY LIVING, LLC V. VENTAMATIC, LTD. AND JAKEL, INC.
GEARY DISTRICT COURT—COURT OF APPEALS IS AFFIRMED IN PART AND REVERSED IN PART
DISTRICT COURT IS AFFIRMED IN PART AND REVERSED IN PART, REMANDED WITH DIRECTIONS
NO. 116,307—OCTOBER 25, 2019

FACTS: Corvias is a construction firm specializing in military housing. Corvias built thousands of units near Fort Riley. In these homes, it installed bathroom ceiling fans manufactured by Ventamatic, Ltd. and Jakel Motors, Inc. After installation, several fans caught fire and damaged homes. Corvias not only incurred damage with fire remediation, it also needed to replace all of the fans in other units, so it filed suit. The district court granted summary judgment to both defendants, finding that the suit was unquestionably a products liability claim covered by the Kansas Product Liability Act. The court ruled that all of Corvias’ claims for damages was barred by the economic loss doctrine. The Court of Appeals reversed the grant of summary judgment on the issue of fire damage, finding that the fans were not an integral part of the house as a whole. But the panel did not address whether Corvias had an implied warranty claim covering whether the fans were inherently dangerous. Both defendants filed a petition for review, which was granted.

ISSUE: (1) Recovery under the KPLA
HELD: The KPLA covers all product liability causes of ac-
A crucial instruction must be the district court’s articulation of the duty owed by the defendant to the plaintiff. Kansas law imparts a duty to employers whose employees injure a third party. The employer owes a duty of reasonable care under the circumstances to prevent harm by employees acting within the scope of their employment. Determining whether that duty has been breached is a fact question for the jury. It was clearly erroneous to instruct the jury that TCK had definable duties to “train” and “supervise” its employees. Because the duty was misstated, both the jury instructions and verdict form were erroneous and the case must be reversed.

**STATUTES:** No statutes cited.

### CRIMINAL

**CRIMINAL THREAT—CONSTITUTION**

**STATE V. BOETTGER**

**DOUGLAS DISTRICT COURT—REVERSED**

**COURT OF APPEALS—REVERSED**

**NO. 115,387—OCTOBER 25, 2019**

**FACTS:** One evening, Boettger was visiting with the employees of a convenience store. He was lamenting the fact that he had found his daughter’s dog in a ditch after it had been shot. Boettger was upset that the sheriff’s department would not investigate. Boettger told one employee that if he found the perpetrator they “might find themselves dead in a ditch somewhere.” The employee who heard the remarks knew Boettger and his speaking style and was not concerned. Another employee, who knew Boettger very well, was closely related to a detective with the sheriff’s department. Boettger, who was visibly angry, approached this man and said that he would “end up finding [his] dad in a ditch.” The employee was concerned and ultimately called the police to report the incident. Boettger denied any intent to threaten or cause harm, but he was still convicted of one count of reckless criminal threat. Boettger appealed, but the Court of Appeals confirmed his convictions. Boettger’s petition for review was granted.

**ISSUE:** (1) Whether K.S.A. 2018 Supp. 21-5415(a)(1) is unconstitutionally overbroad

**HELD:** Some tension can arise when the government attempts to criminalize true threats. An important inquiry cen-
Boettger's conviction under that statute must be reversed. K.S.A. 2018 Supp. 21-5415, which allows an individual to be punished for reckless conduct, potentially criminalizes protected speech and is facially overbroad. Boettger's conviction under that statute must be reversed.


FIRST-DEGREE MURDER—JURY INSTRUCTIONS
STATE V. DEAN
SEDGWICK DISTRICT COURT—AFFIRMED
NO. 116,568—OCTOBER 25, 2019

FACTS: Dean was accused of firing his weapon while at a crowded party in revenge for the death of his fellow gang member. After the shooting was over, Dean was charged with one count of premeditated murder, four counts of aggravated battery and one count of criminal possession of a firearm. During deliberations, the presiding juror brought in a personal notebook which contained notes that were taken outside of the trial. The district court dismissed this juror and questioned the rest of the panel, all of whom denied taking notes or seeing notes from another juror. As he was leaving, the removed panel member gave a partially completed verdict form to the bailiff. It is unknown what the form said, but after seeing it defense counsel moved for a mistrial, which was denied. Dean was convicted as charged. He appeals.

ISSUES: (1) Necessity of a mistrial; (2) cautionary instruction; (3) motion for new trial; (4) evidence of premeditation; (5) admissibility of evidence of gang affiliation

HELD: Because the partially completed verdict form is not in the record on appeal, there is no way to know its impact on the jury. Dean had the burden to designate a record adequate to show error. In that absence, he is not entitled to relief. A district court is not legally required to instruct the jury to view with caution the testimony of a noninformant who is potentially benefitting from the testimony. Defendant's cross-examination showed the witness' potential bias to the jury. The district court did not err by finding that evidence regarding the cooperating witness' arrangement was neither newly discovered nor material. And Dean's failure to provide the new evidence in the record on appeal precludes review. Premeditation involves forming the intent to kill beforehand. In this case, the State presented sufficient evidence of premeditation. The gang affiliation evidence presented at trial was relevant and not unduly prejudicial, especially in light of the mitigating instruction given by the district court.

STATUTES: K.S.A. 2018 Supp. 22-3412(c), -3501(l); K.S.A. 22-3423(l)(c), 60-401(b)

CONSTITUTIONAL LAW—CRIMINAL LAW—CRIMINAL PROCEDURE—EVIDENCE—JURY INSTRUCTIONS—RESTITUTION—VERDICTS
STATE V. GENTRY

SALINE DISTRICT COURT—CONVICTIONS AFFIRMED, RESTITUTION VACATED IN PART
NO. 116,371—SEPTEMBER 20, 2019

FACTS: Palacio fired a gun that killed a passenger in a passing truck. Gentry was charged with aiding or abetting by planning and fueling the encounter and directing Palacio to shoot. Jury convicted Gentry of first-degree murder, attempted first-degree murder, criminal discharge of a firearm at an occupied vehicle, and conspiracy to commit aggravated battery. Sentencing court ordered restitution that included $3642.05 for State's trial preparation and witness expenses. On appeal, Gentry claimed district court erred by: (1) not instructing jury on unintentional but reckless second-degree murder, reckless involuntary manslaughter, and voluntary manslaughter as lesser included offenses of first-degree murder; (2) not instructing jury on attempted unintentional but reckless second-degree murder, attempted reckless voluntary manslaughter, and attempted voluntary manslaughter as lesser included offenses of attempted first-degree murder; (3) instructional error that denied Gentry his constitutional right to a fair trial; (4) denying Gentry's motion for continuance for additional time to secure the firearms expert in Palacio's trial; and (5) ordering Gentry to pay $3642.05 in restitution to Saline County Attorney's office for expenses related to witnesses and preparation of photographic trial exhibits.

ISSUES: (1) Lesser included offenses—first-degree murder; (2) lesser included offenses—attempted first-degree murder; (3) constitutional right to fair trial; (4) continuance; (5) restitution

HELD: Gentry's requested instruction on voluntary manslaughter as a lesser included offense of first-degree murder would have been legally appropriate, but not factually appropriate where Gentry's deliberate actions were not the actions of a person who had lost control, and an aider or abettor cannot be guilty of a crime if the primary actor did not have the requisite mental state of the crime. Because evidence would reasonably justify a jury finding that Gentry acted without an intent to kill but with knowledge that Palacio would engage in conduct dangerous to life when he gave assistance or encouraged Palacio in committing homicide, instructions on lesser included offenses of unintentional but reckless second-degree murder and reckless involuntary manslaughter would have been both legally and factually appropriate. District court erred in declining to give these requested instructions, but the error was harmless. Application of skip rule is discussed regarding situation in this case where jury split its guilty verdict between premeditated first-degree murder and first-degree felony murder.

As held in State v. Shannon, 258 Kan. 425 (1995), and State v. Louis, 305 Kan. 453 (2016), attempted unintentional but reckless second-degree murder and attempted reckless involuntary manslaughter are not recognized offenses in Kansas, and thus would have been legally inappropriate instructions. An instruction on attempted voluntary manslaughter would have been legally appropriate, but not factually appropriate where evidence did not support a finding that Gentry acted in the heat of passion, and Gentry failed to explain how facts
in the case might support finding that Palacio acted in the heat of passion.

Constitutional claim raised for first time on appeal is not reviewed. No abuse of district court’s discretion in denying motion for continuance.

District court could have taxed Gentry for the photocopying and witness expenses as court costs, but instead specifically ordered reimbursement of these expenses as restitution. This was a legal error and an abuse of discretion. That portion of restitution order is vacated.

This was a legal error and an abuse of discretion. That portion of restitution order is vacated.

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—JUVENILES—SPEEDY TRIAL
STATE V. JOHNSON
SEDGWICK DISTRICT COURT—AFFIRMED
COURT OF APPEALS—AFFIRMED
NO. 115,441—NOVEMBER 1, 2019

FACTS: 17-year-old Owens charged with juvenile offenses related to stealing a car at gunpoint. Six months later, the juvenile case was dismissed and Owens was charged with aggravated robbery, criminal use of a weapon and criminal deprivation of property. Jury convicted him as charged in trial that began some 19 months after his arrest. Owens appealed, claiming in part the delay between his arrest and trial violated his constitutional right to a speedy trial. Court of appeals affirmed in an unpublished opinion, finding right to speedy trial attached upon filing of the adult criminal charges, and the 13-month delay from that point until Owens’ trial was presumptively prejudicial. Review granted on Owens’ speedy trial claim that the delay was 19 rather than 13 months, and on State’s cross-petition alleging the panel erred in finding the length of delay presumptively prejudicial.

ISSUE: (1) Speedy trial

HELD: The federal and state constitutional right to a speedy trial applies to juvenile offender proceedings under the Revised Kansas Juvenile Justice Code, citing State v. Robinson, 56 Kan. App. 2d 567 (2018)(filed after briefs submitted in present case). Thus the delay in bringing Owens to trial was more than 19 months. Factors in Barker v. Wingo, 407 U.S. 514 (1972), are applied, finding no violation of Owens’ constitutional speedy trial rights. A presumption of prejudice arose from the length of a delay that was excessive given the relative simplicity of the case, but reasons for the delay weigh against Owens under facts in this case. While he complained about the delay, evidence supports that he wanted his attorney to seek consolidation of his cases and that these efforts resulted in some delay. And Owens made no showing he was prejudiced by the delay. Judgment of court of appeals affirming the district court is affirmed.

STATUTES: K.S.A. 2018 Supp. 22-3402(g), 38-2301 et seq.; K.S.A. 2012 Supp. 22-3208(7); K.S.A. 20-3018(b)

APPEALS—APPELLATE PROCEDURE—CONSTITUTIONAL LAW—EVIDENCE—FOURTH AMENDMENT—STATUTES
STATE V. PERKINS
ELLIS DISTRICT COURT—AFFIRMED
COURT OF APPEALS—AFFIRMED
NO. 112,449—OCTOBER 4, 2019

FACTS: Perkins arrested for DUI. He filed motion to suppress results of breath test to which he had consented. District court denied the motion and convicted him on stipulated facts. Perkins appealed. Court of Appeals directed State to show cause why the matter should not be summarily reversed per State v. Nece, 303 Kan. 888 (2016)(Nece I), and State v. Nece, 306 Kan. 679 (2017)(Nece II). Reflecting the State’s redirected arguments, panel affirmed district court, finding the search incident to arrest exception to warrant requirement allows a warrantless breath test; and finding the good-faith ex-
ception applied in this case because officer acted with objectively reasonable reliance on statute that was later determined to be unconstitutional. State v. Perkins, 55 Kan.App.2d 372 (2018). Perkins’ petition for review granted.

ISSUES: (1) Preservation exception; (2) good-faith exception; (3) search incident to arrest

HELD: State’s redirected arguments are considered. Panel’s request that State brief new arguments on appeal is akin to panel raising the issue sua sponte, and parties are to be afforded an opportunity to present their positions to the court. Nece is distinguished.

District court’s refusal to suppress the result of breath test is affirmed. Good-faith exception to exclusionary rule would save evidence in this case even through Perkins’ consent to search was invalid. Case is analogous to State v. Daniel, 291 Kan. 490 (2010). Here, officer followed existing law and could not reasonably be expected to know that K.S.A. 2012 Supp. 8-1025 would later be found unconstitutional. While provi-

sions that criminalized test refusal were unconstitutional, the entire implied consent statutory scheme was not invalidated.

No need to discuss alternative argument about search incident to arrest exception.

CONCURRENCE (Luckert, J.): Agrees with application of good-faith exception. Also concurs with majority’s implicit application of U.S. Supreme Court caselaw to § 15 of Kansas Constitution Bill of Rights, but questions whether continued application should be in lockstep with federal caselaw. Open to reexamination of Daniel, but not in this case. Application by federal and state courts of Illinois v. Krull, 480 U.S. 340 (1987), warrants reconsideration of whether its exception leaves Kansas without the protection guaranteed by § 15.

other jurors. J.W.’s failure to volunteer information did not amount to prejudicial misconduct.

STATUTE: K.S.A. 2018 Supp. 60-259(a)

CHILD IN NEED OF CARE
IN RE D.H.
ELLIS DISTRICT COURT—REVERSED AND REMANDED
NO. 121,131—OCTOBER 18, 2019

FACTS: D.H. was born in December 2007. Mother and Father were not married and their relationship ended soon after D.H. was born. When D.H. was an infant, the State alleged that D.H. was a child in need of care. In a companion paternity case, Father’s paternity was legally established. Father used that paternity case to seek residency and parenting time decisions for D.H. After a hearing, Father was given primary residency of D.H., with Mother having parenting time once per week. Soon after this hearing, Mother moved out of state. She delivered a son shortly after that, who was later diagnosed with autism. Mother sought and received services for this child, and also sought and received financial and residential stability for herself. For the next six years, Mother spoke on the phone with D.H., but did not actually visit in person. Mother finally had a personal visit with D.H. in 2017. Father died by suicide in 2018. Because of his death, D.H. was placed in protective custody and later sent to live with her paternal grandfather. The State filed a CINC petition. Mother traveled to personally appear at the temporary custody hearing. After hearing evidence, the district court found that D.H. was a CINC because Mother abandoned her. Mother appealed.

ISSUES: (1) Relevant time period; (2) sufficiency of the evidence

HELD: The district court found that Mother abandoned D.H. in 2009, meaning that D.H. was without adequate parental control at the time of the CINC hearing. The plain language of the statute does not require the district court to make its adjudication decision based only on the circumstances that exist on the day of the adjudication hearing. Rather, the district court’s decision should be guided by the temporal language used in the relevant statutory subsection that is being considered. There was insufficient evidence presented that D.H. was in need of care.

STATUTE: K.S.A. 2018 Supp. 38-2202, -2202(a), -2202(d), -2250, -2251

DUTY—NEGligence
MORGAN V. HEALING HANDS HOME HEALTH CARE, LLC
SEDGWICK DISTRICT COURT—REVERSED AND REMANDED
NO. 119,147—OCTOBER 11, 2019

FACTS: Morgan’s son, Robert Cook, had “chronic, severe” paranoid schizophrenia and diabetes. His schizophrenia made him forgetful, which meant he had trouble remembering to take his medication. His doctors prescribed twice-daily home healthcare visits. Cook’s health aides were supposed to evaluate his status, set up medications and remind Cook to take his pills, monitor his blood sugar, and draw labs as needed. Beginning in May of 2013, nurses noted that Cook’s apartment was very warm. Some of Cook’s medications made him unable to tolerate heat. The nurses counseled Cook on the temperature in his apartment and on his personal hygiene. Cook was unable or unwilling to follow their requests, and he continued to live in his apartment with no temperature control, resulting in him sweating and being warm. Medical logs noted that Cook’s pulse was very rapid. In June 2013, Cook died of hyperthermia. Morgan brought a wrongful death and survival action against Healing Hands, claiming its negligence caused Cook’s death. Healing Hands sought and received partial summary judgment on two issues: that it legally had no duty to alert Morgan to Cook’s condition, and that Kansas’ mandatory reporter statute did not require Healing Hands or its employees to report Cook’s condition to law enforcement or state authorities. The remaining issues were tried to a jury, which found in Healing Hands’ favor. Morgan appeals.

ISSUES: (1) Duty to warn and mandated reporter; (2) disputed issues of material fact; (3) jury instructions

HELD: The district court read the mandatory reporter statute too broadly. The statute did not require that Cook had previously been adjudicated incompetent or appointed a guardian or conservator before its obligations were triggered. There were fact questions on this issue that should have been heard by a jury. Evidence showed that while Cook lived independently, he required twice-daily nursing care to manage his physical and mental health. The mandatory reporter statutes created a duty of care, and the violation of these statutes may be used to establish a breach of that duty. The district court did not err in instructing the jury.

CONCURRENCE: (Malone, J.) Concurs in the result.

STATUTE: K.S.A. 39-1430(a), -1430(g), -1431, -1431(a), -1431(e), -1432(b)

CONSTRUCTION—CONTRACTS
WHEATLAND CONTRACTING V. JACO GENERAL CONTRACTOR
JOHNSON DISTRICT COURT—AFFIRMED
NO. 120,401—SEPTEMBER 20, 2019

FACTS: Wheatland and Jaco contracted for Wheatland to perform plumbing and associated work on a commercial building in Johnson County. The contract contained a forum selection clause which stipulated that to the “extent permitted by law”, venue would be in Sedgwick County. The relationship between the parties soured, and Wheatland sued Jaco in Johnson County District Court claiming breach of contract and other violations of the Kansas Fairness in Private Construction Contract Act. Jaco filed a motion to dismiss or, in the alternative, to transfer venue to Sedgwick County under the terms of the contract. The district court denied that motion, citing K.S.A. 16-1806 which requires that actions under the KFPCCA must be filed in the county where the project is located. The Kansas Court of Appeals granted Jaco’s application for interlocutory review.
ISSUE: (1) Venue

HELD: The plain language of the KFPCCA does not allow parties to avoid rights or duties of the act through contractual terms. The clear language of K.S.A. 16-806 requires that venue for a lawsuit must be in the county where the real property is located. Venue selection is a “right or duty” under a contract, meaning the venue selection provision in the construction contract is unenforceable.

STATUTE: K.S.A. 16-1801, -1801(b), -1803, -1804, -1805, -1806

VEHICLE LICENSURE
CENTRAL RV V. KANSAS DEPARTMENT OF REVENUE
FRANKLIN DISTRICT COURT—AFFIRMED
NO. 119,744—SEPTEMBER 27, 2019

FACTS: A travel trailer insured by Safeco Insurance was damaged in an accident in Oregon. Safeco obtained a salvage title from the State of Oregon which carried a “TO-TALED” designation. Central RV bought the trailer from Safeco. When Central RV titled the vehicle with the State of Kansas it received a rebuilt salvage title. Central RV asked the Department of Revenue to reconsider and give it a clean title. The Department of Revenue refused, so Central RV filed suit hoping to force a title change. The district court sided with the Department of Revenue, and Central RV appealed.

ISSUE: (1) The type of title required

HELD: The trailer met the Kansas statutory definition for a rebuilt salvage vehicle that should receive a rebuilt salvage title. The fact that the salvage status was issued by another state does not keep the trailer from being a rebuilt salvage vehicle. In fact, the statute exists to prevent people from title washing vehicles which were totaled in other states.

STATUTE: K.S.A. 2018 Supp. 8-127, -135, -126(ll), -126(mm), -126(qq), -126(rr), -197, -197(b)(2), -197(b)(5)

JURY INSTRUCTIONS—SEXUALLY VIOLENT PREDATORS
IN RE CARE AND TREATMENT OF QUILLEN
JOHNSON DISTRICT COURT—VACATED AND REMANDED
NO. 120,184—OCTOBER 18, 2019

FACTS: Richard Quillen was committed as a sexually violent predator in 2006. As part of his civil commitment, Quillen was entitled to an annual review hearing. In 2013, Quillen asked for a jury trial when he challenged the Kansas Department for Aging and Disability Services’ recommendation that he remain in custody. That request was granted, and after a hearing the jury found that the State met its burden to prove that Quillen did not meet the criteria for transitional release. Quillen sought a new trial, claiming the district court violated his due process rights by failing to instruct the jury on “serious difficulty controlling behavior” as a separate element that the State must prove. The district court denied the motion and Quillen appealed.

ISSUE: (1) Jury instructions

HELD: Quillen questioned whether the elements required to prove a committed person is not safe to be sent to transitional release are the same as those required to initially commit an individual. They are. Despite statutory changes and a consent decree, Quillen correctly notes that the State is constitutionally required to prove that Quillen would have serious difficulty controlling his behavior if transitonally released. The district court erred by not adding that essential element to the jury instructions, and the error was prejudicial. Quillen is entitled to a new trial.

STATUTE: K.S.A. 2018 Supp. 59-29a02(a), -29a07(a), -29a08, -29a08(a), -29a08(c), -29a08(d), -29a08(g)

ADOPTION
IN RE ADOPTION OF C.S.
SHAWNEE DISTRICT COURT—AFFIRMED
NO. 120,359—OCTOBER 4, 2019

FACTS: Father and Mother started a relationship in early 2017. By spring of that year, Mother was pregnant. At the time, both she and Father were under age 18, although Father turned 18 about five months into the pregnancy. During her pregnancy, Mother spent a great deal of time with Father at his mother’s home, where she received food and clothing, but never any monetary support. Mother claims that she spent so much time with Father because he wanted to control her, and there was evidence that Father was verbally abusive. In an effort to get away from him, Mother moved to Florida to live with extended family for the last part of her pregnancy. C.S. was born in December 2017 and moved to live with potential adoptive parents in March 2018. Mother waived her parental rights but Father would not, so the adoptive parents filed a motion seeking to terminate his parental rights for lack of support. The district court granted the motion and Father appealed.

ISSUES: (1) Evaluation of support given father’s age; (2) sufficiency of the evidence

HELD: The obligation to provide support begins at pregnancy, not birth. That support need not be complete but must be of consequence and reasonable under the circumstances. Father was 18 for most of the relevant look-back period where support was required. And there is no statutory distinction between parents who are minors and parents who are legal adults during the relevant time period where support must be provided. Further, Father does not get credit for support that his mother provided to Mother. The district court’s decision to terminate Father’s parental rights is supported by clear and convincing evidence.


DIVORCE—MILITARY RETIREMENT
IN RE MARRIAGE OF THRAILKILL
GRAHAM DISTRICT COURT—AFFIRMED IN PART AND DISMISSED IN PART
NO. 118,246—SEPTEMBER 27, 2019

FACTS: Doug and Denise Thrailkill were both in the military...
tary, although Doug continued his career until he retired as a commissioned officer. Because of the length of his service, Doug began receiving retirement pay as soon as he retired. Doug worked a civilian job for a bit, but ultimately quit and received military disability. Denise filed for divorce in 2016. The proceedings were bifurcated and the decree was handed down before the property settlement was complete. After a hearing on property settlement issues, the district court equally divided the parties’ retirement pay. The court awarded maintenance to Denise and ordered Doug to pay half of the balance on a loan that was taken out to help finance their son’s education. The district court also had to address Doug’s Survivor Benefit Plan, which involved a survivor benefit for a spouse after a military member’s death. Doug appealed.

ISSUES: (1) Authority to rule on Survivor Benefit Plan; (2) calculation of maintenance and child support; (3) Doug’s obligation on the student loan; (4) postjudgment issues

HELD: After a 1986 statutory amendment, a divorce court can order a service member to retain his or her former spouse as the Survivor Benefit Plan beneficiary, even after divorce. Because Doug was married to Denise when he began receiving retirement pay, Denise was included in spouse coverage. And now, because of the divorce, Doug can elect former-spouse coverage for Denise. There is no statutory limitation to a state divorce court’s ability to make orders regarding former-spouse coverage. The district court must consider all income when making maintenance and child support decisions. A portion of each party’s retirement pay must be considered as income. In addition, the maintenance award served to equalize the parties’ income for the next eight years. Denise borrowed $22,000 towards her son’s educational expenses. At the time of the hearing on financial matters, the balance was $11,000. The student loan was correctly treated as a marital debt. The district court correctly ordered each party to pay half of the remaining balance. Doug cannot appeal issues involving postjudgment orders because they were not mentioned in the notice of appeal, and the court does not have jurisdiction to consider them.

STATUTES: 10 U.S.C. § 1447, § 1448, § 1450, § 1450(f) (3); K.S.A. 2018 Supp. 23-2801(a), -2802(b), -2902(a), -3001

CRIMINAL

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—DISCOVERY—EVIDENCE—SANCTIONS
STATE V. AUMAN
DOUGLAS DISTRICT COURT—AFFIRMED
NO. 120,438—NOVEMBER 1, 2019

FACTS: While turning left with sun in his eyes, Auman hit a motorcyclist he had not seen. State charged him with aggravated battery while driving under the influence of alcohol and prescribed medications, and made repeated requests to police department for evidence. On Friday before Monday trial that was scheduled at the last date within speedy trial statute, dashcam videos were obtained and disclosed to the defense. In part, Auman filed motion to dismiss, arguing Brady violation because videos were produced too late to investigate three identified witnesses at the scene and comments between two officers that would tend to show the sun’s glare, not intoxication, caused the collision. Given State’s delay in providing information and video’s potential exculpatory value, compounded by the speedy trial issue, district court dismissed the criminal case. State appealed, claiming the district court abused its discretion in taking such drastic action.

ISSUE: Duty to disclose evidence favorable to the defense

HELD: District court’s dismissal of the case is affirmed. Due Process Clause does not force a defendant to bear burden of a lack of cooperation between prosecutor and law enforcement, which in this case resulted in the eleventh-hour disclo-
sure of potentially exculpatory information that was within State's possession since Auman's collision. State could have waited to file case until it received all discovery information from law enforcement, or—through cooperative efforts of prosecutors and law enforcement—could have arranged for all discovery to be provided within time frame ordered by district court.


CONSTITUTIONAL LAW—CRIMINAL LAW—FOURTH AMENDMENT—EVIDENCE—MOTIONS
STATE V. ELLIS
LYON DISTRICT COURT—REVERSED AND REMANDED
NO. 120,046—NOVEMBER 15, 2019

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

ISSUE: (1) Fourth Amendment—welfare check

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

STATUTE: None

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—MOTIONS—SENTENCES—STATUTES
STATE V. GALES
EDWARDS DISTRICT COURT—AFFIRMED
NO. 119,302—OCTOBER 4, 2019


ISSUE: (1) Illegal sentence—retroactivity and application of Dickey

HELD: Gales entitled to constitutional rule in Apprendi because his conviction became final after Apprendi was announced. Gales does not get benefit of the identical-or-narrower definition of comparable offenses announced in Wetrich which constituted a change in the law. Under complicated facts in this case, district court's process for deciding to classify the prior California crime as a person offense violated Apprendi but the decision is affirmed utilizing the classification process set forth in Dickey which does not constitute a change in the law as contemplated by the 2019 amendment to K.S.A. 22-3504.

STATUTES: K.S.A. 22-3504, -3504(c)(amended 2019);
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K.S.A. 2018 Supp. 21-6811(d), -6811(e)(3); K.S.A. 2015 Supp 21-6811(e)(3); K.S.A. 2000 Supp. 21-4711; K.S.A. 21-3715, -3715(a), -3715(b), -3715(c), -4711(d), -6811(e)(3), 22-3504, -3504(c)

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—
MOTIONS—TRIALS—STATUTES
STATE V. HAMMERSCHMIDT
ELLIS DISTRICT COURT—REVERSED AND REMANDED
NO. 120,016—NOVEMBER 8, 2019

FACTS: Hammerschmidt was charged with a misdemeanor or DUI. He filed motion to suppress evidence from the stop, arguing he was not given proper notices before the breath test. He also referenced two pending decisions awaiting rehearing in Kansas Supreme Court. District court granted continuances on its own initiative, citing the pending rehearing decisions. 607 days after a motion to suppress was filed, and 360 days after State v. Nece II, 306 Kan. 679 (2017) (Nece II), and State v. Ryce, 306 Kan. 682 (2017) (Ryce II), the district court denied the motion to suppress. Hammerschmidt filed motion to dismiss, alleging violation of speedy trial statute. District court granted that motion and dismissed the complaint. State appealed, arguing in part that K.S.A. 2018 Supp. 22-3402(g) bars dismissal.

ISSUE: (1) Speedy trial statute

HELD: District court erred by dismissing the case on statutory speedy trial grounds. Hammerschmidt first requested delay in the case by filing motion to suppress, and that delay was originally attributable to him. Because the matter was taken under advisement for an unreasonable amount of time and because it was unclear if Hammerschmidt consented to the delay, district court later attributed the delay to the State. Although the delay here was several hundred days, the legislature removed the remedy of dismissal when a district court later attributes delays to the State that were originally attributable to a defendant. K.S.A. 2018 Supp. 22-3402(g). Hammerschmidt did not argue that prosecutorial misconduct precipitated the lengthy delay or that application of K.S.A. 2018 Supp. 22-3402(g) violated his constitutional speedy trial rights, and his statutory speedy trial claim is based on circumstances which expressly forbid dismissal on statutory speedy trial grounds.

STATUTE: K.S.A. 2018 Supp. 22-3402, -3402(b), -3402(g)

CONSTITUTIONAL LAW—CRIMINAL LAW—
JUVENILES—SENTENCES—STATUTES
STATE V. N.R.
RENO DISTRICT COURT—AFFIRMED
NO. 119,796—SEPTEMBER 27, 2019

FACTS: 14-yr.-old N.R. was adjudicated a juvenile offender in 2006. Magistrate granted probation and ordered registration under Kansas Offender Registration Act (KORA) as a sex offender. Prior to the 5-year registration period expiring, the legislature amended KORA to require lifetime registration for N.R.’s age and offense. N.R. was charged in 2017 of violating ex post facto constitutional protections. District court denied the motion based on controlling Kansas Supreme Court precedent regarding lifetime registration requirements. N.R. appealed, arguing KORA’s lifetime registration requirement as a sex offender is unconstitutional as applied to juveniles. He also argued his sentence was illegal because the magistrate judge lacked authority to order him to register.

ISSUES: (1) Constitutionality of registration requirement—juveniles; (2) KORA registration ordered by magistrate

HELD: District court did not err in finding the registration requirement constitutional as applied to juveniles. Kansas courts have repeatedly held that KORA offender registration is not punishment, and that a registration requirement is not part of a defendant’s criminal sentence. State v. Dull, 302 Kan. 32 (2015), is distinguished by the mandatory postrelease supervision ordered in that case being part of the juvenile’s sentence. N.R. showed no reason why registration should be considered punishment for juveniles. Test in State v. Petersen-Beard, 304 Kan. 192 (2016), is summarized and applied finding no showing the outcome would have been different had it involved a juvenile instead of an adult.

KORA itself, rather than a court order, imposes the duty to register upon sex offenders. Any lack of magistrate judge’s authority is immaterial because the duty to register arises by statute, falls on N.R., and is not part of N.R.’s sentence.

STATUTES: K.S.A. 2018 Supp. 20-302b(a)(6), 22-4902(b), -4906(h), 38-2356(b); K.S.A. 2006 Supp. 22-4906(h)(1); K.S.A. 2005 Supp. 21-3502(a), -3502(c); K.S.A. 22-4901 et seq.,

APPEALS—CONSTITUTIONAL LAW—CRIMINAL LAW—
FIRST AMENDMENT—STATUTES—TORTS
STATE V. SMITH
DOUGLAS DISTRICT COURT—REVERSED AND SENTENCE VACATED
NO. 119,919—SEPTEMBER 27, 2019

FACTS: Perez lived across the street from Smith who accused Perez of sexual misconduct with Smith’s child. District court denied Smith a final protection from stalking (PFS) order against Perez, but granted Perez a final PFS order against Smith that included a special prohibition against Smith making any direct or indirect disparaging statements in public regarding Perez being a child molester. While entering her residence, Smith told her husband who was standing in their driveway to come inside away from the pedophile. Perez and family heard and recorded that statement. Smith charged with violating the PFS order. She moved to dismiss, arguing the PFS order was an unconstitutional, content-based restriction on her free-speech rights, and that criminal prosecution under K.S.A. 2017 Supp. 21-5924 for violating the order was unconstitutional as applied to her. She appealed on the same constitutional claims, and also argued insufficient evidence showed that her statement was made in public. State asserts the constitutional claim is an impermissible collateral attack on the earlier PFS order, and State questions whether the PFS order is a content-based restriction.
ISSUES: (1) Sufficiency of the evidence; (2) procedural bar to constitutional question; (3) First Amendment; (4) content-based restriction

HELD: Sufficient evidence shows that Smith made the statement in public. Her Fourth Amendment argument concerning privacy of curtilage of her home is not applicable. Even with a curtilage analysis, her words carried beyond that curtilage and invaded curtilage of Perez’ house.

Smith’s appeal is not procedurally barred. She is appealing a criminal judgment with a statutory right to appeal, and her free speech issue is now ripe. Even if she could have raised her First Amendment objections when the district court issued the PFS order, there is no bar to her raising them now.

Smith’s speech warrants First Amendment protection. State’s invocation of the defamation category of speech that may be restricted fails. Cases involving libel are distinguished from isolated slander in this case. Even if slanderous statement could be assumed as defamatory speech, no evidence that Smith’s statement was in fact defamatory. No showing that Smith’s statement was knowingly false, and that Smith’s statement caused any harm to Perez’ reputation.

The PFS order in this case is a content-based prior restraint on speech, thus presumptively unconstitutional. State fails to show the PFS order serves a compelling state interest. Purpose of Kansas stalking statute is to protect innocent citizens from threatening conduct that subjects them to a reasonable fear of physical harm. The statutes expressly excludes constitutionally protected activity from its definition and does not reflect any State interest in preventing slander. Under circumstances in this case, the PFS order, as applied solely to speech which did not subject a person to a reasonable fear of physical harm, was an improper prior restraint of Smith’s constitutional right to freedom of speech. Conviction is reversed and sentence vacated.

STATUTES: K.S.A. 2018 Supp. 21-5427, 22-3602(a), 60-31a02, -31a02(d), -31a02(d)(1), -31a02(d)(2), -31a05(a); K.S.A. 2017 Supp. 21-5924

APPEALS—CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—TRIALS
STATE V. WILLIAMS
GRAHAM DISTRICT COURT—REVERSED AND REMANDED
NO. 120,099—OCTOBER 4, 2019

FACTS: Under a deferred prosecution diversion agreement, State would dismiss felony charges if, in part, Williams paid $490 in costs and fees within one year. After 11 months of nonpayment, State moved to rescind the agreement. District court granted the motion and immediately found Williams guilty as charged based on fact stipulations in the diversion agreement. Williams appealed.

ISSUES: (1) Diversion agreement; (2) waiver of right to jury trial

HELD: District court’s revocation of the diversion agreement, based on Williams’ admitted lack of payments, was not error.

Issue is reviewed for first time on appeal to prevent denial of a fundamental right. A district court’s failure to comply with requirement to advise a defendant of right to a jury trial on the record requires reversal and remand. Here, no written waiver and the record does not show the district court ever advised Williams about his right to a jury trial. Reversed and remanded to either afford Williams his constitutional right to a trial by jury based on stipulated facts or to allow him to execute a valid waiver of a jury trial.

STATUTE: K.S.A. 22-2911, -3403(1)

CRIMINAL PROCEDURE—SENTENCES—STATUTES
STATE V. WILMORE
SHAWNEE DISTRICT COURT—AFFIRMED
NO. 120,171—NOVEMBER 8, 2019

FACTS: Wilmore was convicted of two counts of indecent liberties with a child. On appeal, he claimed the district court imposed an illegal sentence in calculating criminal history by using two prior domestic battery cases that had been used in an earlier case to elevate the classification of a third domestic battering conviction to a felony.

ISSUE: (1) Sentencing—criminal history calculation of prior domestic battery charges

HELD: Wilmore’s “double-counting” challenge is rejected for same reasons stated in numerous unpublished court of appeals decisions. District court did not violate K.S.A. 2018 Supp. 21-6810(d) in calculating Wilmore’s criminal history score. Wilmore’s alternative interpretation of the statute is unreasonable. Under court’s longstanding interpretation of K.S.A. 2018 Supp. 21-6819(d), the unambiguous statutory language does not prohibit a district court from aggregating prior domestic battery person misdemeanors to create a person felony for criminal history purposes even when those same domestic battery convictions were used in an earlier case to elevate a domestic battery charge from a misdemeanor to a felony.

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