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Please check back often for new and exciting ways to put your skills, experience and training to good use by helping your fellow Kansans.
Calling All Kansans—by Providence, Tradition, or Choice

by Sarah E. Warner

“If I went West, I think I would go to Kansas.”
-Abraham Lincoln

When I served as president of the Young Lawyers Section of the Kansas Bar Association a few years ago, I began my first Journal column with the following summation of myself: “I love Kansas. I love the law. And I love being a Kansas lawyer.”

Though the years have flown by, that statement resonates now more than ever. Thus, it’s with great honor and humility that I introduce myself as this year’s KBA President. I could not be more proud to represent our profession in this great state.

My route to the presidency has been, shall we say, unconventional. Thus, I thought I’d spend this, my first column in the Journal, explaining to our members how a young(ish) upstart from SEK ended up taking the KBA reins in 2018.

As you may know, I was not KBA President-Elect last year. That position was held by Bruce Kent, of Manhattan. Bruce was a giant in our profession and my dear friend, a man well-known and well-liked throughout the state. He was a stalwart at the KBA and a strong supporter of the Kansas Bar Foundation. In fact, Bruce would have been the only person to have served as president of both organizations. Put simply, Bruce made the world a better place. Tragically, Bruce lost his fight with cancer on May 15. (I invite you to read Sara Beezley’s tribute to Bruce later in this volume.)

For various reasons, the succession procedures traditionally in place for such tragic times were not available this year. But the KBA Bylaws also indicate that in the case of a vacancy by any officer for any reason, the KBA Board of Governors must select a person to serve in that position. On June 16, 2018—the day after the KBA Annual Meeting in Overland Park—the Board unanimously voted that I should assume the presidency on July 1. I agreed, conscious that I have big shoes to fill.

So that’s how I got here, but why? Well, it comes back to my three-sentence introduction from years ago.

**I love Kansas.** When talking with people outside of our state, I often explain that I am a Kansan by providence, by tradition, and—most importantly—by choice. Born in Overland Park (providence), I grew up in Pittsburg. There, I attended a small Catholic high school (graduating in a class of 35), the same school my mom and my grandmother attended (tradition). I now have lived in Lenexa longer than I spent in Pittsburg as a kid, but I’ll always be an SEK girl at heart.

A proud Jayhawk, I attended the University of Kansas and spent the next five years gathering personally-edifying-but-not-financially-sustainable degrees in Mathematics, French, Political Science, and International Studies. During my last year at KU—what my husband Brandon and I refer to as the “Victory Lap”—two things happened that altered the course of my life.

First, a certain redheaded, engineering major (and soon to be patent attorney) asked me to marry him. Not to jump too far ahead, but I said, “yes.” Hands-down, best decision of my life.

Second, I saw an ad in an archaic daily journal (we used to call them newspapers) for a position as a legal assistant at a local law firm, then called “Thompson & Associates.” I was vacillating almost daily between graduate school and law school, so I decided to apply. I was not a good fit for the assistant position—apparently the firm was looking for a long-term, full-time employee, not an over-committed college student who would be flying the coop in under a year. But the lawyers offered me a position as a law clerk. I was able to observe and assist in the actual practice of law with attorneys I respected, on cases that mattered to real people and businesses. Something clicked. I realized that law is the perfect intersection of theory and practicality, form and substance, structure and creativity. I knew I wanted to be an attorney.

Brandon and I moved to Ann Arbor, Michigan, where we both attended law school at Ave Maria School of Law as members of the new school’s fourth graduating class. We got married after our 1L year. While we both loved studying the law and enjoyed our classmates and professors, we missed the friendly and frank openness of our home state. Having a stranger smile at you on the street, or receiving a “thank you” when you open a door for a person you don’t know, or exchanging pleasantries with a person at the checkout counter—these seemingly small details leave a huge hole when they’re absent. So we were thrilled during the fall of our third year when we both received offers to practice law in Kansas after graduation—me in Topeka, clerking for Hon. Robert Davis of the Kansas Supreme Court; Brandon with a well-respected IP firm in Kansas City. We moved back to Kansas—to Lenexa—and have lived here ever since: Kansans by choice.
I love the law. I clerked for Justice Davis for 3 ½ years, including during and after his transition to Chief Justice. At that time, each justice only had one chambers attorney, so I spent countless hours with the man—discussing the contours of the law, the importance of precision (grammar and punctuation matter, my friends!), the parameters of policy, and differences in judicial philosophy. Justice Davis was the epitome of a jurist, a scholar, and a gentleman. His warmth and passion could make even the most skeptical of critics appreciate the role of our justice system.

Justice Davis described being a lawyer as a calling. We have the power to listen to our clients, assist them in their most soul-wrenching moments, and translate their factual challenges into keen legal strategy based on the law. There is no other profession that requires such compassion, mental prowess, and strategic acumen.

Inspired by this description of the challenges and rewards of private practice, I left the court in November 2009 to join the same Lawrence firm where I had worked as an undergraduate. I’ve been here ever since, working my way through the ranks to a named principal. While our five-person general practice firm handles all kinds of legal matters, my own practice focuses on resolving state and federal constitutional claims; contract disputes, including questions of insurance coverage and allegations of bad faith, as well as business disputes and dissolutions; and other civil litigation.

My real "legal love" remains appeals. I find immense personal and professional satisfaction in crafting a persuasive written argument—finding just the right words and creative phrasing to powerfully convey an argument. In my opinion, there is no higher honor than engaging in a conversation with appellate judges and justices about the merits of a salient legal question.

And for much the same reason, I love talking with people about the law and the importance of our system of justice. For the past nine years, I have taught as an adjunct professor at Washburn Law, teaching both Conflict of Laws and Appellate Practice. I also travel throughout the state giving CLE programs to lawyer associations and presenting to civic groups and schools about the legal profession generally and the critical importance of a fair and impartial judiciary.

I love being a Kansas lawyer. Though I have been practicing for only a little more than 12 years, in Kansas, age is not an impediment to making an impact. With few exceptions, I noticed in my practice from the outset that the most well-respected lawyers treated their colleagues—regardless of the size of their bar number—with dignity. They were interested in my position and took it seriously. Judges wanted to hear what I had to say.

This brings us full-circle, back to the KBA. This is the only statewide organization of Kansas lawyers, regardless of practice, age, or geography. And as I found early on, it’s an organization that is improved when you let your voice be heard. Regardless of where you are in your career, or where your practice is located, or what your specialty may be or how many attorneys are in your office, the KBA offers myriad opportunities for you to use your skills for the betterment of our state and profession. I’ve served in a number of these capacities, from Young Lawyers President to journal author and contributor to Board of Publishers to Strategic Planning Committee and the Board of Governors. Through this involvement, I have made connections that are some of the most professionally and personally rewarding in my life.

If you have questions about what opportunities exist for you at the KBA, we—!—want to hear from you. Our combined voices are what make Kansas such a wonderful place to live and practice law. Whether you’re here by providence, tradition, choice, or all three, you are a Kansas lawyer, and the KBA is your organization. Ad astra, my friends. Here’s to an excellent year.

About the Author

Sarah E. Warner is an attorney at Thompson Warner, P.A., in Lawrence. Before becoming president of the KBA in July, Warner served as president of various professional associations, including the Kansas Association of Defense Counsel, Douglas County Bar Association, and Douglas County Law Library Board of Trustees, as well as the KBA Appellate Practice and Young Lawyer Sections. She also serves as a member of the Kansas Board for Discipline of Attorneys. Warner and her husband Brandon (an administrative patent judge with the U.S. Patent and Trademark Office) call Lenexa home with their dog Kolbe, who inexplicably prefers belly rubs over the practice of law.

sarah.warner@333legal.com
Help Us Help Others

by Amy Fellows Cline

If you were able to join us at last month’s Foundation Dinner, which was held in conjunction with the Kansas Bar Association’s Annual Meeting, then you heard firsthand about all of the wonderful things the Kansas Bar Foundation is doing with the time, talent and treasure generously donated by Kansas lawyers. From scholarships for law students to community redevelopment projects, from hundreds of hours of pro bono legal assistance to face-to-face meetings with banks across the state in an effort to increase the IOLTA grant funding provided by lawyers’ trust accounts, Kansas lawyers have helped the KBF make a positive difference in communities across our state. As the charitable arm of the Kansas Bar Association, the Kansas Bar Foundation allows Kansas lawyers to maximize the impact of their individual efforts with collective action to improve the lives of our fellow Kansans and enhance the perception of our profession.

The KBF recently revamped its website, www.ksbar.org/KBF, and I encourage you to check it out. We’ve compartmentalized the KBF’s projects, the ways attorneys can assist with those projects, and the wealth of information available to educate the public at large about our judicial system.

It is now easier than ever for you to help advance the mission of the KBF, which is “to serve the citizens of Kansas and the legal profession through funding charitable and educational projects that foster the welfare, honor and integrity of the legal system by improving its accessibility, equality and uniformity, by enhancing public opinion of the role of lawyers in our society.”

If you have already joined the KBF in lending a hand to those in need, I thank you for your efforts. And, if you have not yet been able to participate, I encourage you to find a way to become involved. With many legal services organizations facing declines in funding and enduring the effects of burgeoning demand, we as lawyers must all do our part to ensure their work is able to continue. You would be surprised at the substantial impact you can have with gestures as simple as IOLTA enrollment or spending a few hours on a Saturday serving as a mock trial judge.

Explore the options available for contribution of your time, talent and/or treasure on the KBF website, and, if you have ideas for other initiatives or programs that fall within the KBF’s mission, send them my way. Help us help others, and we will all reap the benefits.

About the Author

Amy Fellows Cline is a partner of the Wichita law firm of Triplett Woolf Garretson, LLC. She handles a wide variety of commercial litigation matters, including employment, oil and gas, construction and consumer protection disputes. Ms. Cline has significant experience appearing before courts across Kansas, as well as the Kansas Corporation Commission, Kansas Human Rights Commission, Kansas Department of Labor and U.S. Equal Employment Opportunity Commission.

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Introductions All Around

by Sarah Morse

As a second-generation Kansas attorney, I have long been aware of the positive impact that state-wide bar associations can have for our profession and for the individual attorney. When my now-husband and I returned to Kansas after attending law school in Atlanta, Georgia, I knew that one of the best ways to reconnect with my home state and connect with our new profession was to join and participate in the Kansas Bar Association.

Because I did not attend a local law school, I quickly recognized that I was missing an important piece of the private practice puzzle—knowing your fellow attorneys, local judges, and the little quirks of local practice unique to every jurisdiction. Fortunately, the KBA Young Lawyer President at the time, Sarah Warner, reached out and invited me to join the Young Lawyers Section board. I am grateful for Sarah’s gesture because it gave me the opportunity to get to know my peers, the practice of law in Kansas, and to contribute in a larger sense to the profession. Sarah and the other YLS Presidents I have had the pleasure of working with—Justin Ferrell, Nathan Eberline, and Clayton Kerbs—have set the stage and demonstrated great leadership, and I look forward to building on their past successes.

It is my hope to continue the past presidents’ example and invite others into the great network of the KBA YLS. Our board is already hard at work at several initiatives that we hope will bolster the experience of young attorneys in Kansas. The energy, engagement, and enthusiasm of this year’s board is contagious, and I hope you will join us in our plans. You will hear more about young lawyer efforts as our membership year progresses, but here is a sneak peek into what we are working on:

- **Mock Trial Tournaments:** The YLS has organized and hosted mock trial tournaments for high school students for many years. This year, we are looking to re-energize the program and make it stronger than ever. We hope to engage the entire bar and invite you to consider sponsoring the tournament or judging a round of competition. If you haven’t yet had the privilege of seeing the oral advocacy skills of these students, you are in for a treat! Mark your calendars for February 23 and March 23, 2019, and watch your email for more information on how to be involved.

- **Young Lawyer Engagement:** Starting the practice of law can be a scary prospect and the YLS wants to be sure that new Kansas lawyers have the tools they need to succeed. Our board is working to develop a plan to engage newly admitted attorneys, help them connect with fellow attorneys in their practice area, and provide learning and leadership opportunities. This project is in its early stages, so if it sounds like something you would be interested in, please contact us!

  - **Pro Bono Opportunities:** Many of us want to use our time and talents to help those in need but knowing when, or where, or how can be difficult. Our Pro Bono Committee is working to find opportunities for attorneys with the aim of making it easy for those seeking volunteer and pro bono opportunities to know when help is needed, where it is needed most, and how they can help. Stay tuned for more information on how you can get involved.

We know that attorneys of all ages have incredible demands upon their time. For that reason, our focus this year is on making current programs better and more efficient for our members and finding new, innovative ways to serve those members and their practices. We recognize that the tasks are not small, and to be successful will require great cooperation and teamwork. The team, however, is strong, and I am delighted to introduce you to our board.

**EXECUTIVE COMMITTEE**

**Immediate Past President: Clayton Kerbs**

Clayton lead the Young Lawyer Section with great equanimity and his steadiness laid the foundation for a very successful year. We are grateful to have his continued counsel this year. [Clayton Kerbs currently practices in his hometown of Dodge City, with his father, Glenn. Clayton’s practice consists of domestic and municipal law cases. He attended Creighton University and Washburn University School of Law. Clayton is married to Leah; they have two sons, Porter and Chandler.]

**President-Elect: Mitch Biebighauser**

For as long as Mitch has been on the YLS Board, he has always asked, “what more can I do?” This year, Mitch is stepping in to provided added support for several projects, including mock trial. Mitch Biebighauser has practiced as a criminal defense trial attorney for almost four years. He serves as a Federal Assistant Public Defender for the District of Kansas at the Wichita branch. Mitch’s practice involves felony level defense of indigent persons charged with criminal offenses.
by the federal government. Previously, Mitch was in private practice at Bath & Edmonds, PA, of Overland Park, where his practice involved representation of criminal defendants in federal, state, and local matters of all severities. He graduated from the University of Missouri Kansas City in June, 2014, cum laude. In law school, he served on the law review board, participated in trial advocacy, and founded the Board of Barristers. Outside of the practice of law, Mitch enjoys camping, hiking, and, canoeing. Mitch previously served as the chair of the Johnson County Bar Association Criminal Law Section and has served as a board member of the KBA YLS for three years.

Secretary-Treasurer: Kate Marples Simpson
Kate has spent the last few years building up the YLS Externship Program with great success. We are grateful she’s joined the executive committee as Secretary-Treasurer this year. Kate clerks for the Honorable Carlos Murguia of the United States District Court for the District of Kansas in Kansas City, Kan. She previously clerked for the Hon. K. Gary Sebelius also of the U.S. District Court in Topeka. Kate graduated from KU Law in 2014, where she served as the Symposium Editor of the Kansas Law Review.

American Bar Association Liaison: Rick Davis
Rick has been a great presence on the board and has done a tremendous job connecting attorneys across the state and across state lines. Rick is a true ambassador for the American Bar Association and has welcomed Kansas attorneys to ABA meetings and encouraged pursuit of leadership opportunities on a national level. Rick is a solo attorney in Overland Park who focuses on real estate and construction litigation. Rick obtained his bachelor’s from the University of Kansas and attended law school at Washburn. When not practicing law, Rick spends his time with his three young children and traveling to ABA conferences for his role as the YLD District Representative for Kansas and Missouri and YLD Liaison to the ABA Real Property, Trust, and Estate Law Section.

BOARD MEMBERS
Continuing Legal Education Committee Liaison: Whitney Casement
We are pleased to welcome Whitney to the Young Lawyer Section board for the first time this year. Though she is new on this board, she is not new to bar association leadership and has just completed serving as President of the Women Attorneys Association of Topeka. Whitney is a Senior Associate at Goodell, Stratton, Edmonds & Palmer, L.L.P. in Topeka. Whitney’s practice focuses primarily on workers compensation, employment law, administrative law, and professional licensure actions. Graduating from Washburn Law School in 2012, Whitney started her legal career as an Assistant Attorney General. In addition to serving as the Past-President of the Women Attorneys Association of Topeka, she is co-chair of the Membership and Communications Committee for the Kansas Women Attorneys Association. She also serves on the Board of Communities in Schools of Mid-America, facilitates a weekly meditation group for attorneys in Topeka, volunteers coaching and refereeing children’s basketball, and mentors women at Topeka Correctional Facility.

Forum Co-Editor: Lauren Hughes
Lauren is a familiar face on the YLS board and has enthusiastically participated in many bar activities. You may recognize her from the Annual Meeting where she beautifully played the piano and sang before the Kansas Bar Foundation Dinner. Lauren is a Texas native, growing up in League City. She received her Bachelor of Arts in both English and American Studies from KU in 2013 and her Juris Doctor from the University of Kansas School of Law in 2016. Lauren served as a Staff Editor for the Kansas Journal of Law & Public Policy. After a one-year term on the Journal, she was appointed to the Editorial Board and served as a Staff Articles Editor. During law school, Lauren worked at Kansas Legal Services in addition to Legal Aid of Douglas County, gaining valuable legal experience in estate planning, elder law and real estate. Lauren was an active member of the Phi Alpha Delta Law fraternity and was elected as a Graduate Student Senator for KU’s Student Senate. Lauren was a coordinator for the Volunteer Income Tax Assistance (VITA) Program and served as the Head Graduate Teaching Assistant for the undergraduate Business Law course. Lauren’s primary practice is in the areas of estate planning and administration.

Lauren currently serves on the board of Young Professionals of McPherson. She is on the board for the McPherson YMCA and is on the finance committee. Lauren is a member of the McPherson County Bar Association, the Wichita Bar Association, the Kansas Women Attorneys Association, the American Bar Association and the Kansas Bar Association.

Forum Co-Editor: Sarah Stula
We are pleased to welcome Sarah to the YLS board for the first time. Though she is new, you would not know it by the way she has jumped in and helped take the reins of the YLS newsletter, the Forum. Sarah has already positively influenced the direction of the section this year, and we are grateful for her contributions. Sarah is a research attorney for Justice Caleb Stegall at the Kansas Supreme Court. She graduated from Case Western Reserve University School of Law in Cleveland, Ohio.

Mock Trial Co-Chairs: Casey Walker and Bill Walberg
Casey and Bill return this year as Mock Trial Co-Chairs. If you have ever been involved with the mock trial program, you know what great dedication to the cause their return demonstrates. Organizing the tournament is no easy task! Casey and Bill did a fantastic job with the mock trial program last year and have great ideas for improving the experience this year. Casey has a litigation-focused practice based in Overland Park which takes her all over Kansas, Missouri, and often many other states. While engaging in a variety of litigation, Casey’s
practice focuses on the defense of health care providers in malpractice actions as well as corporate health care law. Originally from Hutchinson, she obtained her law degree from the University of Kansas School of Law, and is an active alumna. Her spare time is spent enjoying life in Lenexa with her husband, Matt, and their three dogs.

Bill Walberg is a third-year attorney at Evans & Mullinix, PA in Shawnee, practicing general litigation with a focus on commercial disputes. Outside of the courtroom, Bill is deeply involved in his community. He is on the Providence YMCA Board, the YMCA Diversity and Inclusion Council, and is an active member of the Mid-America Gay and Lesbian Chamber of Commerce. This will be Bill’s third year as co-chair of the Mock Trial program hoping to increase participation and diversity this year. When he has time, Bill enjoys the gym, hitting the golf links, and storm chasing.

Mock Trial Committee Member and Externship Co-Coordinator: Stephen Netherton

If you aren’t impressed with the two titles Stephen holds on this year’s YLS board, you should be. New to the board, Stephen didn’t even blink at jumping in to two of the section’s biggest projects. Thank you, Stephen! Stephen Nether-ton practices civil litigation at Hite, Fanning & Honeyman in Wichita. He completed his undergraduate studies at Mid-America Nazarene University and obtained his law degree from Baylor Law School. Since joining the Kansas bar, Stephen has been closely involved with the Wichita Bar Association, KBA, and Kansas Association of Defense Counsel. He was also recently appointed to serve a three-year term on the Federal Bench-Bar Committee. When not working, Stephen enjoys spending time with his wife and two children as they cultivate their “urban homestead” near downtown Wichita.

Pro Bono Liaison: Christine Campbell

Christine is new to the board this year and, upon applying, stated, “if this is my last year being a young lawyer, I might as well make the best of it!” We are thrilled she joined before becoming a not-as-young lawyer next year. Christine has taken the duties of pro bono liaison by storm, and is already hard at work finding ways to help you connect with pro bono opportunities. Christy leads the pro bono efforts at Kansas Legal Services in the newly created Statewide Pro Bono Director role. She has worked at KLS since 2008, practicing in a variety of areas. Outside of the office, she is involved in numerous community and bar activities. She is immediate Past President of the Wichita Bar Association Young Lawyers Society and a former President of the Wichita Women Attorneys Association. She is a member of the KBA, Kansas Women Attorney Association, and of the Wesley E. Brown Inn of Court. She’s an avid Bar Show participant, and was recently elected to the WBA Board of Governors. In her spare time, she volunteers with many of Wichita’s community theaters, is revitalizing the art of quilting, and is a devoted dog mom.

Social Chair: Tyson Bramley

Tyson is another new addition to the YLS board, and we are glad to have him! He has brought enthusiasm and great ideas to the board already. Tyson is a lifelong resident of the Kansas City Metro area. He graduated from Drury University, where he played soccer and earned a B.A. in Spanish and International Political Studies. Before law school, Tyson worked for a year for Wells Fargo Financial and spent a year studying Mandarin Chinese while living in Qingdao, Shandong, China. He attended the University of Missouri-Kansas City School of Law. There, he served on the Student Bar Association for three years and was elected President by his peers for his final year. Tyson is licensed to practice law in both Kansas and Missouri. He focuses on criminal defense, landlord-tenant issues, and defense of traffic matters.

Externship Coordinator: Josh Decker

Josh is in his second year as a YLS board member and continues to bring a fresh perspective and innovative suggestions for improvement to the board. He has also represented Kansas at several American Bar Association meetings as a Kansas delegate. Joshua Decker has been practicing law since 2012. He is currently an active member of the Topeka Bar Association, the KBA Young Lawyers Section, the KBA Tax Law Section, and the KBA Real Estate, Probate, and Trust Law Section.

In his free time, Josh cheers enthusiastically for the Jayhawks and spends time with his wife, Emily, and two dogs, Billy (named after Bill Self) and Jasper. He also enjoys mentoring youth as an active Big Brother in the “Kansas Big Brothers Big Sisters” organization.

About the Author

Sarah Morse serves as the Kansas Bar Association’s Young Lawyer Section President. She is Corporate Counsel at FHL Bank Topeka. Sarah received her bachelor’s degree in American History and Literature from Emory University and her law degree from Emory University School of Law in Atlanta, Georgia. Shortly after joining private practice in Topeka, Sarah became involved with the KBA YLS, and she looks forward to working with the engaged and enthusiastic YLS board members this year. In her free time, Sarah enjoys spending time with her family and pursuing more hobbies than is probably advisable.

Sarah.Morse@fhlbtopeka.com
The Inaugural (will it become annual?)
KBA Photography Contest

Categories:

**The Law** – Shots that depict people, places, things that embody the law for the photographer

**The Land** – Kansas landscapes, cityscapes, lakes, rivers, wildlife

**The Life** – Activities and hobbies, family and friends, things that make life outside the courtroom enjoyable and worth living

**The Look** – Abstracts reflecting the photographer’s unique view, offering those who see it a new way of looking at an object or place or individual

Judging will take place during October with decisions to be announced in the Nov/Dec Journal.

All participants will be listed in the Journal.

Photos may be used in the Journal throughout 2019 with photo credit to the photographer.

**Requirements**

- Open to All KBA Member Attorneys (sorry, no family members)
- Photos must be taken during July, August or September 2018
- Must be submitted in hi-res format (300 dpi or better)
- Photographers MUST provide full contact info AND sign a release
- Photographers may submit a maximum of 1 photo per category
- Photographer will select the category in which each photo will be judged

Photos & signed release to be submitted to: editor@ksbar.org

All entries MUST be in by midnight, Sunday, Sept. 30th.

- One winner in each category
- One overall winner with 1st, 2nd and 3rd runners-up
- Judges and prizes will be announced in the September Journal
Opinion:

Is It Time to Statutorily Expand Kansas UIM Coverage?

by Arthur Rhodes

NOTE: Opinions and positions expressed herein are those of the author(s) and not necessarily those of the Kansas Bar Association, the Journal, or its Board of Editors. The material within this publication is presented as information for attorneys to use and consider, in conjunction with other research they deem necessary, in the exercise of their independent judgment. The Board of Editors does not independently research the content of submitted articles approved for publication.

I. INTRODUCTION

Kansas law requires that all drivers possess Uninsured/Underinsured Motorist (UM/UIM) coverage with minimum limits of $25,000 per person/ $50,000 per accident. In theory, this mitigates losses caused by drivers with no insurance or insufficient coverage. In practice, Kansas drivers often learn after an accident that the UIM coverage they purchased does not apply based on a strict “limits-to-limits” test, whereby UIM coverage is only available if the insured’s UIM limits are greater than the tortfeasor’s liability limits. Subsection (b) of K.S.A. 40-284 states:

Any uninsured motorist coverage shall include an underinsured motorist provision which enables the insured or the insured’s legal representative to recover from the insurer the amount of damages for bodily injury or death to which the insured is legally entitled from the owner or operator of another motor vehicle with coverage limits equal to the limits of the liability provided by such uninsured motorist coverage to the extent such coverage exceeds the limits of the bodily injury coverage carried by the owner or operator of the other motor vehicle.

This provision has been interpreted to mean:

In those cases where the UIM coverage exceeds the limits of the bodily injury coverage carried by the owner or operator of the other motor vehicle, UIM coverage exists. However, in those cases, . . . where the UIM coverage equals or does not exceed the limits of the bodily injury coverage carried by the owner or operator of the other motor vehicle, there is no UIM coverage.

This restrictive test places Kansas within a small minority of states with similar UIM statutes that thwart the purpose of UIM damages, which is to make the insured whole. Contrarily, the vast majority of states have adopted UIM schemes that enlarge coverage to fill the void resulting from a tortfeasor’s inadequate insurance. Notwithstanding, as our Kansas Supreme Court has stated, the wording of K.S.A. 40-284(b) unavoidably requires a restrictive interpretation of UIM coverage.
II. PREDOMINANT UIM STATUTORY APPROACHES

States generally utilize three statutory schemes to determine when UIM benefits become available: (1) “add-on” UIM coverage, (2) “supplementation” UIM coverage (of proceeds actually received from the tortfeasor’s liability carrier), and (3) “limits-to-limits” analysis.5 Under the "add-on" approach, the tortfeasor’s liability insurance is automatically augmented by UIM coverage to the extent of the insured’s UIM limit or total damages. If the tortfeasor’s liability limits fully compensate the insured, UIM coverage is not triggered. If the insured’s damages are greater than the tortfeasor’s coverage, then the insured can recover UIM payments up to the lesser of his remaining damages or his UIM limit.

Under the "supplementation" approach, if the insured receives less than the tortfeasor’s full liability limits (e.g., in cases involving multiple injured parties), then the amount that the insured actually receives may be supplemented by UIM payments up to the insured’s UIM coverage limit, so long as the tortfeasor’s policy has been exhausted.

Under the strict "limits-to-limits" method, the insured’s UIM limits are compared to the tortfeasor’s liability insurance limits. The insured’s UIM limits must be greater than the tortfeasor’s liability limits to trigger UIM coverage. For instance, if an insured with $100,000 in damages has UIM limits of $25,000/$50,000 and the tortfeasor has liability limits of $25,000/$50,000, then UIM benefits are not available. Hence, the Kansas approach is counter-intuitive to the expectation that UIM coverage will “fill the gap” if the insured’s damages exceed the tortfeasor’s liability limits.6

Only four jurisdictions other than Kansas apply a strict limits-to-limits test: California, Mississippi, Massachusetts, and North Carolina.7 The remaining states use add-on, supplementation, or some combination thereof to enlarge coverage.8 Many of these statutes display the intent to endow the UIM insured with the greatest possible coverage by centering coverage on the liability proceeds “available” to the UIM insured. Additionally, some states (such as Connecticut) provide the insured with the option to purchase add-on coverage for an additional premium.9 In sum, Kansas is one of the few states with an arcane UIM statutory rubric that often prevents the insured from receiving additional insurance coverage when the tortfeasor is underinsured.

III. KANSAS LAW SHOULD BE UPDATED TO ACCOMPLISH THE PURPOSE OF UIM COVERAGE

The purpose in mandating UIM coverage is “to fill the gap inherent in motor vehicle financial responsibility legislation and compulsory insurance legislation.”10 UIM damages, like all damages, are designed to make the injured party whole.11 The Cashman Court directed that “K.S.A. 40-284(b) should be liberally construed in light of the legislative intent to compensate innocent persons damaged by others without sufficient insurance.”12

Unfortunately, even liberal construction of the limits-to-limits test does not shelter Kansas drivers from “aberrant results.”13 “Surely no gaps are filled and innocent persons are not adequately compensated by a rule that provides for full compensation only if the tortfeasor is either completely uninsured or fully insured.”14

The first court to interpret K.S.A. 40-284(b), in State Farm Mut. Auto. Ins. Co. v. Cummings, concluded that it was “harsh.”15 By any standard, K.S.A. 40-284(b) “is a ‘narrow coverage’ UIM statute.”16 Courts cannot change this, and they cannot impose liability on an insurer when the limits-to-limits test has not been met.17 Only the legislature can make the necessary changes.18

Since Cummings, however, the legislature has not amended the law to ameliorate the statute’s harsh result.19 We must take this to mean that the legislature agrees with the court’s interpretation.20 We can, however, hope for legislative changes that will realign the application of K.S.A. 40-284(b) with its aim.

This statute, which was originally adopted in 1968, should be recalibrated to accomplish the purpose of UIM coverage.21 As a result of the limits-to-limits test, Kansas UIM policies often do not fill the gap or make the insured whole. Indeed, for some accident victims the limits-to-limits test extinguishes the possibility of being made whole. In short, the tortfeasor’s liability coverage should never be used as a basis for denying UIM coverage.22 The insured’s total damages should be compared with the amount of insurance proceeds available to the insured. This would conform to the national trend, accomplish the purpose of UIM insurance, and provide Kansas drivers with the coverage they intuitively expect.

About the Author

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opinion: is it time to statutorily expand Kansas UIM coverage?

1. K.S.A. 40-284(b).
5. While several jurisdictions (such as Connecticut and Ohio) employ schemes that don’t fit comfortably into any of these three categories, those jurisdictions clearly do not employ the Kansas “limits-to-limits” method. See, C.G.S.A. § 38a-336; O.R.C. § 3937.18(C).
8. Colorado, Delaware, and West Virginia provide examples of add-on schemes. Co. Stat. § 10-4-609(1)(c); 18 Del. C. § 3902(b)(2); W. Va. § 33-6-31(b). Supplementation examples can be found in Georgia, Indiana, Maine, Maryland, New Jersey, New Mexico, North Dakota, South Dakota, Tennessee, Vermont, and Virginia. O.C.G.A. § 33-7-11(b)(1)(D)(ii)(II); Ind. Code § 27-7-5-4(b); 24-A M.R.S.A. § 2902; Md. Ins. Code Ann. § 19-509(g); N.J.S.A. 17:28-1.1; N.M. Code § 66-5-301.B; NDCC 26.1-40-15.3; SDCL § 58-11-9.5; T.C.A. § 56-7-1201(d); 23 V.S.A. § 941(f); VA Code Ann. § 38.2-2206.
9. See, C.G.S.A. § 38a-336a(a).
12. Id.
14. Id.
17. See, *Cummings*, 13 Kan. App. 2d. at 639 (explaining that where the minimum requirements of the limits-to-limits test have not been met, “to impose further liability would impose a risk upon the insurance carrier for which it has neither bargained nor been compensated.”)
18. See, *Halsey*, at 142 (noting that the Court is not at liberty to rewrite the statute, as any changes “must be done by the legislature.”)
20. Id. (“When the legislature fails to modify a statute to avoid a standing judicial construction of that statute, the legislature is presumed to agree with the court’s interpretation.”)(Citation omitted.)
22. See, *O’Donoghue I*, at 634. (“It would also seem logical that the purpose of UIM coverage is to allow one to purchase certain limits, e.g. 100/300, to be available to compensate the purchaser’s injuries, regardless of the bodily injury limits carried by any potential tortfeasor.”)(Emphasis added.)

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Mentoring Matters

Merideth Hogan

When Telemachus went in search of his father, Odysseus, who had been sentenced to wander the world in search of home for ten years, the goddess Athena took the form of a family friend—Mentor. Throughout Telemachus’s journey, she provided him with guidance and support until he found his father. While Mentor was just one man/Goddess, “mentor” now describes the influence of numerous men and women who inspire and encourage us to reach our potential—the new generation of Athenas. Mentors are powerful guides that provide both substantive assistance and advice, and implicit indicators of proper decorum and professionalism.

Mentors have had a huge impact on my career thus far. Like many others in the male-dominated legal field, I felt the sharp sting of people telling me (yes, to my face) that I do not have the demeanor of a lawyer because I am not formidable or intimidating. I carried those words with me from undergrad into law school, unsure whether they would prove true. Luckily, during law school and in these early years of my career, I
have been able to build connections with women who are excelling in their careers despite not fitting the “mold”—women who, like Athena to Telemachus, have guided me forward.

In my first year of law school, I signed up to participate in the mentorship program coordinated by the Women's Legal Forum and Women Attorneys Association of Topeka. A few weeks later, I learned that I had been paired with Marla Luckert. Of course, I immediately Googled her and tried to contain my nervous excitement—I had been paired with a Justice of the Kansas Supreme Court. I thought there was no way such an important person would have time for me. And if she did, surely she must be a humorless and serious person to have advanced to the highest level of this state’s judicial system. My assumptions were quickly dispelled at our first meeting, when I realized Marla is not only a kind and funny person, but also vertically challenged like me! Over the years, Marla has helped me to navigate professional conundrums such as whether open-toed shoes are appropriate, what to ask during an interview, and how to give my employer notice without burning any bridges.

In contrast to the formal setup I had with Marla, my second mentor/mentee relationship arose much more organically. I was a third-year law student attending my first Inn of Court meetings in Topeka and knew hardly anyone there. Luckily, I was assigned to the October CLE presentation group with Amanda Stanley. She was the first person to notice that I felt extremely awkward, and she made an effort to integrate me into the group. Amanda introduced me to others at the monthly meetings and helped break the ice, making strangers into friends and discussing the law with bulletproof confidence. Since then, I have had a front row seat to Amanda preparing to fight (ultimately successfully) for the opportunity to become General Counsel at the League of Municipalities while striving to stay an active member of the local and state legal community. She has taught me that courage is inside all of us, if only we dare to use it.

As a newly-minted attorney in my first year out of law school, I embraced that courage and reached out to the person who has become my third mentor—Pat Colloton. I had heard about her work as an Assistant Attorney General and head of the Anti-Human Trafficking Unit and wanted to meet her because of my strong interest in working with trafficking survivors. After finding her email address online, I emailed Pat out of the blue and asked if we could meet; she agreed. Since our first meeting, Pat has introduced me to other prominent advocates for survivors and even assisted me in becoming an Equal Justice Works fellow at Legal Aid of Western Missouri, where I now work with human trafficking survivors.

Each of these women have different strengths and personalities—from reserved and elegant to loquacious and energetic. Seeing them in action has made clear that women attorneys need not try to fit a particular mold in order to be successful. Rather, we should embrace our own strengths and use them to our advantage. They have also taught me that no matter where you are in your career, whether you have reached the pinnacle of your career or are still working toward your potential, you can still be a source of guidance to others—an Athena to the countless Telemachuses still out there searching.

About the Author

Merideth Hogan graduated from Washburn School of Law in May 2016. She recently began an Equal Justice Works fellowship, working with Legal Aid of Western Missouri to address the needs of human trafficking survivors.

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Mazes fascinate me—they have a definite beginning, middle, and end; and generally only one way through. But for every maze that I can work from beginning to end, there was always a maze that needed to be worked from the end to the beginning. A similar maze, one with multiple paths, can face the 19,998,799 men and women still living who have served in the United States military.¹ For their service to our country, veterans, their spouses, and their dependents are entitled to many different benefits (health care benefits, prescription medication benefits, and benefits for service connected injuries to name a few). Yet determining and obtaining those benefits can seem like an unending maze. This article focuses on determining and calculating whether veterans or their dependents can qualify for veteran pension benefits. By determining and calculating if a veteran meets the requirements for pension benefits, you can find the path through the maze from the beginning to reach the end.

Veteran pension benefits are based on the veteran’s service, assets, income, health care expenses, and health care needs. First, this article describes the service requirements the vet-

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¹ Source: Department of Veterans Affairs, “Veterans Health Administration,” accessed February 2023.
A veteran must meet. Second, it describes the asset requirements. Third, it describes the income requirements for each of the three tiers of veterans pension benefits—low income pension, housebound pension, and aid and attendance pension. Fourth, it describes how health care expenses are factored into determining a veteran’s income. And fifth, it uses an example to show how a veteran’s benefits would change as the veteran needs increasing levels of personal care from being at home to being in an assisted living facility and finally entering a nursing home.

To qualify for pension benefits, the veteran must first meet the service requirements. A veteran must have served at least 90 days of active duty, at least one day of that service being during a wartime period, and the veteran must have received a discharge other than dishonorable. All of the examples below assume the veteran meets these three service requirements.

After meeting the service requirements, the veteran must meet the asset requirements. The veteran, spouse, and their dependents meet the asset requirement if they do not have “sufficient means to self-pay.” Not having sufficient means to self-pay, as a general guideline, means that the veteran and his spouse have less than $80,000. Again, all the examples below assume the veteran and his spouse have less than $80,000 in countable assets. The veteran and spouse can give away assets to decrease their assets below $80,000 any time before applying for pension benefits.

The three tiers of pension benefits include low income pension, housebound pension, and aid and attendance pension. These three tiers are based on income and health needs. The first tier, low income pension is similar to social security, but for veterans and their spouses. Under low income pension, a single veteran age 65 can receive up to $1,097 per month, a veteran with dependents can receive up to $1,436 per month, and a spouse who is a widow can receive up to $735 per month. The veteran or spouse cannot have income that exceeds these amounts. A veteran’s annual income includes the veteran’s annual income, the veteran’s spouse’s income, and the income of each child of the veteran who is reasonably contributing to the veteran’s household income. If qualified, the veteran then will be paid the difference between the maximum and the income the veteran has from other sources.

The second tier, housebound pension benefits is for a veteran with low income, medical expenses, and the higher health care needs. To qualify, the veteran must meet the service, asset, and income tests and be disabled and essentially confined to the home. Disabled and essentially confined to the home means that the veteran is rated by the United States Department of Veterans Affairs (VA) as 100% permanently disabled and truly confined to the home; is rated by the VA as 100% disabled with another 60% disabled rating (and determining how a veteran can have a 100% disability rating and another 60% disability rating is an article for another day); without being confined to the home; or 65 years old or older and no rating is required. Under housebound pension, a single veteran can receive up to $1,340 per month, a veteran with a dependent can receive up to $1,680 per month, or a widowed spouse can receive up to $899 per month.

The third tier of pension benefits, aid and attendance pension, is for a veteran or a veteran’s spouse with low income who is blind, in a nursing home, or has a high level of health care needs. In addition to meeting the service, asset, and income tests, the veteran or veteran’s spouse must be blind; live in a nursing home facility; or have two of the following issues: being unable to dress or undress or keep themselves clean and presentable, being unable to attend their biological needs without assistance, or having a physical or mental incapacity that requires assistance on a regular basis to protect them from daily environmental hazards. Under the aid and attendance pension, a single veteran can receive up to $1,830 per month, a veteran with a dependent can receive up to $2,169 per month, or a widowed spouse can receive up to $1,176 per month.

For low income pension, housebound pension, and aid and attendance pension, a veteran and spouse can deduct certain expenses from their monthly income to meet the income limits. Those deductions include: medical expenses; health care and insurance premiums and deductibles; prescriptions, hearing aids, transportation to appointments; home health care; assisted living facility payments; and nursing home care. However, only that part of the medical expenses that is greater than five percent of the maximum rate of pension is allowable.

After laying out the maze of regulations, an example can clarify how to navigate the maze. Here, a single veteran over the age of 65 receives $1,200 monthly gross income. The monthly income limit for the low income pension benefit is $1,097. The veteran can start the maze by trying to reduce his monthly gross income by the prescriptions and health insurance premiums he may already pay along with payment for any transportation to visits to health care providers. For example, the veteran pays Medicare Part B of $134 per month and a co-pay of $50 per month, and a home health worker $240 per month for assistance. The veteran can deduct $369.15 per month from his income [$134 + $50 + $240 – ($1,097 x .05)]. Then, the veteran’s net income is $835.85 per month, and the individual is eligible for $261.15 per month, which pays the home health care provider to help keep the veteran at home for as long as possible.

And like any good example, the example must change a little: so what if the veteran’s income was $1,500 per month and the veteran was housebound? Because of the increased health care needs, the veteran could look to housebound pen-
sion for assistance. The deductions would be the same, but the veteran would only be eligible for a $357 deduction [$134 + $50 + $240 – ($1,340 x .05)]. This would put the veteran’s net income at $1,143 and the veteran could receive $197 per month.

Given that the veteran has increased health concerns, the veteran may need additional home health care or a family care giver. Under housebound pension, along with the current home health aide, the veteran could pay a family caregiver under a caregiver contract to help the veteran stay at home because of the veteran’s increased medical needs. So if the veteran’s daughter was paid under a family caregiver agreement an additional $240 per month, then the veteran’s benefit would increase to $437 per month or $1,340 - {[$1,500 – [$134 + $50 + $240 + $240 – ($1,340 x .05)]]}. In fact, the daughter may already be performing services that she could be compensated for by the veteran through this benefit. The veteran would then receive $1,500 per month normal income plus $437 of housebound pension for total income of $1,937.00. Without the benefit, the veteran would have $836 after paying for medical expenses. With the housebound pension benefit, the veteran would have $1,273 remaining after paying for medical expenses.

Unfortunately, the veteran’s health deteriorates and the veteran must move into an independent living facility (ILF) that charges about $1,200 per month in rent. The ILF provides a safe environment, meals, transportation, and medical administration. The veteran still pays $134 in Medicare Part B and a monthly $50 co-pay. The daughter and the home health care provider cease to provide services, although the daughter continues checking on the veteran about three times per week. Now, the veteran deducts $1,317 per month as expenses [$1,200 + $134 + $50 – ($1,340 x .05)]. The expenses are deducted from the veteran’s $1,500.00 per month income so the veteran receives a benefit of $1,157 per month, which pays all but $43 of the veteran’s rent for the independent living facility. Without the benefit, the veteran would have $116 remaining after paying medical expenses. With the benefit, the veteran would receive $1,500 of regular income per month plus $1,157 of housebound pension and have $1,384 in medical expenses such that the veteran would have $1,273 per month remaining after paying his expenses.

Again unfortunately, due to further health deterioration, the veteran must move into a nursing home. The veteran now looks to receive aid and attendance pension. The nursing home costs $6,000 per month. The veteran will receive the full aid and attendance benefit of $1,830 because the cost of the skilled nursing home exceeds the veteran’s income. However, the veteran will still be unable to pay the skilled nursing home with only his $1,500 of income per month plus the $1,830 of veteran’s Aid and Attendance benefits or $3,330 per month.

The next step will be applying for Medicaid to fill in the gap between veteran’s pension benefits and the cost for nursing home care. But KanCare or Medicaid requires applying for veterans benefits before filing a Medicaid application because veterans are entitled to a $90 per month personal allowance from the VA on top of the $62 Medicaid personal needs allowance for a total of $152 per month.

Where one maze ends (veteran’s pension benefits) another maze starts (Medicaid). But math gives the prudent attorney both a starting and ending point. Math can help determine which path to follow, when to follow that path, and how far down the path to travel before taking a different turn.

About the Author

Adam Dees is an elder care attorney practicing in Hays, Kansas with Clinkscales Elder Law Practice, P.A. He is a 2011 graduate of the University of Kansas School of Law. He received his bachelor’s degree in 2008 from Southwestern College in Winfield, Kansas. Adam is the coordinator of the 2018 Math and the Law series for The Journal.

3. Wartime periods include: Mexican Border Period from May 9, 1916 to April 5, 1917; World War I from April 6, 1917 to November 11, 1918; World War II from December 7, 1941 to December 31, 1946; the Korean Conflict from June 27, 1950 to January 31, 1955; Vietnam Era from February 28, 1961 to May 7, 1975 for veterans that served in the Republic of Vietnam during that period, otherwise August 5, 1964 to May 7, 1975; Gulf War from August 2, 1990 through a future date set by law or Presidential Proclamation such that any veteran that has served for 90 days since August 2, 1990 is eligible for VA benefits. 38 C.F.R. 3.2 (1997).
5. The veterans net worth, or “sufficient means to self-pay” is the market value, less mortgages or other encumbrances, of all real and personal property owned by the veteran except the veteran’s home and personal effects. In evaluating whether a veteran meets the asset test, the United States Department of Veterans Affairs (VA) reviews whether the veteran’s net worth would be consumed during his lifetime and the following factors: if the property can be readily converted to cash; the veteran’s ability to sell the property; the veteran’s life expectancy; the veteran’s dependents; and the rate the veteran may deplete his assets. 38 C.F.R. 3.263 (2011).
9. Id. at 3.351(d) (1979).
14. Id. at 3.272(g)(1)(iii).
In his 2016 State of the Judiciary speech, Chief Justice Nuss announced that a $50,000 grant from the State Justice Institute was approved allowing work with the National Center for State Courts to redevelop the Judicial Branch website. As noted by the Chief Justice, "Kansans deserve a site that will easily keep them well-informed about our Judicial Branch programs and what goes on here in the Kansas Judicial Center."

In considering that goal, it can be useful to slice off a piece of the overall project and compare with another state’s efforts on the same front. For example, comparing the websites for the Kansas and Arizona Commissions on Judicial Qualification illustrates two points on a spectrum of how public access and right to know can be interpreted and provided. Both sites are several clicks deep from the main court site; Kansas at kscourts.org/appellate-clerk/general/commission-on-judicial-qualifications and Arizona at azcourts.gov/azcjc.

Annual Reporting

Until 2015, Kansas posted an annual report on its site in PDF format. The annual report outlined the composition and processes of the Commission, provided complaint statistics, complaint types, and example case summaries. As of the date of this writing, no reports have been published for 2016, 2017, and there is concern that the July, 2018 report may not post on time either.

Arizona compiles annual reports (current through 2017) and those largely match the Kansas Commission’s in content and form. These reports summarize what has already been posted on the main site, however. Advisory opinions, public decisions, and bulletins are posted in full on the site at issuance so there is no lag between issuance and ultimate compilation of an annual report.
Press Releases

The Kansas Commission appears to notify the press when a judge is publicly disciplined. It then becomes the editorial decision of media outlets whether to cover the discipline at all or how much detail to provide in reporting. Those press releases do not appear to make it to the kscourts.org News Releases link nor are they noted on the Commission’s sub-page. Usually, the Commission’s press releases are covered only in outlets local to the judicial district in which the judge sits and the coverage frequently archives behind a paywall after a relatively short period.

The Arizona Commission site has a Press Releases link on its main landing page and the press releases related to judicial discipline are posted when provided to the media. While private media retains editorial privilege in deciding coverage, the releases are still posted as public record and archived for public access at any time.

Public Orders

The Kansas Commission issues public orders to cease and desist in judicial discipline. The orders specify the judicial misconduct observed and may address remedial actions taken to resolve it. However, those are not posted on the Commission website. To obtain such orders, a formal open records request and payment of fees is required. Knowledge of an order’s existence is prerequisite to being able to make such a request.

Arizona’s Commission interprets public access broadly. Their site has a main page link to Public Decisions that are sorted by year. That link leads to a listing of all public decisions categorized by removals, suspensions, censures, reprimands, dismissals with comment, and dismissals. Under those categories are links to the actual order. For example, the public can click a complaint that was dismissed and see a general description of the misconduct alleged and the Commission’s dismissal ruling on that allegation. (Anonymity of judges and complainants is preserved in the dismissal orders.) The public has free, 24/7, anonymous access to everything contemporaneous with issuance.

Advisory Opinions

The Kansas Commission’s advisory opinions are referenced in the Annual Reports (when published) but are merely summarized. There is no apparent link or direct access to the opinions in their entirety from the Commission’s main landing page.

The Arizona Commission has main page links both to their Judicial Ethics Advisory Committee and all judicial ethics advisory opinions dating back to 1976. The opinions are sorted by year, indexed by subject, and searchable. The advisory opinions appear to post to the website when issued.

Judicial Conduct and Ethics Bulletins

Through 2012, the Arizona Commission published semi-regular bulletins that appeared aimed at informing judges on the process and answering general questions about judicial discipline. That last one posted, issued in 2012, contained a summary of complaint disposition the year before but also included a comprehensive white paper that explained in detail judicial disqualification for cause in Arizona. It is not clear why those discontinued in 2012.

There is nothing similar available on the Kansas Commission’s website though inquiry indicates a semi-formal version is distributed to judges only via email. Email distribution, of course, eliminates any public access to the information distributed but also impairs archive searching and access by judges facing a question.

How Much Public Access to be Well-Informed?

Chief Justice Nuss is correct that “Kansans deserve a site that will easily keep them well-informed about our Judicial Branch programs…” Evaluating how much public access is required or preferred to ensure a “well-informed” public will be important to the refresh of kscourts.org. Looking at other states which have staked out various positions on public access and right to know along the spectrum of possibilities is a worthwhile exploration. Arizona provides an example that is aggressively open to its public.

About the Author

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

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A Sampler of Thoughts on Writing Samples

by Emily Grant

As on-campus interviewing season rolls around in a few months, it might be helpful to consider expectations of both students and employers on one important part of the application portfolio – the writing sample.

Initially, employers should know generally how law schools are advising students about their writing samples. Students are encouraged to submit approximately 5-10 pages of their best legal writing work to showcase their legal analysis. Students are admonished to carefully proofread the sample and to clean up the writing and citation as much as possible. Although some career services offices remind students that the work should be “substantially unedited,” many suggest having a legal writing professor or someone in the career services office review the sample prior to submission.

First-year students interviewing in the spring will likely have a memorandum prepared in their legal writing class.
substance and style

These memos will either be closed-universe, meaning that the professor has provided students with the necessary research, or open-universe, for which the students have done the research themselves, in addition to the written analysis.

Second-year students in their fall semester may have an appellate brief from their legal writing class. The supervising professor would typically encourage the student to submit only the analysis section of the brief, and perhaps even just one issue, to stay within the recommended page limit. Second year students may also have a redacted work product from a summer clerkship experience (used with permission of the employer); these could include anything from bench memos to research memos to court documents.

After their second year, students might also have a law journal note or a moot court brief. In my experience, I typically recommend the moot court brief or legal writing class product instead of the law journal note because it best mirrors the legal analysis (rather than academic analysis) that employers are typically seeking.

What does all of that mean for you as a potential employer? Here are several important things to keep in mind.

First, if you want something different from these general guidelines, feel free to specify your exact wishes. If you’d like a specific type of document (a transactional document or an academic analysis), say so in the job posting. If you’d like to keep the writing sample shorter, identify your preferred page limit.

Second, know that the writing samples you receive will likely have been edited by someone—friends, legal writing professors, career services professionals. And some documents, like a law journal note, may be fairly heavily edited and revised. Again, if it is important to you to evaluate a potential hire’s unedited work, you should identify that parameter when you ask for a writing sample.

Finally, recognizing the varying types of writing samples you may receive, think about the most effective way for you and your firm to evaluate the different documents you may receive. Instead of just rating samples as “good” or “bad,” consider a more direct comparison to what you would expect to receive from a junior associate—much better than, better than, comparable to, worse than, much worse than.1

It might also be worth the time to create a rubric to rate certain aspects of the writing sample—writing style or depth of analysis, for example. For each of the categories that are important to you, have specific definitions for “excellent,” “acceptable,” or “needs serious work.” I created the following rubric as an example that you could modify as appropriate for your office, hiring needs, and priorities:

<table>
<thead>
<tr>
<th></th>
<th>Excellent</th>
<th>Acceptable</th>
<th>Needs Serious Work</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Analysis</strong></td>
<td>Arguments are logical, complete, and thorough;</td>
<td>Includes basic overall argument structure and</td>
<td>Arguments don’t logically follow; lacks</td>
</tr>
<tr>
<td></td>
<td>discusses counter-arguments as appropriate</td>
<td>logic; misses or fails to thoroughly explain a</td>
<td>depth; ignores or fails to refute</td>
</tr>
<tr>
<td></td>
<td></td>
<td>few points</td>
<td>counter-arguments</td>
</tr>
<tr>
<td><strong>Writing Style</strong>2</td>
<td>Smooth prose; easy transitions and flow</td>
<td>Mostly clean sentences; some choppy transitions</td>
<td>Difficult to understand; paragraphs don’t</td>
</tr>
<tr>
<td></td>
<td></td>
<td>and ambiguities</td>
<td>connect or flow; ambiguities in text</td>
</tr>
<tr>
<td><strong>Citation</strong></td>
<td>Where needed; complete citation information;</td>
<td>Includes most of the necessary citations; some</td>
<td>Missing important citations; poor format</td>
</tr>
<tr>
<td></td>
<td>correct format</td>
<td>minor errors in format</td>
<td></td>
</tr>
<tr>
<td><strong>Other Professionalism Considerations</strong></td>
<td>Meets specifications in job posting; document is clean and neat; minimal typos</td>
<td>Some problems with document layout; some typos</td>
<td>Did not follow instructions in job posting; unprofessional in appearance and proofreading</td>
</tr>
</tbody>
</table>

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Knowing what kind of advice and process students have for generating writing samples may give you a better idea of what to expect. It can also allow you to customize a job posting to receive something more appropriate and useful for your office and to more effectively evaluate the samples you receive.

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2. See id.

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About the Author

Emily Grant teaches Legal Analysis, Research, and Writing at Washburn University School of Law, and she also serves as the Co-Director for the Institute for Law Teaching and Learning. Having just received a positive tenure vote from the Washburn University Board of Regents, she hopes to never have to compile another writing sample. Emily currently chairs the KBA Board of Editors, which oversees the content and production of The Journal.

emily.grant@washburn.edu.
Dr. Wes Crenshaw, Family Psychology Services, Lawrence
Prof. Jasmine Abdel-Khalik, UMKC School of Law, KCMO
Anthony Anderson, University of Kansas School of Law, Lawrence
Hon. Karen Arnold-Burger, Kansas Court of Appeals, Topeka
Sara Barnes, Cornertone of Care, Overland Park & Roeland Park
Edward Boltz, The Law Office of John T. Orcutt, P.C., Durham, NC
Jonathan Booze, ONE Advisory Partners LLC., Kansas City
Andrea Boyack, Washburn University School of Law, Topeka
Kevin J. Breer, Breer Law Firm, LLC., Westwood
Lisa Brown, Foulston Siefkin LLP, Topeka
Hon. Bryan J. Brown, Office of Administrative Hearings, Topeka
Tricia Bushnell, Midwest Innocence Project, Kansas City
Christopher V. Carani, McAndrews, Held & Malloy Ltd., Chicago, IL
Whitney L. Casement, Goodell, Stratton, Edmonds & Palmer LLP., Topeka
Daniel A. Casement, Stormont Vail Healthcare, Topeka
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Neil S. Sader, Sader Law Firm LLC., Kansas City, MO
Jeremy Schrag, Lewis Brisbois Bisgaard & Smith, Wichita
Joseph Schremmer, Depew Gillen Rathbun & McInteer LC, Wichita
W. Michael Sharma-Crawford, Sharma-Crawford Attorneys at Law, Kansas City, MO
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Matthew Stromberg, Foulston Siefkin LLP., Overland Park
T. Lynn Ward, Ward Law Offices, Wichita
Matthew Wiebe, Washburn University School of Law, Topeka
Ashlynn Yarnell, Ronald W. Nelson PA., Overland Park
Adrian E. Zelvy, Family Psychological Services LLC., Lawrence
Dr. John Zervopolous, Psychology Law Partners, Dallas, TX
Phil Lewis Medal of Distinction

James K. Logan (Olathe) was born in Quenemo, Kan., on August 21, 1929. He served in the U.S. Army out of high school, and attended the University of Kansas following his military service. He was elected president of the All Student Council, earned straight A's and won a Rhodes Scholarship. He declined the scholarship and instead married his sweetheart Beverly Jo after both graduated. Logan attended Harvard Law School where he graduated magna cum laude and was an editor of the Harvard Law Review. He taught at the University of Kansas Law School, of which he became dean at the age of 31. During his tenure at KU, he edited and co-authored the first practice book published by the KBA: Kansas Estate Administration. Later he co-authored Kansas Corporate Law & Practice through several editions with Alson Martin. Logan became involved in the KBA's CLE program, teaching a course on estate planning, which he presented several times across the state. He resigned from the KU law faculty in 1968 and was working on a farm policy speech for US Senator Robert Kennedy when Kennedy was assassinated. Jim joined the Johnson County law firm of Payne & Jones in Olathe until his appointment as a U.S. Circuit Judge for the 10th Judicial Circuit by President Jimmy Carter. When he retired from that post after 21 years of service, he returned to private practice with his son and brother with the Logan Law Firm in Olathe. As a judge, Jim served on panels deciding some 9,000 cases. He has authored, co-authored and edited five books, written more than 840 officially published legal opinions and approximately 60 articles or other publications. But with all his major contributions throughout his legal career, of most importance to him are his family and friends, including the judges and lawyers with whom he has served, his 45 former law clerks and his former law students.

The KBA’s Phil Lewis Medal of Distinction is reserved for individuals or organizations in Kansas who have performed outstanding and conspicuous service at the state, national, or international level in administration of justice, science, the arts, government, philosophy, law, or any other field offering relief or enrichment to others. The recipient need not be a member of the legal profession nor related to it, but the recipient’s service may include responsibility and honor within the legal profession. The award is only given in those years when it is determined that there is a worthy recipient.

Professionalism Award

Hon. Evelyn Z. Wilson (Topeka) is Chief Judge of Kansas’ Third Judicial District (Shawnee County). Before taking the bench in 2004, she practiced law for 19 years—seven years in Northwest Kansas at Lund Law Firm, and twelve years in Topeka at Wright, Henson, Somers, Sebelius, Clark & Baker. A native of Smith County, Kansas, Judge Wilson graduated from Bethany College and Washburn Law School. She is Chair of the Kansas Sentencing Commission, and President of the Kansas Bar Foundation Board of Trustees. Judge Wilson is a member of several associations, including the American, Kansas and Topeka Bar Associations; Kansas Women Attorneys Association; and Women Attorneys Association of Topeka.

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 as identified by the KBA Hallmarks of the Profession.
Distinguished Service Award

Marilyn Harp (Topeka) began working for Kansas Legal Services in 1979, immediately following her graduation from the University of Kansas School of Law. She has worked there continuously since, holding the positions of staff attorney and managing attorney. In 2006, she became the second Executive Director in the history of Kansas Legal Services.

Projects she counts as successes in her quest for Access to Justice for low income Kansans include:

- establishing a centralized intake system and the ability for some callers, including Kansas senior citizens, to receive advice directly from that initial contact;
- transforming forms to interactive interviews, allowing over 10,000 Kansans annually to create forms leading to success as self-represented litigants;
- modifying Supreme Court rules that allow retired and inactive attorneys to provide pro bono legal services through KLS;
- support for the local creation of ten courthouse-based self-help centers; and
- operating Kansas Legal Services offices statewide with enthusiastic advocates providing direct services to more than 15,000 Kansas families each year, persons who otherwise would have no access to legal assistance.

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. 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.

Pillars of the Community Awards

Thomas Adrian (Newton) is co-owner and an attorney with Adrian & Pankratz, P.A., where he has practiced since 1973. His work concentrates primarily in the areas of health law, water law, business, and estate planning. Tom received his undergraduate degree from Washburn University and his Juris Doctor from Washburn University School of Law.

He is a Past President and former board member of the Kansas Bar Association. He also served as President of the KBA’s Solo and Small Firm Section. He is currently a member of the Committee on Continuing Legal Education of the KBA. A member of the KBA since 1969, he also belongs to the Harvey County, Wichita and American Bar Associations. He has received the Outstanding Trustee Award from the Kansas Hospital Association and is a past recipient of the Robert K. Weary Award and the Outstanding Service Award from the KBA.

He has been active in his community and his church, holding leadership positions on a wide variety of local boards and charitable organizations.

Robert W. Wise (McPherson) is the senior member of Wise & Reber L.C., where he practices in the areas of litigation, business, banking, trusts and estates, arbitration and mediation. He graduated from McPherson College; he received his law degree, with honors, from George Washington University where he was a member of the board of editors of the Law Review. Wise received an honorary Doctor of Laws from McPherson College and the Central Christian College of Kansas Academe of Achievers Award.

He is past president of the Kansas Bar Association, past chair of the KBA Ethics Grievance Panel, past chair of the KBA Corporation, Banking and Business Law Section and is a Foundation Fellow. Wise has received the KBA’s Professionalism Award and Outstanding Service Award, the KBA Bar Foundation Robert K. Weary Award and the Kansas Legal Services Making a Difference Award. He has actively served on a number of national and international boards and commissions and community organizations.

Pillars of the Community Award recognizes a Kansas lawyer with a minimum of 10 years active non-specialized, general legal practice in a predominately low-density population area of Kansas and substantial practice in small or solo law firms or local government service.
Distinguished Government Service Award

Hon. Larry D. Hendricks (Topeka) A native of Great Bend, Kansas, Larry earned a bachelor's degree from Kansas State University, a master's degree in public administration from the University of Northern Colorado and his JD with honors from Washburn University School of Law. He served eight years in the United States Air Force.

He began his 25 years of private practice as a solo practitioner and was a partner in the Topeka law firm of Stumbo, Hanson and Hendricks. He served as city attorney for Alma, Auburn, Lecompton and Perry, Kansas.

Larry was appointed to the 3rd Judicial District Court in November, 2006. He retired from the bench March 31, 2018.

Larry and his wife Beckie have two married sons and two grandsons.

Courageous Attorney Award

Rekha Sharma-Crawford (Kansas City, Missouri) Her fiery advocacy for immigrant's rights and devotion to the rule of law have kept Rekha up all night more times than she can count. Her fearlessness has put Rekha in the local and national spotlight as she's taken on extremely complex and high-profile cases that others have turned away. These cases are complicated further by the state of immigration laws and the court of public opinion. Rekha has the ability to articulate the law and its implications on cases that are anything but cut and dried. She has often turned the tide of misunderstanding and misinformation that plays out in television, print and social media, brought clarity to vague areas and protected the fundamental right of due process.

Rekha's victories in courtroom battles have served as the foundation for several articles she has written. She is a respected and published contributor for many legal journals. Her expertise in immigration law is sought out by clients and colleagues in the legal field, from judges and immigration officials to lawmakers. Rekha is a frequent instructor at the American Immigration Law Foundation Litigation Institute and speaker at the American Immigration Lawyers' Association national conference. She has also spoken at a variety of seminars about immigration law locally at the Johnson County Bar Association, Kansas Bar Association, and Kansas and Missouri Public Defenders.

It is not Rekha's nature to sit out and hope for the best. Her personal and professional philosophy to make a meaningful difference in her community and country led to The Clinic at Sharma-Crawford (“The Clinic”), a nonprofit organization. Rekha and her husband, Michael, established The Clinic to close the gap between low-income immigrants facing removal and the availability of qualified, affordable representation with the U.S. Immigration Court. The Missouri Bar Association honored Rekha and Michael with its Pro Bono Publico Award in 2017. She received her Juris Doctorate from Michigan State University College of Law and is licensed in three states.
Outstanding Young Lawyer Award

Joslyn Kusiak (Independence) is an attorney at Kelly & Kusiak Law Office LLC. Kusiak's current legal practice includes estate planning and administration, business formation and providing ongoing business consulting and advice, and civil litigation.

Kusiak is a 2009 graduate of Missouri State University and a 2012 graduate of Washburn University School of Law. While in law school, she served as staff editor for the Washburn Law Journal, clerked for the Honorable Steve Leben at the Kansas Court of Appeals, clerked with the Kansas Highway Patrol, and interned at the Washburn Law Civil Litigation Clinic.

Kusiak was introduced to the Kansas Bar Association during law school and has been involved ever since. Kusiak has served as the KBA Young Lawyer Section Secretary/Treasurer and as the YLS Social Chair. Kusiak has also served on the KBA Strategic Planning Task Force and was a member of the 2016 KBA Annual Meeting Planning Committee. Kusiak presently serves on the KBA Board of Governors as the Young Lawyer Delegate to the American Bar Association. As such, she serves as a voice to the ABA for Kansas Young Lawyers at the ABA House of Delegates, the policy-making body of the ABA, which convenes twice a year.

No stranger to community involvement, Kusiak presently serves on the Independence Community College President's Advisory Council and the Women 4 Women Successful Women's Advisory Team. Joslyn and her husband, the Honorable Jeffrey W. Gettler, also volunteer as a host family through CP2, a partnership with Independence Community College that connects local families with college student athletes.

Outstanding Young Lawyer Award is given annually to recognize 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

Eunice Chwenyen Peters (Topeka) received her Bachelor of Science degree in kinesiology with an emphasis in athletic training from the University of Illinois in 1997 and her juris doctorate from Washburn University School of Law in 2006. Peters is the at-large member on the Kansas Bar Association (KBA) Board of Governors and serves on the KBA Diversity Committee as education subcommittee co-chair, the Kansas Women Attorneys Association Council as co-chair of the outreach and education committee, and KBA Awards Committee as a member. From 2012 to 2015, she served as the chair of the KBA Diversity Committee. Peters has written articles and presented CLEs about diversity and inclusiveness in the legal profession. In her legal career, she has worked in both public service and private practice.

The Diversity Award recognizes an individual who has shown a continued commitment to diversity; 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.
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https://go.ksbar.org/AM18photos
Outstanding Service Awards recognize service that significantly advances the administration of justice or the goals of the legal profession and/or the KBA.

Mark A. Andersen is a partner in the law firm Barber Emerson, L.C., Lawrence, Kansas. He is a Kansas native, received his J.D. from the University of Kansas School of Law and his B.A. from Bethany College. For 12 years, Mark has served as the KBA liaison to, and Secretary of, the Kansas Electronic Recording Commission. He is a co-editor of the Kansas Real Estate Practice and Procedure Handbook, published by the KBA. Mark co-authored a chapter on electronic recording for the KBA's Kansas Real Estate Practice and Procedure Handbook. He was a contributing editor to the KBA Real Estate, Probate & Trust Section Newsletter for 12 years. He is a past president and member of the KBA Executive Committee of the Real Estate, Probate, and Trust Law Section, serving from 2007 to present. Mark has been a CLE program speaker or moderator at KBA sponsored CLE programs on multiple occasions. Active in a number of organizations at the state and federal levels, Mark is admitted to the Kansas Bar, Missouri Bar, and Supreme Court of the United States.

Larry R. Baer earned his bachelor's at Washburn University and his law degree at Washburn University School of Law following his service in the U.S. Navy. He had a private practice in Newton and Harvey County for many years, during which time he also served as City Attorney and Prosecutor for Halstead, dedicating many hours to the Halstead flood control project. He was very active in that community, serving on the Harvey County Jobs Development Council for six years and being involved with the Harvey County United Way, Newton Optimists and its youth basketball program and participated in several youth mission trips with his church. Larry then spent 17 years with the League of Kansas Municipalities, retiring from the League as General Counsel in 2018. While he was there, Larry conducted League-sponsored training for city employees and elected officials; he wrote and revised policy manuals, field legal questions from member cities and monitored legislation that could potentially affect Kansas municipalities.

Scott M. Hill is a partner at Hite, Fanning & Honeyman LLP, which he joined upon his graduation from Washburn University School of Law. Admitted to practice in Kansas state and federal courts and the U.S. court of appeals, Scott’s practice is concentrated in banking, business transactions, business litigation and bankruptcy. He also has extensive experience in construction, corporate law, real property, probate, estate planning, civil litigation, and insurance defense. A member of the Wichita, Kansas, and American Bar associations, Scott served as the Young Lawyers President of both the Wichita and Kansas Bar Associations, and as the Kansas and Missouri Young Lawyers Division District Representative to the ABA. A recipient of the KBA’s 2008 Outstanding Young Lawyer award, he currently serves as a Trustee for the Kansas Bar Foundation and is Chair of the IOLTA Committee.

MIP is dedicated to the investigation, litigation, and exoneration of wrongfully convicted men and women in our five-state region, including KS, MO, NE, IA, and AR. Founded as a joint partnership with the University of Missouri and University of Missouri-Kansas City law schools, MIP has expanded to include partnerships with the University of Kansas School of Law's Project for Innocence and the Iowa State Public Defender's Wrongful Conviction Division. Since 2011, MIP has been involved in the successful exonerations of Dale Helming and Robert Nelson in Missouri, and most recently, the exonerations of Floyd Bledsoe, Richard Jones, and Lamonte McIntyre in Kansas. In addition to direct representation, MIP works to prevent wrongful convictions, and worked to pass laws to reform eyewitness identification procedures, recording of custodial interrogations, and compensation for the wrongfully convicted in Kansas.

Susan G. Saidian attended Millsaps College and Washburn University, obtaining her bachelor's degree in 1982. She graduated from Washburn University School of Law in 1988. She spent most of her years in private practice in the area of bankruptcy, working for both consumer and business debtors, creditors and although she found all areas rewarding, she particularly enjoyed her work for consumer debtors. Susan 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.
Pro Bono Awards

Pro Bono Awards recognize lawyers or law firms that deliver direct legal services, free of charge, to the poor or, in appropriate instances, to charitable organizations who primarily provide other services to the poor; Pro Bono Certificates are awarded to lawyers who: are not employed full time by an organization that primarily provides free legal services to the poor; 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 has no resources to employ paid counsel; have voluntarily contributed a significant portion of time to provide legal services to the poor without charge; and/or lawyers whose voluntary contributions have resulted in increased access to legal services for low- and moderate-income persons.

HUSCH BLACKWELL

Accepting the award for the firm were: (L to R): Shawn Shipp, Michael Raupp, Larry McMullen, Christina Pyle

Douglas M. Greenwald lives and practices law in Wyandotte County. He serves as a member of the Board of Directors of the United Way of Wyandotte County and KidsTLC (Olathe).

University of Kansas School of Law Legal Aid Clinic

Barbara Wrigley, Office Manager; Meredith Schnug, Associate Director; Melanie DeRousse, Director

Pro Bono Certificates

Everett Fritz II is a second generation Kansas lawyer. A graduate of Washburn Law School, he practiced with his father in Kansas City, Kan., then took a position with Western Casualty and Surety Company as a claims attorney. His career led him to Indiana and Illinois until retirement allowed him to move back to Indiana to be near family. When his daughter’s family moved to the Kansas City area, Everett and his wife moved, too, and he quickly took up work with KLS as a pro bono attorney.

Erika Jurado-Graham established her own immigration practice in Kansas City. Upon graduation from Washburn University School of Law, Erika also holds a law degree from Universidad Alfonso Reyes in Monterrey, Mexico. Licensed in Kansas, Missouri and Mexico, she currently has 520,000 followers on Facebook, her YouTube channel receives thousands of visits on a weekly basis and her immigration videos have over a million views. Erika is considered a social media Hispanic Influencer and her immigration Facebook portal is one of the top three immigration pages nationwide.

Jerome P. McAndrews learned early on from his parents to give back to the less fortunate. He became enamored with the law after a long career in insurance during which he worked in investigations, litigation, contract analysis, depositions and testifying as an insurance expert. During law school at UMKC, he interned as a prosecutor and public defender. McAndrews started his own firm in 2017 which allows him more time with KLS as a pro bono attorney. He also takes cases from the Johnson County District Court.

Joy A. Springfield is an experienced litigator with Shook, Hardy and Bacon in the areas of complex product liability and business and pharmaceutical litigation. Joy devotes many pro bono hours to KLS and Voluntary Attorney Project. She helps foster families adopt children and co-founded the Shook Kansas Pro Bono Task Force, expanding the firm’s pro bono presence in Kansas. She is also accredited with the Dept. of Veterans Affairs to handle veteran disability claims.

Charles R.C. Regan has long been involved in volunteer efforts with Third and Long Foundation, teaching inner city children to read and write, and with the Kansas City Chapter of Autism Speaks, raising money and awareness of those affected by autism. He is a graduate of UMKC Law School and of the Ross T. Roberts’ Trial Academy. A trial attorney with Yonke Law, LLC, Regan participated in mock court proceedings and in Trial Competition at the end of the program.

Frederick R. (Rick) Smith is an attorney in Pittsburg, Kan. He was nominated for his volunteer work with the KBA Free Legal Answers program, on the basis of the number of times he has offered information and/or advice to Kansans who have contacted the program. Of the 26 volunteers who have participated in the program this past year, Smith reached out to people more than any other individual. The Free Legal Answers program is part of a nationwide, ABA-sponsored effort. Interested volunteers can learn more and sign up at www.kansas.freelegalanswers.org. Nearly 250 Kansans took advantage of this valuable program in the past year.

He graduated from Kansas State University, Manhattan, Kan., in January 1967. He received his Juris Doctor degree from Washburn University in 1970, where he served as president of the Law School Student Association in 1968. He was a member of the Law Review and a member of Phi Alpha Delta legal fraternity. He was honored by serving as student representative and dedication speaker of the new Washburn Law School building.


Kent moved to Salina in 1989 and practiced with the Barta, Kent and Sheahon firm. From 1991-1993 he served as chief counsel for the Department of Human Resources for the State of Kansas.

Bruce was very active in Kansas Democratic Party politics. He served as the First Congressional District Chairman and attended many state and national party conventions. He was a voracious fund raiser for many local, state and national campaigns. Bruce met Kathryn during the 2002 Sebelius campaign, and they hosted many political fundraising events throughout their time together. In 1993, he was appointed by President William J. Clinton as Regional Administrator of Region VII of the Small Business Administration in Kansas City. He served in that capacity until 2000. His last position before retirement was as Counsel to the Department of Planned Giving at the Kansas State University Foundation in Manhattan.

In addition to the practice of law, Kent was a partner in many business ventures. He was active in the Kansas Bar Association, where he served in multiple leadership positions and, at the time of his death, he was the President-Elect of the association. Bruce is survived by his wife, Kathryn Focke of Manhattan; son, Kelly W. Kent, of Kansas City, MO; daughter, Krista and husband Patrick Allen and grandchildren, Avery and Miles, of Overland Park, KS; step-daughter, Joelle and husband Gerry Keller of Washington, DC.

He was preceded in death by his parents and two brothers, Rex and Carl.

Visitation was held on Friday, May 18 at Yorgensen-Meloan-Londeen Funeral Home in Manhattan. Services were held Saturday, May 19, at the First Lutheran Church, 930 Poyntz Avenue in Manhattan, with Pastor Jerry Reynolds officiating. A celebration of life followed at Kites Bar and Grille in Aggieville. Private interment took place at Sunrise Cemetery in Manhattan, Kansas.

Memorials may be made to the Homecare and Hospice Foundation in Manhattan or to the Kansas Bar Foundation Scholarship Fund in Topeka. Contributions may be left in care of the Yorgensen-Meloan-Londeen Funeral Home, 1616 Poyntz Avenue, Manhattan, Kansas 66502. Online condolences may be left for the family through the funeral home website at www.ymlfuneralhome.com
A TOAST TO BRUCE KENT
(offered by Sara Beezley at the KBA’s 2018 Annual Meeting):

We are missing someone tonight. And we will be missing someone tomorrow.
Bruce Kent was the face of the Kansas Bar Association and the Kansas Bar Foundation, the poster boy so to speak. I don’t know when my path initially crossed with Bruce’s, probably at one of the first KBA meetings I went to which would have been in the early 80s. Once that happened, our paths continued to cross, at KBF Board meetings, at KBA Board meetings, at the Slam Dunk CLEs in Manhattan which he organized, at the Plaza Lights seminars which he co-founded, at the Court appreciation dinners, at the awards committee meetings and at K-State athletic events and foundation events.

And when our paths crossed we never just passed by, no one passed by Bruce Kent. You talked, you caught up, you smiled, you laughed and you got a hug. What Bruce did for our profession with his work through the association, the foundation and continuing legal education made him a legend, truly a legend in our profession. He was to be installed tomorrow as the Kansas Bar Association President and he was so looking forward to that. He would have been the first attorney to have served as presidents of both organizations.

If you needed something done, Bruce Kent was always there willing to lend a helping hand, be on or chair a special committee, volunteer when no one else was volunteering or cheering other bar and foundation members on when they needed support and encouragement. The staff of both organizations loved Bruce because of his willingness to help and knew they could always call on him.

Please stand with me, stand and raise your drinks for a toast to our dear friend and colleague, Bruce Kent. He will be sorely missed. Hear, Hear!

From the Foundation Dinner and Recognition program at Annual Meeting:

The KBF family lost a Fellow and friend on May 15. His passion was in providing lasting opportunities to remember and celebrate members of the legal profession and to provide for future members. Bruce’s commitment to the KBF will be appreciated by law students who will benefit from his plan to establish the Bruce Kent Memorial Scholarship award.

Bruce served as KBF president in 2007-2008. During his presidency, he continued working on establishing a planned giving program at the KBF. In appreciation for his time, donations, passion, and giving heart, tonight we recognize him posthumously as a KBF Pillar of the Foundation.
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by Robert W. Parnacott
Introduction

“Too little has been written on the history of the legal profession in Kansas . . .” 2 Even less has been written on the legal history of the territorial period, which began in 1854 with the passage of the Kansas-Nebraska Act. There are few legal history articles or book chapters that deal solely or even primarily with the territorial period. 3 More often, these materials give only cursory treatment to pre-statehood matters. 4

Research on the practice of law during this period is difficult because the territorial court records that exist are divided among the Kansas Historical Society and the federal archives in Kansas City, Missouri. 5 Though scattered, however, these sources are available to researchers, including online at the state historical society website. In addition, the history of the practice of law in the territorial period appears in books, articles, and other materials published on general Kansas history.

The territorial period is where the journey began for the practice of law in Kansas. This article will focus on Kansas territorial legal history, with some pre-territorial legal history. Care will be taken to not repeat matters covered in previously published KBA Journal or law review articles, except when necessary for context.

Pre-territorial Period

The region that was to become the territory of Kansas was acquired by the United States through the Louisiana Purchase in 1803. Before there was any real settlement of the area other than by Native Americans, no organized legal system would have had much impact. As part of laying the case for slavery, the first pro-slavery Kansas territorial legislature, in its preface to the 1855 Session Laws, included a recitation of the various state or territorial governmental jurisdictions between 1804 and 1854 over the Kansas Territory’s area, with the pointed statement: “the institutions of domestic slavery were established and recognized” in the region that was to become the territories of Kansas and Nebraska. 6

There may be few records of legal proceedings during this period preceding the Kansas organic act. On the Kickapoo Indian reserve in July 1839, United States soldiers arrested a Kickapoo Indian for killing a Kickapoo blacksmith. The defendant was convicted in April 1841 and sentenced to eighteen months imprisonment and a five hundred dollar fine. But the defendant was “apparently” granted presidential clemency in May 1841. 7
In August 1842, a merchant and his employees were arrested for transporting alcohol illegally. But after being brought to Platte County, Missouri, for arraignment, the men were released by the magistrate and were not tried. A more serious crime was the robbery, kidnapping, and murder of a merchant on the Santa Fe Trail in April 1843. The defendants tried in Missouri. Two directly involved with the murder were sentenced to death and hanged in St. Louis in August 1844. A similar crime occurred in March 1847, resulting in the arrests of two Native Americans of the Sac (or possibly the Fox) Nation, although the disposition of the matter is not given.

Four United States Army deserters murdered a Native American traveling companion in late July 1852. One was arrested in Liberty, Missouri, and the others in St. Louis. The case was tried in the United States district court in St. Louis. Two men were sentenced to death, one was acquitted, and the fourth apparently avoided punishment by testifying as a prosecution witness.

The laws of the United States were not the only laws in force in the region in the period after the Louisiana Purchase. At least two tribes that had been relocated to the area, the Wyandot and the Ottawa Nations, had written codes of law. The Ottawa code had twenty-five laws regarding criminal, civil, and administrative matters. For example, the code included the following regarding alcohol possession:

Whisky on the Ottawa land cannot come. If any person shall send for it, or bring it into the Ottawa country, he who sends, or he who brings shall pay five dollars, and the whisky shall be destroyed. Any one sending or bringing the second time, shall forfeit all of his annuity money. For the third offence, he shall be delivered over to the United States officers, to try the severity of the White men’s laws.

A Wyandot Indian was convicted of murder under the Wyandot code in January 1853. He was sentenced to die by firing squad. The prosecutor in the case actually thought that only the lesser crime of manslaughter had been proven. But a request for clemency from the president was denied, and the sentence was carried out.

**Extra-judicial Systems**

Both before and after the organization of the territorial legal system, other systems were employed for redress of grievances. Most notable were squatter associations and their courts. After the territorial courts organized, some of these squatter courts continued to operate. One territorial district court judge ordered a deputy marshal to organize a posse to put a stop to one such court. After the posse was met with gunfire, the posse withdrew, but when the posse returned in greater numbers, the squatter court had apparently “adjourned.” Other self-help measures included such groups as the “Settlers Protective Association,” formed in the Osage Ceded Lands, which also addressed claim disputes among its members.

The ultimate punishment was administered extra-judicially during the territorial period, there having been at least twenty-eight lynchings (not including political killings). Although political violence is outside the scope of this article, it should be noted that lawyers were not immune from such violence. Most notably, William Phillips—a lawyer—was murdered by a pro-slavery band that included a court clerk and deputy clerk of the territorial district court.

**Military Law**

Another legal system in the territory was military justice. This system sometimes overlapped with the civil justice system. In 1856, a justice of the peace in Douglas County issued a warrant to arrest a soldier accused of theft. But when the soldier was brought to be examined, a captain accompanied by six soldiers came and “told the prisoner he came to release him, ordered him out of court, took the prisoner away, and dismissed the court.” After the governor inquired about the matter, the commanding officer informed the governor that the soldier would be court-martialed instead of being returned to the custody of the civil authority.

**The Organic Act**

The Kansas Territory’s first code of laws, the 1855 Session Laws, includes as an addendum the text of Congress’s organic act organizing the government of the Kansas Territory. The act provided for both supreme and district courts, as well as probate courts and justices of the peace. The supreme court was to consist of a chief justice and two associate justices, each of whom was to serve individually as the district court judge of one of the three judicial districts. They were required to reside in the assigned district. The supreme and district courts had both common-law and chancery jurisdiction. Probate courts and justices of the peace were to have only such jurisdiction as the legislature granted. The position of a territorial attorney was also authorized.

**The First Territorial Legislature**

The first territorial legislature is often called the “Bogus Legislature” because it came to power through a massive pro-slavery election fraud. Once seated, that legislature adopted a code of laws. For the most part, this simply copied the existing Missouri State Code. As a curative, the legislature included a statute that provided that any references to “state” that might have been missed in drafting were to be interpreted as meaning the Kansas Territory. Also demonstrating the Missouri influence were the annotations provided to reported Missouri judicial opinions. Finally, to supplement the statutes, the territorial code provided that the common law and statutes of England adopted prior to the “fourth year of James the First.”
also were the law of the territory to the extent that they did not contravene the laws of the United States or the territory.31

Although the actions of the legislature during this time are beyond the scope of this article, under the category of too good a story not to mention, there is a contemporaneous anecdote that captures the legislative Zeitgeist:

The great portion of the [territorial legislature] boarded and lodged at what was called “Jack Thompson’s Restaurant.” . . . This was a one-story frame building, . . . being divided into three rooms, the principal of which the bar was kept, whilst in the others faro, draw-poker, and other gambling games were played every night and on every Sunday, for the entertainment, if not the profit, of the lawmakers. . . . The dining tables furnished lodging room for a number of boarders, who spread their blankets on them when the dishes were removed. The bar-room also provided a number with lodging. This was generally crowded, and immense quantities were here drunk of a most infamous compound of vile drugs, the qualities and character of which were only known to the manufacturer, but which he could safely have warranted to destroy the constitution of the strongest man, in a very limited time, and which “Jack Thompson” and his bar-keepers sold for whiskey at a dime a glass. . . . Late at night this bar-room was covered with a few inches of saw-dust, upon which, as the outsiders withdrew, boarders, mostly legislators, would stretch themselves and fall asleep. One night a stage driver happened to drink some of that whiskey . . . and he rolled over on the floor among the members. In the morning, whilst engaged in shaking off the sawdust, he was accosted by one of the thousand borers for bank charters, or railroad bills, or town company corporations, to obtain his influence to get an act through the legislature. This threw the stage-driver into a violent passion, and the borer came near to getting a flogging. “It is bad enough,” said the stage-driver, “to get drunk, and make a fool of myself, and get into bad company, but no man shall insult me by mistaking me for a member of the Kansas Legislature.”32

The Territorial Courts and Justices

With the presidency in the hands of the national Democratic party all territorial supreme court judges appointed were Democrats.33 Before the territorial supreme court justices arrived and assumed their duties, judicial functions were performed by justices of the peace appointed by the territorial governor.34 Only six of the supreme court justices appointed served any appreciable length of time.35 Of the short-timers, Madison Brown was the initial appointee for chief justice, but he did not accept the commission. He was replaced by Samuel D. Lecompte.36 John Pettit later replaced Lecompte as chief justice. The first two associate justices appointed were Rush Elmore and Sanders Johnston. After those two were removed for cause by the president, associate justices Sterling G. Cato and J. M. Burrell were appointed. But Burrell quickly resigned, left the territory, and shortly thereafter died in October 1856.37 Associate Justice Thomas Cunningham was appointed to replace Burrell, but, after coming to the territory, also quickly resigned.38 From late 1855 to mid-1857, Lecompte and Cato were the only territorial supreme court justices serving. Joseph Williams was appointed in 1857 to fill the third slot. The next year, Cato was removed and replaced by Elmore.

Thus, the six supreme court justices actually performing judicial functions during the territorial period were Samuel D. Lecompte and John Pettit as chief justices, and associate justices Rush Elmore, Sanders Johnston, Sterling G. Cato, and Joseph Williams.

Samuel Dexter Lecompte 39

Samuel D. Lecompte was born in Maryland in 1814, and practiced law there until he was appointed to the Kansas territorial supreme court. Lecompte served from 1854 to 1859, after he was removed by President Pierce.40 Initially he was a popular choice.41 But those opposing slavery came to believe that he was a pro-slavery partisan. A British journalist at the time described him as “[a] small, fair-complexioned, keen-eyed lawyer.”42 The journalist went on to characterize Lecompte as “the Jeffreys of the territory”43 and suggested Lecompte acted as the “chief of the bloody assizes” of Kansas.44 The secretary to one territorial governor noted that Lecompte had fully aligned himself with the pro-slavery faction in the territory.45 The secretary also commented that “Lecompte was a third or fourth-rate lawyer,” and “was notoriously indolent and sluggish.”46

In its defense of Lecompte after his removal as chief justice, the pro-slavery territorial legislature opined that Lecompte was “honest, high-minded and [a] capable . . . functionary.”47 R. Alton Lee, in his book on the history of the Kansas Supreme Court, states that Lecompte “was a man of great force of character’ who was ‘openly partisan in his support of slavery’” and was a “leader of the proslavery forces.”48 His reputation as a pro-slavery partisan may have been overblown.49 His notoriety for pro-slavery partisanship followed him post-statehood, however.50 Controversy over Lecompte’s territorial record persisted into the statehood era, including a kerfuffle that resulted in Lecompte’s suing for libel.51

In the interval between his arrival in the territory in late 1854, but before the territorial legislature had adopted its first set of laws, Lecompte was asked to grant an injunction against an alleged trespasser. But he refused the request, finding he lacked such power.52 Lecompte later presided over a grand jury in 1856 that presented indictments against a Law-
rence newspaper for publication of “the most inflammatory and seditious character,” and against another newspaper for reporting on free-state meetings calling for resistance to the pro-slavery territorial government.63

A territorial governor tried to encourage Lecompte to be more active in conducting court proceedings.64 Lecompte replied to the governor with documentation in his defense.65 The governor’s frustration with Lecompte probably was best shown by the matter of Charles Hays, a pro-slavery adherent charged with the murder of a free-state resident.66 The governor had actually come upon the dying victim during a tour of the territory. The governor (together with an associate supreme court justice, Sterling G. Cato, who was also present) obtained a dying statement from the victim.67 Although a grand jury returned an indictment and Hays was arrested, Lecompte released the prisoner on bail that was posted by the territorial sheriff.68 The governor considered this judicial act as without authority, and directed the United States marshal to re-arrest Hays. But the marshal refused to serve the warrant. The governor then re-issued the warrant to a military commander, who arrested and detained Hays. Lecompte subsequently ordered Hays released by granting a writ of habeas corpus.69

The governor later attempted to have all the territorial supreme court judges replaced, but to no avail. The governor believed particularly that neither Lecompte nor Cato had “any pretense of impartiality.”60

There are some positive anecdotes regarding Lecompte during this period. A free-state leader was detained on treason charges in a hotel room in Leavenworth.61 A lynch mob assembled, but Lecompte and a U.S. marshal stood guard overnight to protect the prisoner. Also, after a brutal murder in August 1857, Lecompte tried to dissuade a mob from lynching the suspects, though unsuccessfully.62

Shortly after the legislature began service, Lecompte and the supreme court were drawn into a dispute between the legislative branch and the governor. One of the first official acts of the initial territorial legislature was to transfer their meeting place from the first official territorial capital in Pawnee, located in the vicinity of Ft. Riley, now one of the many ghost towns in Kansas, to the Shawnee Manual Labor School, in modern-day Johnson County, ostensibly because of the lack of accommodations at the former location.63 After the territorial governor vetoed legislation adopted after the relocation and the legislature overrode the veto, the legislature, through the territorial attorney, referred the matter to the territorial supreme court. The court issued a reply in which two of the justices believed that the relocation had been within the legislature’s power.64 Only Lecompte and Elmore supported the veto, while Johnston declined to sign the court’s reply.65 The court declined to take a position on the other issues raised, preferring to allow them to come before the court through “the ordinary course of judicial investigation.”66

One Lecompte opinion, Fackler v. Ford, made it to the United States Supreme Court for review.67 The case involved a contract for conveyance of land, with the plaintiff seeking a decree of specific performance. The defendant asserted that the contract was void on public policy grounds. After reciting the facts, Lecompte addressed whether the plaintiff’s failure to comply with a requirement for platting created a valid defense. The platting requirement was intended to protect purchasers such as the plaintiff. Lecompte noted that to sustain the defense would allow the defendant seller to take advantage of his own violation of the law, and that “[t]he evident injustice of this must strike the mind with conclusive force.”68

As to the plaintiff’s claim that the U.S. treaty with the non-party Delaware Nation created an injustice, Lecompte forcefully replied:

Can the commission of injustice be predicated of the sovereignty of the republic? May the courts open their records for the entertainment of such charges? Not to say how in conflict such a proposition is with the rules of proceeding, which guard against multiplicity and eschew the introduction of collateral issues and the determination of questions coram nobis judice, necessary as those rules are to protect both courts and territories against interminability of litigation, how strange to ask that the doings of those not parties to the record shall become leading issues; how much more strange that the courts, creatures of the constitution and the laws, shall be asked to hear the sovereignty, above suit, above wrong, implicated in outrage and injustice. The allegation is scandalous, and if not found cited as the highest instance of that scandal of which courts of equity are sedulous to purge their records, only so because, like parricide, its enormity was supposed to be too great to be regarded as committable.69

Since an equitable remedy was sought, the doctrine of clean hands came into play; “particeps in wrong are left where they are found, in the feeling of disgust which restrains the courts exercising this species of jurisdiction from attempting a settlement of their tainted controversy.”70 Lecompte went on to hold that, where a contract is in part against public policy, courts can separate the unenforceable part from the remainder of the contract.71 The territorial supreme court affirmed the lower court’s order of specific performance. On review, the United States Supreme Court affirmed, subject to a slight correction to the terms of the conveyance ordered.72

After leaving the court, Lecompte practiced law in Leavenworth. After statehood, he served as a probate judge and as a state legislator. He died in Kansas City, Kansas, in 1888.73
Rush Elmore

Rush Elmore was born in Alabama in 1819. After being admitted to the bar, he practiced law in Montgomery, Alabama. He served in the Mexican-American War. After his initial appointment to the Kansas territorial supreme court in 1854, he was removed in 1855. But he was re-appointed in 1858 and served again until statehood.

Unlike Lecompte and Cato, Elmore, while a slaveholder, did not fully embrace the passions of the pro-slavery faction in the territory. One contemporary considered Elmore as "a man highly esteemed for his ability and his integrity by people of both political parties."

Elmore held night court sessions, including one proceeding where a particular attorney was not present. After Elmore inquired as to the attorney’s whereabouts, he was informed that the attorney was attending a ball at the local turnverein. Elmore then recessed the court and was later observed "gliding through the giddy mazes of the dance."

Several of Elmore’s supreme court opinions are included in the appendix to the second edition of the first Kansas Reports. One, involving a case of grand larceny, involved the question whether there was any difference between “steers” and “working cattle.” Without citing any dictionary, Elmore found that “[in] common parlance, and in every day conversation” the terms were synonymous.

During his judicial tenure he served as a delegate to the Lecompton constitutional convention. After statehood, he remained in Kansas, practiced law in Topeka, and died in August 1864.

Sanders Walker Johnston

Sanders Johnston was also pro-slavery. He was born in Kentucky in 1820 and served in Ohio as a captain in the Army. He apparently presided over the first criminal matter in the territory, involving an issuance of a warrant charging three men with intent to kill. Johnston was removed from office, purportedly for his involvement in land transactions connected to the first territorial governor and Elmore. But a contemporary account suggests that Johnston’s reluctance to join in the supreme court’s first opinion upholding the relocation of the legislature was a factor as well.

Johnston later practiced law in Leavenworth and then Washington, D.C. He died in 1905 and is buried in Arlington National Cemetery.

Sterling G. Cato

Elmore was replaced in 1855 by Cato. A territorial governor’s secretary described Cato’s qualifications, or lack thereof: “[h]is knowledge of the law was extremely meagre, and his sense of justice was by no means delicate or refined.” Cato, along with Lecompte, was reportedly the “most exoriated of territorial officials.” Similarly, it was said that Cato “followed closely in the footsteps of Lecompte.” On the other hand, it was said that Cato, at least in matters not involving slavery, was generally “just and impartial.” President Pierce, writing to the territorial governor about his appointments, said of Cato:

With a good Court and good Marshall I cannot doubt that there will be harmonious and useful action in the administration of territorial affairs. Perfect impartiality on the part of the officers of the Territory toward the Southern and Northern settlers there and the free exercise of their judgment and will in the conduct of the political affairs of the Territory is what I have sought from the first and what I mean in the end to secure.

As he had tried with Lecompte, a territorial governor also tried to get Cato to move forward with court business, but apparently to little avail.

After a disbandment order from a territorial governor, a group of free-staters that had been involved in a skirmish were arrested. Cato denied their bail request, and almost one hundred men were kept incarcerated over the winter. Some were subsequently acquitted, although convictions were obtained on “various degrees of manslaughter.” Cato then presided over the subsequent criminal proceedings. In addressing the charges, which included treason and murder, he dismissed the treason charges:

In many cases of general riot, the lines of distinction between the offenses of treason and murder fade almost imperceptibly into each other, and can be traced only with difficulty; and for this reason, as well as for the reason that it may now be considered the policy of our Government, even when the offense is susceptible of double construction, to select that offense which is most simple in its nature and the least political in its associations., I dismiss from consideration the question so far as treason is concerned.

One contemporary anecdote relates that a settler came upon Cato in a cabin playing poker with the Douglas County Sheriff. When asked if court would be in session, Cato asked the sheriff how much money he had. The sheriff had about one hundred dollars, so Cato said: “‘Then there will be no session to-day, for at this rate I cannot win that hundred dollars in time to open court before 10 o’clock tomorrow.’” Cato was also known to recess court to have a drink at a nearby saloon.

Cato left the territory after being replaced on the court. Little else can be found regarding Cato, either of his life before his appointment, or after his leaving the state. He had been a High Priest of Masonic Lodge Harmony Lodge—No. 46 in Eufaula, Alabama in 1848. His father’s estate, of which he was an executor, was subject to litigation that the Georgia Supreme Court resolved in 1858. It is reported he died in St. Louis, Missouri, circa 1867.
Joseph Williams

Joseph Williams was born in Pennsylvania in 1801. He had been a drummer boy in the War of 1812. Williams was admitted to the Pennsylvania state bar. He moved to Iowa after appointment to the Iowa Territory's supreme court, later serving (after Iowa became a state) as chief justice of the Iowa Supreme Court. It was said Williams “was a weak man, easily influenced, and without personal dignity.” Williams had “scarcely the ability of a common county court lawyer [and was] totally destitute of the talents, learning and dignity, required for a higher judicial officer . . . .” Those opinions, however, seem inconsistent with the high positions that Williams held outside the territory. A territorial governor’s secretary considered Williams as having had “an honorable reputation.”

After some free-staters were arrested and denied bail, a pro-slavery man was abducted, released and given a warning to pass on to Judge Williams that, unless the prisoners were allowed bail, Fort Scott would be raided. Judge Williams then set bail. In a separate, later, occurrence, a free-state raid on Fort Scott in November 1860 caused Williams and most of his staff to relocate to Missouri. During the raid, Williams and others were held prisoner outside on a cold December day. Williams’s office furniture and law books were burned to keep the prisoners warm. Williams asked the raiders to spare his fiddle and clothes from the fire, and his request was granted.

Williams authored the supreme court’s opinion in *Locknane v. Martin*, which concerned the jurisdiction of probate courts. Under the organic act, probate court jurisdiction was to be set by the legislature. The organic act went on to provide the supreme and district courts with both chancery and common law jurisdiction. The 1858 legislature had attempted to confer chancery and common law jurisdiction on the probate courts. Williams observed:

It is the positive duty of those intrusted with the administration of the government to observe and maintain a strict compliance with the provisions of [the organic act]. They have no right to enlarge upon the powers therein imparted, or change them, so as to allow or permit one department of the government thereby created to encroach upon the legitimate province of another; nor can the peculiar arrangement and characteristic of either of those departments, as fixed by this law, be altered or in any manner changed, by adding thereto or transferring the attributes and powers which properly belong to one, from it to any other branch or portion of the same department; nor can the peculiar jurisdictional sphere of action of any of the branches or divisions of the same department, as organized by this law, be increased or diminished so far as the province of its power is concerned.

Williams noted that no authorities attributed such jurisdiction to probate courts, and that the organic act limited that jurisdiction to the supreme and district courts. To allow the legislature to enact a law at odds with the organic law “would be to raise the stream of the fountain above its source, and be subservive of all law.” Williams concluded:

There, perhaps, can be no greater injury done to those composing the body politic than that of either branch or department of the government assuming power and exercising it in derogation and violation of cardinal law. Let the fundamental law of our government be encroached upon, and its establishment and organization be interfered with, and confusion, strife and oppression will be the irresistible consequence.

The probate court therefore lacked jurisdiction over common law and chancery claims.

In another case, involving liability of a city for flooding a cellar after grading work on a street, Williams commented:

Considering all that is presented by the record of this case, and the assignment of errors therein, it might be considered that we have been too prolix and elaborate in our treatment and discussion of it. In excuse thereof, we have to say that incorporated cities and towns are springing forth and multiplying within our territory so rapidly, and litigation is becoming so rife, in relation to the powers, rights, privileges, obligations and duties thereof, that we deemed it proper, as the court of the highest authority in the territory, to embrace this, the earliest opportunity, to declare the law, as we understand it, so far as we consistently could with reference to the case at bar; and, by so doing, that we might best subserve the public interest.

Williams, after Kansas statehood, was appointed to a judgeship in Tennessee. After retiring he moved back to Ft. Scott, Kansas and died in March 1870.

John Pettit

Pettit is the subject of one of the few articles focused solely on territorial legal history. In the interests of not re-plowing already capably tilled soil, the reader can seek out that article for a fuller understanding of Chief Justice Pettit. One item of note, however, is that after free-state interests had seized the legislative reins, the legislature—overriding the territorial governor’s veto—repealed the strict pro-slavery provisions of the territorial laws, prohibiting slavery in the territory. Pettit, sitting as a district court judge, then ruled the prohibition of slavery in the territory unconstitutional in the case of *Haley v. Foard*. Samuel Lecompte was one of the attorneys for the plaintiff slave owner. Pettit later served as an Indiana state supreme court judge from 1870 to his death in early 1877.
The Territorial Executive Officers

Three persons served as territorial U.S. attorneys: Andrew Jackson Isaacs from 1854-1857, William Weer in 1857-58, and Alson C. Davis from 1858 to statehood.121 A territorial governor’s efforts to make the territorial courts more active also were directed towards Isaacs, apparently to no better effect than the attempt made with the Judges Lecompte and Cato.122 Isaacs reportedly called for “war—war to the knife—war to the death” in support of the slavery interests.123 A territorial governor’s secretary suggested Isaacs may have served as part of a masked band that harassed free-state settlers.124

Of the ten persons who served as territorial governors during a period of less than seven years, six had some legal background.125 In particular, Wilson Shannon practiced law and served as a county and prosecuting attorney in Ohio before being appointed as territorial governor.126 He later left the territory after resigning the governor’s post, but returned and practiced law in Lecompton, Topeka, and Lawrence, regularly appearing before the Kansas Supreme Court.127 George Beebe, the last (acting) territorial governor, practiced law in Troy (now Doniphan) County and had served in the territorial legislature.128 After statehood, Beebe relocated to St. Joseph, Missouri to continue practicing law.129

Notable Attorneys Practicing Law during Territorial Times130

Samuel Wood

Samuel Wood was born in Ohio in 1825 and was a conductor on the underground railroad in that state.131 Shortly after he was admitted to the bar in Ohio, he left for the Kansas territory. A tale is told that Wood and a companion, en route to the territory, arrived in Westport, Missouri and stopped at a saloon. There they noticed a reward poster for a prominent New England abolitionist, Eli Thayer. Wood asked what they would do with Thayer upon capture, and was told that Thayer would be hanged. Wood replied, “I am Eli Thayer. Proceed to hang.”132 Although he did not die then, Wood would later be murdered as a consequence of his involvement in one of the violent post-statehood county seat battles that continued to the turn of the century.133

Wood and John Halderman served as joint defense counsel in the first murder trial in the territory. Elmore presided, and Isaacs was the prosecuting attorney.134 The prosecution arose out of a homicide occurring at the time of the first congressional election held in the territory. Although pleading self-defense at the grand jury proceeding, the defendant was bound over for trial. Halderman then applied to Chief Justice Lecompte for a writ of habeas corpus, which was subsequently granted. Halderman advised the client to “vamoose the ranch” at once, but the defendant was rearrested after a new information was filed. The defendant later escaped custody and apparently was never tried.

James Lane

James Lane is primarily known for non-legal matters.135 However, there are a couple of anecdotes about his practice of law. He attempted to represent a client charged with murder in Lecompte’s court. But Lecompte refused to allow the representation because Lane would not swear an oath to support the pro-slavery laws of the territory.136

Another anecdote concerns Lane’s defense of several free-state residents accused of stealing hogs from some pro-slavery persons.137 Lane discovered that the prosecuting witnesses had participated in the fraud that led to the election of the Bogus Legislature. After the prosecution rested, Lane asked the court to take judicial notice that the witnesses had been residents of Missouri when they voted in the territorial election, and “that men who would thus stuff ballot-boxes, overrun elections and drive voters from the polls ought to be thankful they were not hung.” Lane also challenged the court’s jurisdiction, asserting the theft had taken place on reservation lands. Then, turning to the audience, he said that the witnesses, belonging to a “party of murderers and thieves,” had no rights in the territory and belonged in prison. The resulting furor among the attendees caused the judge to leave by jumping out of a window and “the prosecutors fled in all directions.” Lane told his clients, “Where, oh, where are thine accusers?” Afterwards, Lane found the prosecuting attorney at a local hotel and Lane admitted he had no case, but had been promised a twenty dollar gold piece as a fee and he needed the money. Lane then told the prosecutor, “[m]y clients are cleared, and yours have cleared out for Platte county [in Missouri]. I hope your friends will find a ferry, and none of them be drowned in swimming the Missouri river.”138

Lane was also a party in what was known as the Lane-Jenkins Claim Contest, “the most famous land contest” during the territorial period.139 The dispute later led to a violent altercation in which Lane shot and killed Jenkins.140 Lane was charged with the homicide, but, after a lengthy examination, the court returned a decision finding no probable cause that a criminal offense had been committed.141 Lane, like his counterpart Wood, also died a violent death, albeit by his own hand, committing suicide in 1866.142

John James Ingalls

John James Ingalls was one of the first United States senators for Kansas, but before statehood he practiced law in Sumner and Atchison.143 His first case involved his client’s dispute over a doctor’s bill. Ingalls won a partial victory but was unable to collect any fee.144 As was likely the case for most territorial attorneys, getting clients, let alone paying clients, was a problem for Ingalls early in his practice.145 After winning a case for a client, Ingalls inquired about payment, but the client demurred, claiming that Ingalls made it look so easy that he should not be paid.146 Ingalls sometimes took his fees in trade.147
Ingalls's correspondence sheds some light on what an attorney's library, if he had the means, would include. In a letter to his father requesting some books for his library, Ingalls asked for: "Bouvier's Law Dictionary, Chitty on Contracts, Greenleaf on Evidence, Davis' Massachusetts Criminal Justice, Justice Davis' Criminal Justice, Story's Bills and Promissory Notes, Walker on American Law, Oliver's Conveyances, Interest Tables, Greenleaf's Cruise (Real Estate) and Parsons' Mercantile Law."148

Ingalls shared his thoughts on his law practice in other correspondence with his father: "[i]t seemed perfectly easy to badger and wind up a witness, to throw blocks in the path of counsel, and to confuse the court with the most remarkable points of law, and the argument was the easiest of all."149

A note preceding correspondence reproduced in the Kansas History Collections has this comment on Ingalls:

Ingalls came to Kansas in his twenty-fifth year. He had graduated from Williams College [in Massachusetts] and had "read" law. He expected to enter on the practice of law in Kansas. This he actually did in a diffident way. It is the misfortune of man that he must make choice of a calling before he is qualified to best judge what he is specially fitted for. Ingalls possessed none of the qualities required in the making of a good lawyer. He was an aristocrat by nature, and lacked human sympathy, his disinclination to drudge and dig and toil and his ever-increasing desire to have a part in the broader field of politics dominated his character and wrecked his career as a great advocate.150

Contemporary accounts provide several anecdotes about the practice of law in the territorial days. In one instance, Pettit was presiding as a district court judge. A colorful local attorney, Dick Rees, was sitting in front of the bench, out of sight of Pettit. Somewhat bored, apparently, Rees took his gold-headed ebony cane and, for the amusement of the gallery, started mimicking a flute player. Noticing the gallery's reaction, Pettit told Rees, ""get out of here making a monkey of yourself for the amusement of the crowd."157 Singling out a young attorney who had been laughing, perhaps too much, Pettit turned his attention, and ire, towards the new target: ""Young man over there, what are you grinning about like a chessey cat?"158 The embarrassed attorney slunk out of the courtroom "in a crouching manner like a whipped spaniel."159 That attorney was Daniel Valentine, who after statehood was to serve as a Kansas Supreme Court associate justice.

The dress code for attorneys may have been less than strict at the time. Rees is described in the incident above as being "dressed a little slovenly with slippers on, his socks evidently cut in high water, up to his knees, showing his little bare, freckled, red legs from his knees down to his heels."160 In another proceeding presided over by Pettit, an attorney representing a defendant was described as in "unkempt condition, beard long and shaggy, hair not combed, linen and clothes generally disorganized and dirty, eyes red and blotched."161 When the attorney rose to speak, Pettit, thinking the attorney the client, said: "Sit down and let your counsel speak for you."162 Upon finding out the speaker was the attorney, Pettit said: "I did not recognize you as a lawyer from your appearance, go on sir, what have you got to say?"163

One last amusing anecdote relates back to the statute, later invalidated, that attempted to confer both law and equity jurisdiction on the justices of the peace. After one new justice of the peace took office, he discussed with a local attorney how his courtroom should be set up.164 The justice of the peace had read up on the English practice of having separate law and equity judges, but since the jurisdictional realms were combined in one judge, therein lay his quandary. The attorney, deciding to play the judge's dilemma for all it was worth, agreed that the judge's table should have two chairs on opposite sides, one for when the court was considering the law, and the other for when equity was at issue. The judge sought confirmation: "When the lawyers are arguing the law points, I must hear and decide the law side of the court, and when the witnesses are being sworn and examined before me or a jury, I must sit on the chancery or equity side of the court?"165 The attorney agreed, to which the judge then asked: "What about the gown, the wig and the wool sack the English judge had?" The attorney suggested that the judge could forego the "full togger-y" but perhaps could get a sack of wool to sit on when equity was at issue.166 The justice of the peace followed through, and it was said that "[i]t was as good as a circus sometimes to see 'Old Necessity' try a lawsuit."167
After the free-state interests took over the state legislature in 1857, there existed dueling versions of state law, with the free-state laws being applied in lower courts while the appellate court, still staffed by pro-slavery judges, favored the pro-slavery code.168 The earlier pro-slavery code was finally repealed by the free-state legislature. But even after the repeal, there was confusion about what was the law in Kansas.169

Conclusion

Much in the practice of law has changed since territorial times. Still, many matters remain constant. Practicing law was a struggle in those times, and can be the same now. When I was a research attorney for the Kansas Court of Appeals, a judge once remarked to me that the work often seemed like Sisyphus's burden of pushing a boulder up a hill, only to have the boulder return to the bottom of the hill, to be pushed up again, and again, and again. But, as Albert Camus noted, "One always finds one's burden again . . . [t]he struggle itself toward the heights is enough to fill a mans [sic] heart."170 The journey of law in Kansas continues.

About the Author

Robert W. Parnacott retired and received the Kansas Bar Association Distinguished Government Service award in 2016 after serving 16 years in the Office of the County Counselor for Sedgwick County, Kansas. He graduated in 1991 from Washburn School of Law with Dean's Honors. This is his ninth article published in the Journal of the Kansas Bar Association, including a two-part article on summary judgment.

Further Reading171

Books

Requisite Learning and Good Moral Character, Robert Richmond, ed. (1982).

Articles

The Early Days, Paul E. Wilson, Chapter I in The Federal Courts of the Tenth Circuit: A History (Up to 1992).173
How the Law Came to Kansas, Paul E. Wilson, 63 Journal of the Kan. Bar Ass’n. 26 (Jan. 1994).

The Supreme Court of Kansas, Henry Inman, 4 Green Bag 321 (1892).
The Supreme Court of the State of Kansas, Edwin A. Austin, 13 Kan. Hist. Coll. 95 (1913-1914).
U.S. v. Lewis L. Weld: Judicial Creativity or Judicial Subversion, James Durham, 56 Journal of the Kansas Bar Ass’n 8 (May/June 1987).

1. Ad astra per aspera, the state motto: To the stars, through difficulties. K.S.A. 75-201 (describing state seal which includes the motto).
to the stars: where the journey of law in Kansas began


[NOTE: Kansas Historical Collections is the unofficial title of the series from Volumes 1 through 10. The official title is “Transactions of the Kansas State Historical Society”, and for Volumes 11 through 17: “Collections of the Kansas State Historical Society.” The unofficial title is used on the historical society index online at: https://www.kshs.org/p/kansas-history-a-journal-of-the-central-plain/12443.

17. Paul Wallace Gates, Lynchings in Kansas, 1850s-1932 The Story of Lecompton, supra note 32, at 158 (indicating Burrell's stay in the territory was less than two weeks). Andrew Moore, appointed before Burrell and Cato, apparently did not perform any judicial services.
18. Id.
19. Professor Michael Hoeflich's article “In Judge Lecompte's Court,” supra note 3, provides a close look at Lecompte and his tenure as a territorial justice.
20. Following his removal, the territorial legislature passed a resolution attacking the claimed interference in the “independence of the judiciary . . . [as] inconsistent with and subversive of the fundamental principles of our government, and imminent perilous to the liberties of the people.” Governor Geary's Administration.
21. It has from my first manhood to this day, placed me in the ranks of the partisans, also being applied to Justice Cato. Moore, The History of Tribal Sullivan and LeCompte instead of Lecompte), this article uses what appears to be the most accepted spelling.
22. It is a fact, however, that Lecompte's advent was awaited with much interest, as his goodness and greatness had been liberally heralded throughout the territory.

68. Fackler v. Ford, 1 Kan. 463 (1858)

70. "discharge[d] the duties of his office . . . with distinguished ability and fairness to the entire satisfaction of the people . . . of every political faith."). But see Wakefield, 5 Kan. Hist. Coll., supra note 17, at 74 ("Judge Elmore was less intemperate and a little more dignified than Cato").

72. 65 U.S. at 693 (noting that although the Kansas court had ordered "a conveyance of the undivided moiety" (share), the contract actually called for conveyance of divided portions).

74. Frank W. Blackmar, Biographical Sketch of Judge Rush Elmore, 8 Kan. Hist. Coll. 435 (1904)(Martin was a law partner of Elmore after Elmore left the court).


77. Gihon, supra note 32, at 32.


79. Horton, supra note 17, at 501.

80. Wissell v. Territory of Kansas, 1 Kan. 525, 527 (1860).


82. Id. at 175.


87. Gihon, supra note 32, at 158. On the other hand, President Pierce wrote Cato was an "able, learned man." Ponce at 91.


89. Gihon, supra note 32, at 32.

90. Wakefield, 5 Kan. Hist. Coll., supra note 17, at 74 (". . . Cato was naturally a good-hearted and just man, who tried to administer the law honestly").

91. https://www.gildelerhrman.org/content/john-w-geary.

92. Gihon, supra note 32, at 160.

93. Id. at 43. Although sentenced to serve with a ball and chain, that portion of the sentence was remitted by Governor Geary for being "cruel and unusual punishment."


96. Id.


98. Id. (1912)("Repeated efforts have been made by the Kansas Historical Society to learn something of Judge Cato's early life and antecedents, but without avail.").


103. Id. at 87, n. 3.

104. Id. at 88, 90, 94

105. Robley, supra note 18, at 75.

106. G. Murlin Welch, Border Warfare in Southeastern Kansas: 1856-1859, 37 (1977)(quoting a letter sent to the United States Secretary of State in March 1858 by someone seeking appointment to Williams’s position). That letter writer did note that Williams was a “pretty good fiddler.” By other accounts, “he was an unusual and unique character.” McLaughlin, 25 Annals of Iowa, supra note 102, at 87.


111. 1 Kan. 494 (1858).

112. Id. at 497-98.

113. Id. at 501.

114. Id. at 504.


117. McLaughlin, supra note 102, at 94.


119. Gary L. Cheatham, “Kansas Shall Not Have the Right to Legislate Slavery Out,” 23 Kan. Hist. 154, 166-69 (Autumn 2000)(Haley was a Leavenworth slave owner that sued, under the Fugitive Slave Act, Board who had assisted a runaway slave).


122. Gihon, supra note 32, at 177-78.
to the stars: where the journey of law in Kansas began

123. Id.
124. Id.
126. Id. at 43.
127. Id. at 48.
128. Id. at 75.
129. Id. at 77.
130. A roster of attorneys admitted to the territorial supreme court bar is found at 5 Kan. 697 (1871) ("Members of the Bar of the Territorial Supreme Court, by law constituted members of bar of the State Court"). See also Moore, Early History of Leavenworth, supra note 17, Appendix, 244 (listing members of the Leavenworth bar during territorial times).
134. George W. Martin, The First Two Years in Kansas, 10 Kan. Hist. Coll. 120, 129, n. 30 (1908)(relating the recollection of Halderman more than fifty years later).
135. Wilson, 10 Kan. Law. Rev., supra note 4, at 126, n. 14 ("James H. Lane was more distinguished as a politician and military leader than as a lawyer."); Robert Collins, Jim Lane: Son of the West, Statesman, Kansas (2007).
138. Id. at 136.
140. Id. at 22.
141. Id. at 176.
143. Burton J. Williams, Senator John James Ingalls, 18, 36 (1972).
144. Id. at 18.
145. Id. at 21.
146. Id. at 22.
148. Id. at 424, n. 55.
150. Id. at 94.
152. Welch, supra note 106, at 38.
155. Humphrey, 4 Kan. Hist. Coll. at 293 (one pro-slavery probate judge, inquiring of a grand juror’s political beliefs, dismissed him when he was found wanting).
156. Id.
157. Moore, Early History of Leavenworth, supra note 17, at 248.
158. Id.
159. Id.
160. Id. at 247.
161. Id. at 251-52.
162. Id. at 252.
163. Id.
164. Id. at 334.
165. Id. at 335.
166. Id.
167. Id.
171. These books and articles have some varying degree of information on the territorial period. This list does not include Kansas legal history sources that deal only with post-territorial matters. In addition to this list, there are some general American law history books regarding this period: Morton J. Horwitz, The Transformation of American Law 1780-1860 (1977); and Lawrence M. Friedman, A History of American Law (3d ed. 2005).
172. The Kansas Historical Collection, Kansas Historical Quarterly, and Kansas History articles are available online at: https://www.kshs.org/p/kansas-history-a-journal-of-the-central-plains/12443.
174. Id.
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David J. Rebein is a Kansas native and a recognized trial lawyer who has spent over 35 years advocating for individuals to obtain justice through our civil court system. He has tried thousands of cases and represented Fortune 500 companies as well as individuals in personal injury cases. He led his firm to be recognized by the highly coveted and competitive U.S. News and World Report’s, ‘Best Law Firms in America.’

David began his legal career in 1980 when he joined the Mangan, Dalton and Trenkle law firm in Dodge City, Kansas. David later co-founded his former law firm, Rebein Bangerter P.A. In 2010, he merged firms with his brother, distinguished trial attorney Paul Rebein, to form Rebein Brothers law firm.

For 10 years in a row, David has been recognized and rated as a ‘Top 100 Attorney’ by Super Lawyers, a highly regarded rating service based on peer recognition and professional achievement. David has been named a Fellow of the prestigious American Trial Lawyers Association as one of the top 100 trial lawyers in the nation. He is an invited member of the Million-Dollar Advocates Forum and the International Academy of Trial Lawyers.

Through his work, David has earned the respect of his peers and a reputation as a skillful and ethical trial attorney, which has garnered him national recognition with the highest possible peer-review rating from Martindale-Hubbell.

David is a past-president of the Kansas Bar Association (KBA) and is a recent recipient of the KBA Distinguished Service Award. He is the immediate past-president of the Kansas Trial Lawyers Association and has been recognized repeatedly by Best Lawyers in America for his work as a trial lawyer.

In July of 2014, David was appointed to be one of nine members on the Kansas Supreme Court Nominating Commission. The board is responsible for recommending qualified individuals for appointment to the Kansas Supreme Court and the Kansas Court of Appeals.

David and his wife, Bernice, are both active in numerous organizations in the Dodge City community where they raised their two sons. David was inducted into the 2017 Dodge City Community College Hall of Fame for Outstanding Volunteer Service.

David received his Bachelor of Arts, Summa Cum Laude, from Washburn University and his J.D. from the University of Kansas School of Law. He remains actively involved in both colleges. He has been honored by the Washburn University School of Law with the prestigious Honorary Life Membership Award for providing exemplary service to his profession, community and law school. He also accepted an appointment to serve on the Kansas University Law School Board of Governors.

David is licensed to practice law in Kansas and Florida and continues to represent clients with passion and the highest degree of professionalism and dedication.

Thank you KBF Fellows!

The 2018 KBF dinner was a success and recognized several individuals who achieved new levels of giving. We thank the Hon. Evelyn Z. Wilson for her service as the 2017-18 KBF President and welcome incoming KBF President Amy Fellows Cline who will lead the foundation for 2018-19.
Fellows

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Ms. Sherry Maxwell, Santa Fe, NM
Ms. Patricia Ann McGrew, Lawrence
Ms. Esther M. Miller, Hiawatha
Mr. & Mrs. Jerry L. Miller, Topeka
Mr. Thomas V. Murray, Overland Park
Mr. & Mrs. Erick E. Nordling, Hugoton
Mrs. Barbara Nordling, Lawrence
Mr. & Mrs. Cameron E. Oury, Lawrence
John B. Patterson Lori L. Heasty, Lawrence
Mr. & Mrs. Richard L. Patterson, Topeka
Mr. & Mrs. Leonard Peck, Scottsdale, AZ
Mr. William B. Pendleton, Lawrence
Hon. & Mrs. G. Joseph Pierron, Lawrence
Mr. & Mrs. Rodney J. Rice, Horton
Mr. & Mrs. James A. Roberts, Lawrence
Mr. & Mrs. Steve Roberts, Hiawatha
Mr. & Mrs. Bill Sampson, Lawrence
Mr. & Mrs. Delwin Scarbrough, Hiawatha
Ms. M.L. Schmitt, Hiawatha
Ms. Erin R. Schneider, Shawnee
Mr. & Mrs. Richard Schroff, Corvallis, OR
Mr. & Mrs. Blaine Shaffer, Hiawatha
Mr. Rex A. Sharp, Prairie Village
Ms. Diane W. Simpson, Lawrence
Ms. Mary Sue Smith, Wichita
Mr. & Mrs. Glee S. Smith, Jr., Lawrence
Ms. Paula W. Starr, Hiawatha
Ms. Mary G. Starr, Hiawatha
Ms. Barbara /Ms. Helen Starrett, Tacha, Lawrence
Mr. & Mrs. Shaun P. Trenholm, Lawrence
Mr. & Mrs. Lester Trentman, Fairview
Hon. Thomas M. & Mrs. Suzanne F. Tuggle, Concordia
Mr. & Mrs. Roger A. Vickery, Topeka
Mr. & Mrs. Gerald K. Wagner, Hiawatha
Mr. & Mrs. Marvin D. Watts, Hiawatha
Matthew S. Wheeler /Maria A. Tacha, Hays
Mr. & Mrs. Stephen R. Wilson, Hiawatha
Mr. & Mrs. Bradley S. Winfrey, Prairie Village
Hon. & Mrs. James R. Wolf, Tallahassee, FL
Ms. Ruth E. Wolfe, Hiawatha
Hon. Lee Yeakel, Austin, TX
Mr. & Mrs. Jerry Young, Topeka
**OUR MISSION**

The purpose of the Kansas Bar Foundation is to serve Kansans and the legal profession by funding charitable and educational projects that foster the welfare, honor and integrity of the legal system by improving its accessibility, equality and uniformity and by enhancing public opinion of the role of lawyers in our society.

The Kansas Bar Foundation is a 501(c)(3) charitable organization and is supported by contributions from private donations from lawyers, corporations and the public.

Attorneys may make ongoing donations to the KBF Fellows Program. These “Fellows” sign a pledge to commit at least $1,000 over a 10-year period. After reaching Fellow status, donors can reach the following higher-giving categories:

- **Fellow Silver:** $2,500 – $4,999
- **Fellow Gold:** $5,000 – $7,499
- **Fellow Platinum:** $7,500 – $9,999
- **Fellow Diamond:** $10,000 – $14,999
- **Pillar of Foundation:** $15,000 – $49,999
- **Pillar of Profession:** $50,000 or more

Individuals, corporations and other organizations may also contribute gifts online at https://www.ksbar.org/donations.
By participating in the KBF Planned Giving Program, you can help ensure the future access to justice for all Kansans

Planned charitable giving can be done during your lifetime or through your will. The tax benefits depend on the vehicle used. Donor restricted and unrestricted funds allow for a range of options in creating your gift.

How can a planned gift benefit Kansans and members of the KBA?

Your gift will help support current and future KBF programs that facilitate the administration of justice and the success of the foundation by providing:

• Support for legal services to low-income Kansans.
• Advocacy for children in need of care and victims of domestic violence.
• Legal and law-related educational materials to the public.
• Scholarships for students and stipends for teacher training and continuing education.
• KBF building and maintenance fund support.

Planned giving possibilities include but are not limited to:

• Naming the KBF as a beneficiary of part or all of your retirement assets.
• Donating your life insurance policy.
• Creating a bequest in your will or living trust.
• Leaving a lasting legacy with a major gift.
• Creating memorial or honorary gifts in recognition of KBA members or special occasions.

Levels of Giving*  

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*Effective 01/01/2013
Members in the News

New Positions

**Kelli Broers**, former Assistant General Counsel for the Kansas State Department of Education, has joined McAnany, Van Cleave & Phillips, P.A. as a litigation associate. Broers brings a wide range of legal experience to the firm including administrative law, school law, and family law.

**Stacy Bunck** has been named managing shareholder of Ogletree Deakins—one of the largest labor and employment law firms representing management—Kansas City office. Stacy is the first managing shareholder in the firm’s history to rise to that rank using an alternative, reduced hours track.

**Trent Byquist** has joined Kennedy Berkley Yarnevich & Williamson, Chtd. of Salina. The Salina native graduated from Salina Central High School, graduated summa cum laude from Kansas State University and earned Order of the Coif from the University of Kansas School of Law. He previously worked in Wichita for Kansas’ largest law firm; before that, he spent two years as a law clerk for Kansas Supreme Court Chief Justice Lawton R. Nuss. Byquist’s practice focuses to a large extent on assisting individuals and businesses with transactional matters (merges and acquisitions, real estate, business formation and planning, licensing, leasing, financing, etc.).

**B. Keith Edwards**—formerly an Assistant District Defender in Topeka’s Third Judicial District Public Defender’s Office—has joined the Criminal Division of Joseph, Hollander & Craft LLC. Based in the firm’s Wichita office, Edwards represents individuals charged with criminal offenses in municipal and state courts. Edwards received a bachelor’s degree in classical antiquity from the University of Kansas and earned his juris doctorate from Washburn University School of Law. He is a graduate of the National Criminal Defense College’s Trial Practice Institute at the Mercer Law School in Macon, Georgia.

**District Judge Robert Frederick** has been appointed by Chief Justice Lawton Nuss to serve as chief judge of the 25th Judicial District, effective July 1st. Frederick, a district court judge since 2001, succeeds Chief Judge Wendell Wurst. The 25th Judicial District includes Finney, Kearny, Hamilton, Govey, Wichita and Scott counties. Frederick is a graduate of the University of Kansas and Washburn University School of Law.

**Sarah Ellen Johnson**, former Kansas Capital Appellate Defender with more than 17 years of experience in the appeals courts of Kansas, has joined Monnat & Spurrier, Chartered to lead the firm’s appellate practice and legal research and writing section. Johnson received her law degree from the University of Wisconsin-Madison Law School, with honors. She also holds a bachelor’s degree in political science from Carleton College.

**Kip Kubin** has joined Martin Pringle Attorneys at Law. He represents employers and self-insured entities through all phases of litigation and appeal with a particular emphasis on workplace injuries. He has over 30 years of experience in workers comp and administrative proceedings. He formerly served on the Kansas Workers Compensation Advisory Board which advised the legislature on proposed changes to the Kansas Workers Compensation Act.

**Edward Larson**, former Kansas Supreme Court Justice, has been reappointed to a four-year term on the Judicial Ethics...
members in the news

Advisory Panel. District Judge Ben Burgess and Municipal Judge Amie Bauer were reappointed to four-year terms on the Judges Assistance Committee; and former Finney County Chief Judge Wendel Wurst was reappointed to the Kansas Continuing Legal Education Commission.

Lathrop Gage law firm of Overland Park has been selected to represent the Meade Hospital Board, in addition to representation already provided by Foulston Siefkin LLP in Topeka.

Christopher Mattix has joined White Goss, a Professional Corporation as an associate. He uses his unique background as a JD/CPA to assist clients in leveraging economic development incentives in Kansas and Missouri. He also has experience challenging property tax valuations and represents clients in zoning, permitting and other land use matters.

Adam C. Mauck joined the law firm of Henson, Hutton, Mudrick, Gragson & Vogelsberg LLP as an associate attorney. He received his law degree from the University of Kansas School of Law with a certificate in business and commercial law. His practice will be in the areas of general civil litigation, business law, real estate law, construction law and employment law.

Shannon Rush, of Coffman and Campbell in Burlington, was chosen by the 4th Judicial District Nominating Commission to fill the magistrate judge vacancy created when Taylor Wine was appointed district judge and chief judge in the 4th Judicial District. The district includes Anderson, Coffey, Franklin and Osage counties.

J. Corey Sucher has joined the practice of Brad Pistotnik Law, P.A.

Doug Thompson, Dickinson County Counselor, will work with a Kansas City, Mo. law firm and a San Francisco, Calif. law firm as the county joins a lawsuit against drug manufacturers to recover the significant costs of dealing with the opioid addiction crisis. Every day, more than 115 people in the U.S. die of opioid overdoses. The CDC estimates the total economic burden of prescription opioid misuse in the U.S. alone is $78.5 billion a year, including healthcare, lost productivity, treatment and criminal justice involvement.

Brian White, formerly the chief counsel at UConn Health—the clinical, research and academic arm of the University of Connecticut—joined the University of Kansas as its general counsel and vice chancellor for legal affairs on Aug. 2nd. White earned both his bachelor’s degree and his law degree from the University of Iowa. White will oversee KU’s Office of the General Counsel, a team of nine attorneys and seven staff providing counsel, assistance and information to KU employees regarding university policy and procedure, the Board of Regents, the state of Kansas and the federal government.

New Locations

Biggs Paul LLC of Wichita has opened an office in Lawrence. That office will be led by Sean Durr.


Clinkscales Elder Law Practice, PA announced that it has secured new office space at 1701 Landon St. in Hutchinson. The firm has practiced elder law since 2004 in Hays. Its expansion is due to the demand for elder law services and rapid client growth in the region. By opening meeting locations in other towns, the firm hopes to lessen the travel burden on clients. The number to call for an appointment at the Hutchinson location is: 877-325-8040. For more info, visit www.elderlawkansas.com

Roger L. Falk has merged his solo practice—Law Office of Roger L. Falk, PA—into Joseph, Hollander & Craft LLC. A veteran criminal defense attorney, Falk is a graduate of Washburn University and Washburn University School of Law. He is active with the KBA, the Wichita Bar Ass’n., the Kansas Ass’n. of Criminal Defense Lawyers, a founding member of the National Association of DUI Defense Lawyers, and on the Legal Committee of the National Organization for the Reform of Marijuana Laws. Joseph Hollander & Craft LLC has 16 attorneys and offices in Kansas City, Lawrence, Topeka and Wichita. Falk will work out of the Wichita office and serve clients statewide.

Notables

District Magistrate Judge Douglas Bigge was re-elected president of the Kansas District Magistrate Judges Association for the next year. Bigge was elected magistrate judge in 1996 to serve Rooks County of the 23rd Judicial District. He graduated from Fort Hays State University and attended the National Judicial College in Nevada.

Brian L. Bina of McPherson was elected to the Board of Directors of the Kansas School Attorneys Association at their annual meeting in Wichita. Bina earned his Juris Doctor from Washburn University and has been in private practice in McPherson and Marion counties since 2011. Bina is also a member of the KBA, the ABA, NSBA and Council of School Attorneys. He serves as counsel for the following districts: USD 411 (Goessel), USD 418 (McPherson), and USD 397 (Centre).

Chief Judge Glenn Braun of the 23rd Judicial District was appointed to hear oral arguments with the Kansas Supreme Court on one case on the Court’s May 1st docket. Braun was appointed to the 23rd Judicial District in 2012 and has been
chief judge since 2016. He presides over cases in Ellis, Rooks, Trego and Gove counties. Braun is a past-president of the Kansas Bar Association (2010-11) and served on the Kansas Racing and Gaming Commission from 2005-2012. The case Braun heard was Appeal No. 115,036: State of Kansas v. Yamuna Rizal.

Randy Clinkscales with Clinkscales Elder Law Practice addressed the Kansas Chapter of the National Association of Elder Law Attorneys in Olathe. His talk was “Old MacDonald Had a Farm, Until He Needed Long Term Care: Planning for the Rural Medicaid Client.” Earlier in the year, Clinkscales addressed a national conference for elder law and estate planning attorneys held in Chicago. His presentation at that conference was on succession planning in a law practice.

District Magistrate Judge Julie Cowell (Pawnee Co. of the 24th Judicial District), District Judge Steve Hornbaker (Geary Co. of the 8th Judicial District), District Magistrate Judge Paula Keller (Cheyenne Co., 15th Judicial District), District Judge John Weingart (Brown Co., 22nd Judicial District) and District Judge Robert Wonnell (Johnson Co., 10th Judicial District) were appointed by the Kansas Supreme Court to serve on the Judicial Education Advisory Committee. The Court also reappointed District Magistrate Judge Douglas Jones (Chase Co., 5th Judicial District). The commission recommends and organizes education and training programs for Kansas appellate, district, and district magistrate judges.

Allen Glendenning, Great Bend, was reappointed by the Kansas Supreme Court to serve another term on the Kansas Commission on Judicial Qualifications.

Greg Goheen, the immediate past president of the KBA, has been retained by the Garden City Community College Board of Trustees to investigate allegations brought against GCCC President Herbert Swender by the Faculty Senate.

Leslie Greathouse was profiled by the Kansas City Business Journal in May, after having been named to Spencer Fane LLP’s newly created position of “general counsel” back in January. She originally practiced law in California, but after having children, decided to return to her Midwestern roots to raise her kids. She joined Spencer Fane in 2008 to help establish a financial litigation department. She jokes that her first project as general counsel was to write her own job description. She credits yoga for helping her achieve some balance in her mind and her life, and she enjoys reading fiction as an antidote for the intense, serious reading she does at work.

Barry Grissom, former federal prosecutor, took the lead of a team of attorneys working to reintegrate 44 migrant children with their families. The children were being housed at the Villages, a state-licensed therapy home with a federal contract to house unaccompanied minors.

Steve Hirsch, Decatur County Attorney, took on an intern for the summer – a first year law student from Washburn University School of Law, Kenneth McBride. McBride’s internship was possible because of a partnership between Washburn and the Dane G. Hansen Foundation. That allows students to learn from an attorney practicing in northwest Kansas, with the goal of encouraging students to develop an interest in the communities they serve and to return to practice law.

Ross Hollander, of Joseph, Hollander & Craft has been ranked among the state’s top tier of labor and employment lawyers by Chambers USA 2018.

Brandon Jones, Anderson County Attorney, directed that new body cam equipment and tasers for the police officers of the city of Garnett be paid for in part by funds from the county’s DUI and other court diversion fees, over which the county attorney has jurisdiction. Jones said he has the discretion to use the funds, which accrue in varying amounts each year, to help train and equip law enforcement, make charitable donations and make big ticket purchases for his office so he does not have to use taxpayer dollars.

The Kansas District Magistrate Judges Association named its officers for the next fiscal year (see Judge Doug Bigg earlier in this column.) District Magistrate Judge Marty Clark was elected first vice president. He serves in Russell County of the 20th Judicial District. District Magistrate Judge Brendon Boone was elected 2nd vice president; he serves Gove County of the 23rd Judicial District. District Magistrate Judge Jennifer Ashford was elected 3rd vice president; she serves in Johnson County of the 10th Judicial District.

Stephen McAllister, U.S. Attorney for the District of Kansas announced early in June that Kansas will receive two new federal prosecutors to boost the battle against violent crimes in the state. The allocation of two new prosecutors was made possible by the federal government’s decision to provide 190 new assistant U.S. attorneys nationwide in the effort to increase prosecutions for violent crimes.

The Hon. Patrick McAnany with the Kansas Court of Appeals, spoke to the Lyon and Chase County Bar Association as part of its celebration of the 60th Anniversary of Law Day. McAnany expounded on the importance of the rule of law and the Separation of Powers between the three branches of government. He explained that Law Day was created as a way to counter the Communist May Day celebrations. The focus of Law Day 2018 was the Separation of Powers, which McAnany described as an essential element in upholding the rule of law and in maintaining the independence of the judicial branch.

Dan Monnat of Monnat & Spurrier, Chartered, has been ranked in the top tier of Kansas litigators practicing in the white-collar crime and government investigations sector by Chambers USA 2018.

Kerri Reisdorff, shareholder in Ogletree Deakins, will chair Ogletree Deakins Women’s Initiative. The goal is to har-
ness and spotlight the tremendous talent of the firm’s nearly 400 female attorneys. Reisdorff works out of the firm’s Kansas City office; she advises and defends clients with regard to all aspects of the employer/employee relationship.

Shannon Rush was sworn in June 1st as the first female magistrate judge of the Fourth Judicial District Court.

Diane Sherwood has been recognized by the American Institute of Family Law Attorneys for Three Years of being one of the 10 Best Family Law Attorneys for Client Satisfaction.

Patrick Smith, a local Pittsburg, Kan., attorney, has been hired by Crawford County to file a lawsuit against pharmaceutical manufacturing companies in an effort to recoup for the county some of the costs of dealing with the opiate addiction crisis affecting Crawford County and many other Kansas counties and communities. The heavy burden of caring for those who are addicted to opiates has strained law enforcement, first responders, health centers, treatment programs and other community services beyond budgets and available funds.

Christopher Sook, a Hays attorney and David Trevino, a Lawrence attorney, were appointed by the Kansas Supreme Court to three year terms on the Client Protection Fund Commission. The fund was created to compensate persons who suffer economic loss as a result of dishonest actions by Kansas attorneys. It is financed by annual registration fees paid to practice law in Kansas. Notably, of 11,000 lawyers actively licensed to practice in the state, typically fewer than 15 lawyers per year have been subject to claims on the fund. The Commission is composed of one judge, four actively practicing attorneys and two non-attorneys.

District Court Judge Gunnar Sundby retired from his position in the First Judicial District (Leavenworth and Atchison counties) on June 16 after 20 years of service. A graduate of Washburn University School of Law, Sundby has been appointed by the Kansas Supreme Court to a senior judge role which will allow him to continue to practice as a judge on a part time basis, able to accept assignments in any district court throughout the state, as well as for the Court of Appeals and the state Supreme Court.

Maurice Watson recently stepped down as chairman of Husch Blackwell. Watson, a member of the firm’s health care, life sciences and education practice received his law degree from Harvard and later served as a senior aide to former U.S. Sen. John Danforth. He has actively served the community on a number of major institutional boards.

Russ Welsh is in his 20th and final year as chairman of Polsinelli PC. Welsh has taken Polsinelli to national status with some 800 lawyers in 20 offices; it is currently the second largest firm in the Kansas City area. Polsinelli has also taken on a more active role in civic activities with Welsh serving on a number of key metro-area boards. F. Chase Simmons has been working with Welsh and is set to succeed him when he steps down.

The Wichita Bar Association, in May, presented these annual awards: Glenn Young Jr., of Young, Bogle, McCausland, Wells & Blanchard was honored with the Lifetime Achievement Award; David Calvert, in private practice, received the Howard C. Kline Distinguished Service Award; Judge Joseph Bribiesca was given the Chester J. Lewis Diversity Achievement Award. The President’s Award was presented to: Christine C. Campbell, Kansas Legal Services; Charles Harris; Judge Michael J. Hoelscher, 18th Judicial District; Sylvia B. Penner, Fleeson, Gooing, Coulson & Kitch. The Jonalou Pinnell Distinguished Service Award was presented to Jamie Haig, division manager, U.S. District Court. The Law-in-Education Committee presented the Benson-Batt Award to Mary (Mindy) McPheeters, Spirit AeroSystems. The Young Lawyers Section presented the Liberty Bell Award to Jennifer White, ICT S.O.S.
Obituaries


Judge Matthew Joseph Dowd, Jr., 78, Topeka, Kansas, passed away Tuesday, May 15, 2018, in his home surrounded by family.

Matt was born July 5, 1939, in Oklahoma City, the son of Matthew and Mary Francis Calloway Dowd. He grew up in Kansas City, the eldest of five siblings.

Matt’s wife, Judy Hermesch McDaniel, survives of the home. They shared 12 years of marriage; they enjoyed traveling extensively including his beloved Ireland. They also enjoyed cheering on the Jayhawks and attending grandchildren activities.

Grateful to have shared Matt’s life are his children Kathy Nibler (Matt), Mike Dowd, Liz Aldrine (Baron), Trish Dowd Kelne (Adam), Cara Schroeder (Mike), Tara Wineinger (Sam), and Ty Bachmann (Jill); Christina Wright (Doug), Jeff McDaniel (Rae Ann), and Lindsay Klemovich (Michael); and his 15 cherished grandchildren to whom he was devoted: Tanner, Baron II, Blake, Brayden, Lucy, Grace, Thomas, Drew, Brady, Jacob, Sophia, Ellie, Cora, Addison and Hudson. He is survived by his brother Kevin Dowd and sisters-in-law, Judy Dowd and Mary Dowd.

He was preceded in death by his parents, his brother Michael Dowd, his sister Mary Beth Dowd and his brother Terry Dowd.

Matt was previously married to Mary Kay Riedel Bachmann Dowd, who passed away in 2004. He was first married to Margaret Fuchs Dowd.

Matt lived life with a love of knowledge, learning and ser-
obituaries

vice; he graduated from St. Agnes High School (now Bishop Miege) and earned a degree in history from Rockhurst University. He earned his doctorate from the University of Kansas Law School and later a Masters of Administration of Justice (Wichita State University), and a Masters of Judicial Studies (University of Nevada at Reno). Matt served our country in the US Army and was later commissioned a Judge Advocate General officer, retiring as a Lieutenant Colonel in the US Army Reserves.

Matt began his career as a criminal defense attorney and later served as Assistant Attorney General (1972-74). He worked in private practice and was elected associate district judge (1976). Among many accomplishments during his 31 years as a judge, Matt took great pride in launching Drug Court of Shawnee County, a diversion program to aid first-time offenders with alternatives to prison or probation. Many lives were positively impacted: at the time of his retirement over 200 had graduated.

Matt’s love of learning was matched by his love of laughter; through both he gave of himself in service to numerous community and charitable organizations. He was a member of and lector at Most Pure Heart of Mary Church, Knights of Columbus Council No. 4254, the James W. Gibbons Fourth Degree Assembly, volunteer of Big Brothers and Big Sisters, Friends of the Topeka ZOO and Sertoma. He demonstrated his dedication to his Irish heritage through the St. Patrick’s Day Committee and led the parade with St. Patrick for many years. If not heralding the Irish colors, then Matt would likely be found in Crimson and Blue cheering his beloved Jayhawks.

Matt’s family greeted friends at Most Pure Heart of Mary Church, where Remembrances were spoken. The James W. Gibbons Fourth Degree Assembly of the Knights of Columbus then conducted a Chalice Ceremony which was followed by a Rosary.

Mass of Christian Burial was celebrated a at the Church. Burial, with full military honors, followed in Mount Calvary Cemetery.

In lieu of flowers, memorial contributions are suggested to Big Brothers Big Sisters, Most Pure Heart of Mary Church, and Drug Court, sent in care of Kevin Brennan Family Funeral Home, 2801 SW Urish Road, Topeka KS 66614.


Richard H. Heilbron (3/2/1922 - 6/18/2018)

Richard H. Heilbron, 96, of Overland Park, KS passed away on June 18th, 2018. He was born on March 2nd, 1922 in Maplewood, MO, to Richard and Lois Kuhlman Heilbron. Dick, as he preferred to be called, attended William Jewell College, the University of North Carolina and the University of Chicago, where he graduated with a B.S. in physics. Dick was commissioned in the United States Army Air Force in 1944 and served in the Western Pacific. After WWII Dick returned to school and earned a law degree, J.D., from the University of Kansas City School of Law and was admitted to the Missouri Bar. During law school, Dick became employed as claims adjuster with Farmers Insurance Group and after obtaining his law degree became personal injury defense trial attorney for Farmers Insurance, as founding partner in the Heilbron and Powell Law Firm. Dick retired from Farmers Insurance in 1987. He then worked for Home Insurance Company of New York as a consultant until May 1989.

Dick belonged to Kappa Alpha Fraternity and Phi Delta Phi legal fraternity. Dick served as President of Jackson County Law Library for three years and taught various phases of trial practice at seminars sponsored by the Bar Association and the UMKC Law School. Dick was appointed by the Missouri Supreme Court to the 16th Judicial Circuit Bar Committee for two consecutive four-year terms. The committee hears and adjudicates ethical complaints against lawyers. He also served as Division Chairman for one year and General Chairman for two years. In 1987 Dick was honored by the Kansas City Metropolitan Bar Association at the Bench Conference by being presented with its Third Annual Litigator Emeritus Award.

Dick was highly respected by his colleagues and adversaries alike for his court room skills and his high standard of ethics. He was truly an honorable gentleman.

Dick was an avid reader and loved jazz. He was a founding member of the Friends of Jazz, later known as Folly Jazz. He spent many hours lovingly caring for his large yard.

Dick was an exemplary husband and father. He was preceded in death by his beloved wife, Jane Doak Heilbron (nee Brandom) in 2012. They had been married 68 years. He was also preceded in death by his parents. Dick is survived by four children Richard H. Heilbron, Jr. (Patti), Susan Doak Williams (Larry), Martha Jane Manso (Carlos) and Nancy Land Heilbron.

Dick is also survived by eight grandchildren, Carlos Alberto Manso (Susan), Cristina Doak Yates (Chris), Sarah Heilbron Pipkin (Donald), Cara Susan Williams, Jane Ahrling Waggner, Alejandro Martin Manso (Katie), Richard Barnett Heilbron, and Laura Ellen Williams. He also has four great granddaughters, Elena Brynn Medlock, Nora Taylor Manso, Annabelle Noel Manso and Claire Doak Yates.

No memorial service was planned, per Dick's wishes. However, a gathering of friends and family is scheduled on Sunday, August 12, 2018 at 6 p.m. at Tatsu's Restaurant in Prairie Village. Those interested in attending, please advise as such on the Amos Family Funeral Home website.
Roger W. Lovett (6/22/1925 – 6/7/2018)

Roger W. Lovett, 92, of Topeka, went to his eternal rest on Thursday, June 7, 2018.

He was born June 22, 1925, in McPherson, the son of William M. and Sibyl B. (Warner) Lovett.

He joined the U.S. Army Air Corps in 1943 at the age of 18. He was trained as a pilot at Luke Field in Arizona and flew a B-25 bomber in the South Pacific during the last years of World War II.

After the war, he returned to Lawrence, where he completed college and graduated from the University of Kansas’ law school in 1951. He was in private practice in McPherson before being elected McPherson’s County Attorney.

In 1961, he moved to Oklahoma where he was owner/operator of the KALV radio station in Alva. In 1972, he moved to Topeka and went to work as an attorney for the Kansas Civil Rights Commission.

Flying was always his passion and in the 1950s he joined the Air National Guard where he was a jet pilot. He retired as a lieutenant colonel.

He was a loving husband, father, grandfather and great grandfather.

He was preceded in death by his parents, William and Sibyl Lovett; a sister, Eunice (Lovett) Kelley; wives, Norma Jean (Rissler) Lovett; and Linda (Hendryx) Lovett; and Elsie (Bloomquist) Lovett; infant daughter, Linda Jean Lovett; son Michael W. Lovett; and infant grandson, James M. Hill.

He is survived by wife, Chris McCoy; daughters Dianne M. (Lovett) Hill; Suzanne (Lovett) Simpson; and sons James W. Lovett; and Brent R. Lovett; grandchildren Jason, Aaron and Tim Hill; Sarah Nylund; Russell and Bill Bomberger; Christopher and Jay Lovett; Audrey Lovett; Andrew and Nathan Lovett; and 16 great-grandchildren.

He had five stepchildren, Barbara McCoy (deceased), Chris McCoy, Patrick McCoy, Michael McCoy, and Elizabeth (McCoy) Schraeder; and 10 stepgrandchildren.


Robert Ray Sweatt Jr. 73, of Frontenac, KS died 12:12am Sunday April 22, 2018 at his home following an illness.

Robert was born December 25, 1944 in Pittsburg, KS the son of Robert Ray and Zelma Ann (Lashmet) Sweatt. Robert attended area schools and was a graduate of St. Mary’s Colgan High School. Following high school Robert earned his Bachelor’s degree at Pittsburg State University and later his Law Degree from Washburn University. Robert married Janie Dixon; they later divorced. On October 7, 1997, Robert married Nancy C. Tillman in Topeka, Kan.; she survives at the home. Robert began his career at Western Casualty and Surety Company in Ft. Scott, Kan. in 1974. Later he worked for the Kansas State Highway Commission and was appointed the Director of Highway Safety. In 1976, Robert was appointed as the Assistant Attorney General. In 1979, Robert began work at Boeing in Wichita as counsel on their legal team. In 1988, he served as President of Equity Pacific in Missoula, MT. In 1991, he returned to work for the State of Kansas in the Department of Revenue until he retired in 2013. Robert was a member of the Sacred Heart Catholic Church; was a member of the bar; loved history; politics; music; movies and fast cars.

Survivors include his wife; children Rob Sweatt and wife Amy of Mission Hills, Kan., Gretchen Koc and husband Kevin of Prairie Village, Kan.; step-children Taud Boatman and wife Buffy of El Reno, Okla., Michael Doremus and wife Gayvien of White Heath, Ill. and Justin Shobe and wife Nicole of Merriam, Kan.; seven grandchildren and nine step-grandchildren.

Robert was preceded in death by his parents.

Memorial Mass of Christian Burial was held Wednesday April 25, 2018 at the Sacred Heart Catholic Church with Fr. Thomas Stroot as celebrant. Burial was to be at a later date at Garden of Memories Cemetery in Pittsburg, Kan. Family received friends prior to the service at the church. In lieu of flowers the family asked expressions of sympathy to be in the form of memorials to the Sacred Heart Food Pantry and/or St. Mary’s Colgan Baseball Program. Friends may drop off or mail memorials to Friskel Funeral Home 230 E. McKay Frontenac, KS 66763. Condolences may be left at www.friskelfuneralhome.com.

Ben Upshaw 12/5/1949 – 5/31/2018

Ben Steven Upshaw, 68, passed away on May 31, 2018, in Ulysses, Kansas.

Born December 5, 1949, Steve grew up in Ulysses. After high school, he joined the U.S. Marine Corps and served a tour of duty in Vietnam at the height of the war. Upon discharge, he completed his Bachelor’s at KU. He then worked overseas for several years in offshore oil drilling operations before returning to attend law school at Washburn. Setting up his law practice in Ulysses, he prided himself as being “just a country lawyer”. He was elected Grant County Attorney and served several years in that role.

He is survived by wife, Linda McHenry of the home; daughter, Clancy Upshaw and son-in-law, Jared Stringham of Oklahoma City; step-daughters, Dana (Russell) Hasenbank of Plains, and Teri (Lynnne) Berschauer of Hutchinson; stepson, Troy (Kathleen) McHenry of Alpha, New Jersey, sister; Anne Armstrong; and nephew, Ben Staggs; as well as numerous grandchildren and great-grandchildren.

He is preceded in death by his parents, Ben and Mary Upshaw, and sister, Mary Kay Weinant.

After cremation, the family planned a private service per his request. In lieu of flowers, the family suggests memorials to Shriners Hospital for Children in care of Garnand Funeral Home, 405 W. Grant Ave, Ulysses, KS 67880.
Sidney L. Willens 12/13/1926 – 6/8/2018

Sid Willens always loved to see his name in the newspaper—today not so much. On June 8, 2018, Sidney L. Willens, age 91, passed away peacefully and rejoined his beloved wife of 52 years, Lorraine, who died in 2005. A celebration of Sid’s remarkable life was held at Temple Beth Torah, 6100 West 127th, Overland Park, KS, 66209 on Sunday, June 17, 2018 at 10 a.m. His longtime friend and advocate for social justice, Rabbi Mark Levin, will officiate. Private interment. Born December 13, 1926 in Kansas City, Mo., the only child of Louis and Esther Willens, Sid earned his Eagle Scout at age 15, graduated Paseo High School at 16, became a "hard way" Sachem in the Tribe of Mic-o-Say at 17, served in WWII at 18, graduated the University of Kansas City School of Law at 21, married Lorraine at 25, and made partner at Tucker, Charno, Willens & Jouras at 29.

With these early achievements under his belt and with his mother Esther and wife Lorraine by his side for support and inspiration, Sid was ready to take on injustice wherever he found it. Sid worked hard to become an attorney, but he was really a journalist at heart. A wordsmith, he typed his own one-page letters advocating his demands and recommendations for social and individual justice. Sid spared no expense when it came to postage, envelopes and photocopies. His carefully chosen words were addressed to the decision-makers, but his genius was in what he typed at the end of each letter: "cc: the press, news outlets and interested public citizens." No elected or appointed official could take the chance of ignoring Sid’s letters without being held accountable by who knows whom. Combining that strategy with good ideas, concrete suggestions, and an attorney’s use of facts and persuasive arguments, Sid created substantial positive change for our community. With Sid, no committee was necessary to solve a problem. His power came only from being a private citizen without any desire for secondary political or financial gain.

Sid’s accomplishments were many. A few that he was most proud of: he successfully defended victims who suffered the double indignity of police brutality and bogus cover-up charges; he helped establish the Office of Citizen Complaints with the KC Police Department; he helped create the Jackson County Office of Human Relations and Citizens’ Complaints and was its first chairman; he introduced the ombudsman concept to Missouri; he championed and authored Missouri’s first Crime Victim's Compensation Law; he obtained a $1.6 million dollar three-year federal grant creating police-social worker teams to help at-risk children at the moment they entered the justice system; he persuaded the KC Municipal Court to create a specialized housing court to deal with blighted properties and absentee landlords; he led the effort that won a $259,000 federal grant for a pilot program creating monthly house maintenance reserves assisting low income residents with home repairs to prevent neighborhood blight from taking root; he persuaded the Jackson County Circuit Court to create separate waiting rooms for victims/witnesses and the defendants against whom they were to testify; he was the regular Kansas City Times/Star book reviewer on the law and the court system with his reviews becoming springboards for his civic causes and crusades; he wrote The Handbook of Negotiation at the request of the National Council of the Boy Scouts of America for its use in investigating and resolving complaints and conflict; he and Walt Bodine created and organized the Watch Program which, during the 1976 Republican National Convention in KC, placed 435 volunteers around the clock at potential flash points between police and demonstrators; he led the fund-raising effort that established the H. Roe Bartle Memorabilia Exhibit at Bartle Hall; he was one of the regular Friday "Hell-Raisers" on Walt Bodine’s KCUR radio show during which he advised callers on methods and strategies to effectively advocate for themselves; and, in an amusing and successful demonstration of "chutzpah" and perseverance, Sid, a Jew, turned a "person-to-person" phone call to Pope John Paul II into a Vatican audience with his Eminence and Sid’s Catholic wife, Lorraine. The story appeared in newspapers worldwide.

Sid’s awards and honors are numerous and Sid is not one to "toot his own horn" anyway. Still, his professional colleagues have honored him with, among others, the Missouri Bar President’s Award, the Missouri Bar’s Pro Bono Award, UMKC’s Law School Alumni Award, and UMKC’s Practitioner of the Year award. To those who knew Sid best, all truthfully marvel at his ability to balance and combine successful civic activism, the practice of law and being the greatest husband, father, son and provider anyone could wish for. Sid’s positive impact on so many people’s lives and in such individualized ways made for a life well-lived. No one could ask for or deserve a better legacy.

Sid is survived by his three children: Mark Willens (Cathy), Linda (Kevin) Myres, Susan (Andy) Ortbals; and grandchildren Sara Glass, Aaron (Erin) Ortbals and their son, Jameson, Adam (Nadia) Glass, Rachel (Tom) Ryan, Brianna Ortbals, Elizabeth Willens, and Chloe Ortbals. All of Sid’s family honor and salute him. His shoes will be difficult to fill, but they have blazed a path for all of us to emulate and follow. While a donation in Sid’s name would be welcome, he would prefer you find your own cause and spend your time and money fighting for it. To inspire you further, please view a documentary about him titled "The Hellraiser-The Legacy of Sid Willens, Activist Lawyer" that has been posted on YouTube at https://tinyurl.com/hpvceu6. Sid would be pleased knowing that he sparked in you a desire to raise a little hell of your own. Online condolences to www.mcgilleysheil.com.

obituaries

J. Robert Wilson, 90, died on May 21, 2018, at Holly Creek Retirement Community in Centennial, Colorado, of complications of Parkinson’s disease.

Bob was born in Meade, Kansas, on December 3, 1927, the son of Robert and Bess (Osborne) Wilson. He graduated from Meade High School in 1945. He enlisted in the U.S. Navy and was a Hospital Apprentice in training for the invasion of Japan when the Japanese surrender ended World War II.

Bob graduated from the University of Kansas, earning his B.A. in geography in 1950 and his law degree in 1953. After law school, he returned to Meade where he practiced law, served as Meade City Attorney, and was twice elected Meade County Attorney. In 1957, Bob took a position with the Kansas Corporation Commission in Topeka, later serving as General Counsel and a member of the Commission.

On a summer vacation to Estes Park, Colo., Bob met the love of his life, Marguerite Reiter of Kansas City. They eloped and were married in Las Vegas, Nevada on November 27, 1960. Soon thereafter, Bob took a job with Kansas Nebraska Natural Gas Company (later KN Energy, and a predecessor of today’s Kinder Morgan). Bob and Marguerite moved to Hastings, Neb., where their son, John Ramsey, was born. Bob worked in various roles at KN, eventually becoming president in 1978 and chairman in 1985. During his tenure the company grew and prospered, moving its headquarters to Lakewood, Colo. in 1980; it successfully fended off several takeover attempts by Mesa Petroleum (T. Boone Pickens). Bob also served for many years as a board member of Farmers Alliance Mutual Insurance Company of McPherson, Kan.

In his later years, Bob enjoyed traveling the world with Marguerite, including a memorable visit to the Holy Land; playing golf; supporting his beloved Kansas Jayhawks, the Colorado Buffaloes and the Denver Broncos; and spending time with friends and family.

Survivors include his wife of 57 years, Marguerite Wilson of Centennial, Colo.; his son John (Mollie Mitchell) of Golden, Colo.; nieces Susan Larson (David) of Cedar Rapids, Iowa, and Joyce Brophy (George) of Leawood, Kan.; and his grandnieces and grandnephews.

Services and burial were held at Olinger Chapel Hill Mortuary, 6601 S. Colorado Boulevard, Centennial, Colo., on Wednesday, May 30th.

In lieu of flowers, contributions may be made to the University of Kansas or the Parkinson Association of the Rockies.
HELD: The hearing panel erred by finding that Buckner did not violate KRPC 8.4(c). The record supports a conclusion that Buckner was dishonest with his clients. The hearing panel also erred by finding that Buckner’s actions were knowing. The evidence proves they were intentional. Given those facts, a majority of the court agrees with the disciplinary administrator that disbarment is the appropriate discipline. A minority of the court would have imposed discipline of indefinite suspension.

ORDER OF DISBARMENT
IN THE MATTER OF L.J. BUCKNER, JR.
NO. 118,663—JUNE 29, 2018

FACTS: A hearing panel determined that Buckner violated KRPC 1.4(b) (communication); 1.5(d) (fees); 1.15(a), (b), (c), (d) (1)(ii), (d)(3), and (f) (safekeeping property); 1.16(d) (termination of representation); 8.1(b) (failure to respond to demand for information); and Supreme Court Rule 207(b) (failure to cooperate in a disciplinary investigation). The complaint arose after Buckner represented clients using a flat monthly fee structure. The fee agreement also contemplated a “success fee”, which gave to Buckner a portion of the client’s recovery. After representation was concluded, Buckner failed to advance settlement proceeds to his clients. The clients attempted to initiate fee dispute proceedings through a bar association, but Buckner refused to participate. After failing to get recourse, the clients filed a complaint with the disciplinary administrator’s office. Buckner did not respond as directed and did not participate in the investigation as required. When he eventually did speak with the disciplinary administrator’s office, Buckner indicated that he believed his fee agreement allowed him to keep all of the settlement proceeds.

HEARING PANEL: The hearing panel believed that Buckner’s testimony during the hearing was inconsistent with other evidence. The panel concluded that Buckner was required to disburse some of the settlement proceeds to his clients. Evidence showed that Buckner had inaccurate and incomplete billing practices. After considering the evidence, the hearing panel concluded that Buckner violated a number of rules but found the evidence lacking to support a violation of KRPC 8.4. The disciplinary administrator’s office recommended sanction of disbarment. The hearing panel recommended a two-year suspension.

HELD: The hearing panel erred by finding that Buckner did not violate KRPC 8.4(c). The record supports a conclusion that Buckner was dishonest with his clients. The hearing panel also erred by finding that Buckner’s actions were knowing. The evidence proves they were intentional. Given those facts, a majority of the court agrees with the disciplinary administrator that disbarment is the appropriate discipline. A minority of the court would have imposed discipline of indefinite suspension.

ORDER OF DISBARMENT
IN THE MATTER OF RUSSELL W. DAVISSON
NO. 118,758—JUNE 15, 2018

FACTS: After Davission failed to appear at the hearing, a hearing panel determined that Davission violated KRPC 1.3 (diligence), 1.4(a) (client communication), 8.4(d) (conduct prejudicial to administration of justice), Rule 207(b) (cooperation with disciplinary investigation), and Rule 211(b) (timely answer to formal disciplinary complaint). The disciplinary matter arose after Davission was retained by a couple who wanted his help with filing a bankruptcy petition. Although the petition was filed and the clients completed their payment plan, Davission did not answer their calls and provide the assistance they needed to receive a discharge. The clients filed a disciplinary complaint, but Davission did not respond. Davission also had complaints filed in other cases where he failed to respond to the disciplinary investigator.

HEARING PANEL: Despite receiving proper service, Davission did not appear at the formal hearing. After finding that Davission violated multiple conduct rules, the panel concluded that Davission’s failure to cooperate amounted to a bad faith obstruction of the disciplinary process. Finding no mitigating factors, the hearing panel agreed with the disciplinary administrator and recommended discipline of disbarment.

HELD: Davission failed to appear for argument before the court. After considering the record plus the extra aggravator of his failure to appear, the court agreed that Davission should be disbarred.

ORDER OF INDEFINITE SUSPENSION
IN THE MATTER OF JOHN BERNARD SULLIVAN
NO. 118,723—JUNE 29, 2018

FACTS: A hearing panel determined that Sullivan violated KRPC 1.1 (competence); 1.3 (diligence); 1.4(a) (communication); 1.8(f) (accepting compensation for representation from someone other than the client); 1.16(a)(2) (declining and terminating representation); 1.16(d) (terminating representation); 8.4(b) (commission of a criminal act reflecting on the attorney’s veracity); 8.4(d) (engaging in conduct prejudicial to the administration of justice); Supreme Court Rule 203(c)(1) (failure to timely report felony charges); and Supreme Court Rule 211(b) (failure to file a timely answer in a disciplinary proceeding). Sullivan’s Kansas license was suspended in February 2014. There were several incidents which precipitated the complaint. Sullivan failed to properly docket an appeal in federal
court, resulting in his client being unable to obtain relief from a criminal sentence. Sullivan was also charged with multiple counts of drug possession, stemming from multiple incidents.

HEARING PANEL: The panel noted that there were multiple aggravating factors, including the large number of violations. But the panel also noted the absence of a selfish or dishonest motive and could clearly conclude that part of Sullivan’s conduct was caused by his drug addiction. Sullivan made restitution to clients to the best of his ability, sought drug treatment and counseling, and fully cooperated with the disciplinary process. The disciplinary administrator asked that Sullivan be disbarred. Sullivan asked that his suspension be continued so that he could, in the future, petition for reinstatement. Because Sullivan showed great progress in recovery and cooperated with the investigation, the hearing panel recommended an indefinite suspension.

HELD: At the hearing before the court, the disciplinary administrator noted Sullivan’s progress and asked that the court adopt the recommendation of indefinite suspension, with criteria for reinstatement including discharge from probation and continued evidence of sobriety. The court agreed and imposed discipline of indefinite suspension, beginning on the date of this opinion.

ORDER OF REMAND
IN THE MATTER OF ZANE TODD, JR.
NO. 118,742—JUNE 8, 2018

FACTS: A client accused Todd of failing to promptly request a recalculation of jail time credit. Although the issue was ultimately resolved with a determination that the client was not entitled to relief, Todd stipulated to the misconduct and entered a diversion agreement with the disciplinary administrator. The diversion agreement required Todd to complete 16 hours of CLE. Todd completed only 15 hours and the agreement was terminated. After the termination of diversion, the disciplinary administrator filed a formal complaint. Todd, believing he had been diagnosed with a terminal illness, did not respond. After learning of his circumstances, the disciplinary administrator recommended that Todd communicate with KALAP to see if another term of diversion was appropriate. Todd’s health eventually improved and a hearing was set on the formal complaint.

HEARING PANEL: The panel noted that much of Todd’s delay in dealing with the disciplinary process was caused by his health issues. On that basis, the hearing panel disagreed with the disciplinary administrator’s request for suspension and recommended discipline of published censure.

HELD: The hearing panel erred when it found that Todd violated KRPC 8.1(b). This case has significant mitigation, and Todd was entitled to a great deal of deference due to his health circumstances. And some of the poor communication was caused by procedural irregularities within the disciplinary administrator’s office. For that reason, this case is remanded to the disciplinary administrator for imposition of an informal admonition with costs paid by the disciplinary administrator.
when rejecting his affidavits. Because there is evidence that could support Beauclair’s claims, this case must be remanded to the district court for live testimony on Beauclair’s claim of actual innocence. Beauclair’s colorable claim of actual innocence excuses the successive nature of his pleading.

STATUTES: K.S.A. 2017 Supp. 60-1507(f)(2)(A); K.S.A. 60-1507, -1507(b), -1507(c), -1507(f)

**SCHOOL FINANCE**  
**GANNON V. STATE**  
**SHAWNEE DISTRICT COURT—ADEQUACY REVERSED**  
**EQUITY UPHOLDED**  
**NO. 113,267—JUNE 25, 2018**

FACTS: This is the latest decision in the ongoing litigation involving the adequacy and equity of Kansas’ system of funding public schools. After it was told that the 2017 funding formula was neither adequate nor equitable, the legislature was again tasked with crafting a constitutionally compliant funding plan. The 2018 legislature responded by passing Senate Bill 423 and Senate Bill 61, which added approximately $854 million in new funding, to be phased in over the next five school years. The remedial legislation also allowed each district to increase its local option budget authority in order to generate new funds. The legislation was reviewed by the Supreme Court to check for adequacy and equity.

ISSUES: (1) Adequacy; (2) equity

HELD: The additional funds allotted by Senate Bills 61 and 423 still fall short of reaching constitutional adequacy, primarily because there are insufficient adjustments made for inflation. By timely making these inflation adjustments, the current funding scheme will come into compliance. Senate Bills 61 and 423 remedy the equity issues that were identified in previous *Gannon* opinions. Specifically, the reliance on LOB does not create an inequitable system, although reliance on LOB should be pursued with caution.


**HABEAS CORPUS—STATUTES**  
**WHITE V. STATE**  
**BUTLER DISTRICT COURT**  
**COURT OF APPEALS IS REVERSED**  
**DISTRICT COURT IS REVERSED—CASE IS REMANDED**  
**NO. 114,284—JULY 6, 2018**

FACTS: White pleaded no contest to a person felony and received the presumptive sentence. This sentence was summarily affirmed by the court of appeals, and the judgment became final on February 12, 2013. White filed a K.S.A. 60-1507 motion more than two years later, beyond the one-year time limit. White acknowledged his tardiness and asked the district court to allow an out-of-time filing because of manifest injustice – his appellate counsel failed to provide him with a copy of the mandate which finalized his direct appeal. The district court found that White failed to sustain his burden to prove manifest injustice, and the court of appeals agreed. White’s petition for review was granted.

ISSUES: (1) Retroactivity of K.S.A. 2017 Supp. 60-1507; (2) existence of manifest injustice

HELD: K.S.A. 60-1507 was amended after the court of appeals’ opinion for this case. The amendments limit a court’s ability to find manifest injustice. These amendments do not apply retroactively, as doing so would limit litigants’ ability to raise a vested defense and cause manifest injustice. White’s claims must be reviewed by using all of the *Vontress* factors. White presented credible evidence that he never received the court of appeals mandate, and criminal defendants should be able to rely on counsel to protect legal interests. If true, it could serve as a basis for manifest injustice. But the record is underdeveloped, and the case must be remanded for further proceedings related to White’s credibility.

CONCURRANCE AND DISSENT: (Johnson, J.) White meets either the *Vontress* test or the new statutory test and meets his burden to prove manifest injustice. The case should be remanded to the district court for a hearing.

STATUTES: K.S.A. 2017 Supp. 60-1507; K.S.A. 60-1507, -1507(f)

**CONTRACTS—STATUTORY INTERPRETATION**  
**SCRIBNER V. U.S.D. NO. 492**  
**BUTLER DISTRICT COURT—AFFIRMED**  
**NO. 116,818—JUNE 15, 2018**

FACTS: Scribner was employed by U.S.D. 492 until May 2015, when she was notified that her contract was not going to be renewed. Acting in accordance with statutory amendments to the teacher due process statutes, the school board did not give a reason for the decision or notify Scribner of her due process rights. Scribner believed that these omissions were unconstitutional, and she filed a motion for declaratory judgment asking the court to find that the statutory amendments were unconstitutional. The district court found that the statutory amendments were constitutional, as the change did not deny due process to the teachers. Scribner appealed

ISSUES: (1) Property interest in continued employment; (2) violation of employment contract

HELD: Scribner did not enjoy a vested right that could not be removed or altered through due process. The legislative process provides all the process that is due when legislation results in the deprivation of protected property interests. The legislation that stripped away the enhanced requirements for nonrenewal was not arbitrary. Although there were not any public hearings held prior to passage of the legislation, due process does not require a hearing before legislation is adopted. Because the board complied with the statute in effect at the time of Scribner’s nonrenewal, there is no merit to her breach of contract claim.

STATUTES: K.S.A. 2017 Supp. 72-2251(a), -2252(a), -2252(b); K.S.A. 2014 Supp. 72-5437; K.S.A. 2013 Supp. 72-5436(a), -5436(b), -5437(a), -5438(a), -5445(a); K.S.A. 60-409, -412, 72-5436

**STATUTORY CONSTRUCTION**  
**WORKERS COMPENSATION**  
**ATKINS V. WEBCON**  
**WORKERS COMPENSATION BOARD—COURT OF APPEALS IS AFFIRMED**  
**BOARD IS AFFIRMED**  
**NO. 113,117—JUNE 8 2018**

FACTS: Atkins worked as a roofer for Webcon. As a senior crew member, he was often assigned to out-of-state jobs. For these jobs, the crew would depart the company office in company-owned vehicles on Monday and return on Friday. Employees were on the clock for approximately 12 hours. After that time, they were free to do what they wished, with the caveat that company vehicles could
not be driven to a bar. One evening, Atkins walked to a bar that was across the street from his hotel. On his way back to the hotel, Atkins was struck by a car being driven by an intoxicated driver. Atkins suffered catastrophic and permanent injuries. Atkins received preliminary benefits, and an ALJ found after a regular hearing that Atkins’ injuries arose out of and in the course of his employment because travel was part of his job. The board reversed, disagreeing with the ALJ that travel was intrinsic to Atkins’ job. The court of appeals affirmed and Atkins’ petition for review was granted.

ISSUE: (1) Compensability of Atkins’ injuries

HELD: There is no bright-line test to determine whether an injury occurred in the course of employment. The inquiry should be whether the injury is connected to job performance. If travel is an intrinsic part of the job duties, workers compensation eligibility extends to the period when an employee is coming and going from the job. But in this case, Atkins was neither going to nor coming from work. The activity he was engaging in at the time of his injuries had no connection to Atkins’ work. For that reason, the board correctly found that Atkins was not entitled to benefits.


DIVORCE—JURISDICTION IN RE MARRIAGE OF WILLIAMS SHAWNEE DISTRICT COURT—AFFIRMED COURT OF APPEALS—AFFIRMED NO. 113,103—MAY 18, 2018

FACTS: The Williamses married in 1985. Due to Alfonza’s military service, they moved frequently. Joann settled in Kansas and filed for divorce in 1993. With no objection from Alfonza, the district court awarded Joann 25 percent of Alfonza’s military retirement benefits as part of the property settlement agreement. Neither party appealed. Many years later, Joann sought to have Alfonza pay her portion of his retirement. Alfonza responded by moving to set aside the portion of the divorce decree that awarded Joann a portion of his retirement benefits, claiming that the district court lacked jurisdiction to make such an award. Alfonza’s motion to set aside was denied and Joann was given attorney fees. This decision was affirmed on appeal, and Alfonza’s petition for review was granted.

ISSUES: (1) Federal limits on state jurisdiction; (2) consent to jurisdiction; (3) attorney fee award

HELD: The plain language of the Uniformed Services Former Spouses’ Protection Act limits a state court’s personal jurisdiction over a service member, but not its subject matter jurisdiction. Because there is no limit to the state court’s subject matter jurisdiction, a service member may consent to personal jurisdiction. Alfonza gave that consent when he participated in discussions regarding his military retirement benefits during the divorce hearing and did not object. Joann’s attempt to have Alfonza pay her share of his military retirement benefits was not a garnishment action but was instead a proceeding as part of the original divorce action. The Kansas Family Law Code authorizes the award of attorney fees, if appropriate. Because of that authority, the award of attorney fees is affirmed.


CRIMINAL

CRIMINAL LAW—CRIMINAL PROCEDURE—EVIDENCE—JURY—JURY INSTRUCTIONS STATE V. BARLETT WYANDOTTE DISTRICT COURT—AFFIRMED; COURT OF APPEALS—AFFIRMED NO. 112,573—JUNE 8, 2018

FACTS: Barlett involved in a three car chase that resulted in a shooting death. Trial court denied Barlett’s requests for a jury instruction on self-defense, and for an instruction that mere association with the principals or mere presence in the vicinity of the crime is insufficient to establish guilt as an aider and abettor. Trial court also denied Barlett’s motion for a mistrial when jury, which had been provided a full transcript of Barlett’s recorded interrogation, was unable to view half the recording due to equipment failure. Jury convicted Barlett of criminal discharge of a firearm into a vehicle under a theory of aiding and abetting. Barlett entered guilty plea to voluntary manslaughter after jury split on the felony-murder charge. In unpublished opinion, Court of Appeals affirmed the firearm conviction, finding in part the self-defense instruction was legally inappropriate under State v. Bell, 276 Kan. 785 (2003), and State v. Kirkpatrick, 286 Kan. 329 (2009), because Barlett was charged with a violent felony which prevented him from asserting a theory of self-defense. Barlett’s petition for review granted in part on claims that the district court: (1) erred by not instructing the jury on self-defense; (2) erred by not instructing jury that the defendant’s mere presence with the principals or at the scene of the crime was insufficient to establish guilt as an aider or abettor; (3) failed to provide jury with a statutory definition of intentional conduct; and (4) violated Kansas statute by not replaying the recording in its entirety.

ISSUES: (1) Jury instruction—self-defense, (2) jury instruction—aiding and abetting, (3) jury instruction—intentionality, (4) malfunctioning electronic equipment

HELD: Four-step progressive instructional analysis in State v. Plummer, 295 Kan. 156 (2012), is applied. General rule stated in Bell and Kirkpatrick—that a defendant charged with committing a forcible felony is not permitted to assert a theory of self-defense—is overly broad and is inconsistent with intent of legislature and other Kansas Supreme Court opinions. Better rule is adopted: a defendant may not assert self-defense if that defendant is already otherwise committing a forcible felony when he or she commits a separate act of violence. Under this new rule, a self-defense instruction was legally appropriate in this case, but it was not factually appropriate.

As in State v. Carter, 305 Kan. 139 (2016), the mere presence or association instruction would not have been factually appropriate in this case.

Panel’s analysis and finding that an instruction defining intentionality was not warranted in this case, and that any error was harmless, is affirmed.

No violation of K.S.A. 2017 Supp. 22-3420(c) is found, and no abuse of district court’s discretion when it decided the equipment failure did not produce a fundamental procedural failure. The means or form of responding to a jury’s request to review evidence is discretionary, not mandatory.

STATUTES: K.S.A. 2017 Supp. 21-5111(n), -5202(h), -5223, -5226(a), 22-3420(c); K.S.A. 21-3214, -3214(a), 22-3423(1)(c)
ISSUE: Restitution

FACTS: Futrell charged with burglary and theft for break-in of vehicle in January, and burglary and theft for break-in of same victim’s house in February. He entered no contest plea to the residential burglary in exchange for dismissal of all remaining charges. Sentence imposed including restitution as requested by State to cover a broken screen door, money missing from the victim’s home and vehicle, a broken vehicle window, and the destruction of an unrelated phone. Futrell appealed, arguing district court could only order restitution for the broken screen door—the damage caused by his conviction crime of burglary. Court of appeals affirmed restitution for damages proximately caused by the crime of conviction. Order to pay for damages for money taken from home and vehicle in February is vacated, and case is remanded to district court for a new restitution hearing under the proper legal standard. Independent application of Arnett standard is precluded by factual deficiency in the record.

STATUTE: K.S.A. 2017 Supp. 21-6607(c)(2)

CRIMINAL LAW—CRIMINAL PROCEDURE
EVIDENCE—STATUTES
STATE V. GEORGE
LEAVENWORTH DISTRICT COURT—REVERSED AND REMANDED
COURT OF APPEALS—REVERSED
NO. 112,224—JUNE 8, 2018

FACTS: Following mistrial, George was convicted in second trial of kidnapping, rape, aggravated robbery, and aggravated intimidation of a witness or victim. George relied on a misidentification defense. Second-trial evidence centered on victim’s testimony, surveillance video and phone lineups; and a stipulation that was referenced but not included in the record that indicated DNA test results from rape kit or victim’s clothing showed consistency with victim’s boyfriend but no consistency with George’s DNA. George filed pro se petition for post-conviction DNA testing, asking for testing of collected but previously untested hairs. District court denied the petition, relying on State v. Lackey, 42 Kan.App.2d 89 (2009) (Lackey I), to find additional testing would not point to George’s innocence. George appealed. Court of appeals affirmed in unpublished opinion, finding district court erred in relying on Lackey I which was overturned by State v. Lackey, 295 Kan. 816 (2012) (Lackey II). Applying Lackey II, panel found that while the hairs could produce exculpatory evidence, they would nevertheless be cumulative to other record evidence. Review granted.

ISSUE: Postconviction motion for DNA testing

HELD: On record in this case, district court erred in denying George’s petition for DNA testing of hairs found at the crime scene. If testing of hairs found where rape occurred only revealed that George’s DNA was not present, the results would be exculpatory under Kansas law. Unlike other jurisdictions, the evidentiary value of this potentially exculpatory evidence does not matter at this stage. Because Kansas law does not allow for weighing of evidence until after DNA test results are obtained, exculpatory by the smallest margin is sufficient. Once DNA test results are obtained, district court makes probabilistic determination about what reasonable, properly instructed jurors would do with the new evidence in light of totality of the circumstances. Under K.S.A. 2015 Supp. 21-2512(c), future testing of the hairs “may produce” results indicating presence of other individuals’ DNA, which would be first of its kind from the crime scene and thus necessarily noncumulative. Reversed and remanded to district court to examine actual stipulation from retrial. If that stipulation essentially provided that no person’s DNA besides the victim’s boyfriend’s was present at the crime scene, then DNA testing of the hairs is unnecessary because the result would be cumulative. But if the stipulation does not so provide, then legal principles identified by the Kansas Supreme Court are to be applied to make the necessary determinations under K.S.A. 2015 Supp. 21-2512.

CONCURRENCE (Biles, J.): Writes separately to identify small but significant error in majority’s conclusion that test results show-
ing that George's DNA was not present would be exculpatory because it might show George was not at the scene. Concurs only because the DNA testing in this case has an ever-so-slight tendency instead to create the possibility of doubt as to the identity of the perpetrator.

STATUTES: K.S.A. 2017 Supp. 21-2512, -2512(c); K.S.A. 2015 Supp. 21-2512, -2512(c); K.S.A. 2013 Supp. 21-2512; K.S.A. 20-3018(b), 21-2512

CRIMINAL PROCEDURE—STATUTES
STATE V. GROSS
SALINE DISTRICT COURT—AFFIRMED
COURT OF APPEALS—AFFIRMED
NO. 113,275—MAY 25, 2018

FACTS: Gross was convicted in a bench trial on charges of criminal threat, criminal damage to property, and battery against a county corrections officer. Pretrial mental health evaluations were conducted on the judge's own motion and on the State's request, each finding Gross competent to stand trial. During the trial, defense counsel and prosecutor conferred in chambers about Gross' outbursts, off-topic comments, and general conduct. Trial judge noted Gross' demeanor but remained convinced that no further evaluation was needed. Gross appealed in part on claim that he should have been present during the in-chambers discussion of his mental state. Court of appeals affirmed in unpublished opinion, citing controlling precedent in State v. Perkins, 248 Kan. 760 (1991), that K.S.A. 2017 Supp. 22-3302 does not mandate that the defendant be present when the discussion concerns whether to hold a competency hearing. Review granted on Gross's claim that Perkins was not applicable to his case, and that Perkins should be overturned as inconsistent with K.S.A. 22-3302(7).

ISSUE: Right to be present

HELD: Court considers issue raised for first time on appeal. Gross asserted no constitutional claim, so review limited to statutory analysis. No meaningful way to distinguish the hearing in Perkins from the hearing at issue in this case, thus Perkins applies. The in-chamber conference without Gross being present did not violate K.S.A. 2017 Supp. 22-3302(7). K.S.A. 2017 Supp. 22-3302(7) is ambiguous given the multiple uses of the term "proceedings" in other portions of the statute, and the statute's language does not clearly support Gross' reading of its meaning. The holding in Perkins is reaffirmed, based on doctrine of stare decisis and 27 years of legislative acquiescence thereafter to the court's interpretation of the statute.

STATUTES: K.S.A. 2017 Supp. 22-3302, -3302(a), -3302(3), -3302(4), -3302(6), -3302(7); K.S.A. 22-3301, -3302

CRIMINAL LAW—CRIMINAL PROCEDURE
JURY INSTRUCTIONS
STATE V. JARMON
SEDGWICK DISTRICT COURT—AFFIRMED
COURT OF APPEALS—AFFIRMED IN PART
REVERSED IN PART
NO. 111,608—JUNE 15, 2018

FACTS: Jarmon was convicted of felony burglary. Prior to sentencing, he filed a pro se motion for a new trial, based on alleged ineffective assistance of trial counsel. District court heard arguments and denied the motion, finding no basis for granting a new trial and finding an insufficient basis for replacing defense counsel. Jarmon appealed that decision, and claimed reversible error for jury to be instructed on burglary without including a definition of theft. In unpublished opinion, the court of appeals affirmed the conviction but reversed and remanded for a renewed hearing with new appointed counsel on Jarmon's pro se collateral challenge to his conviction on the basis of ineffective assistance of counsel. State's petition granted for review of the remand order. Jarmon's cross-petition granted for review of the claimed instructional error.

ISSUES: (1) Omission of an instruction on elements of theft, (2) motion for new trial

HELD: Clearly erroneous standard applies because Jarmon did not object to the burglary instruction. Under facts in this case, the omission of an instruction on the elements of theft was harmless error, as a rational jury would have concluded that at least one of the reasons Jarmon went into the building was to steal property. State v. Rush, 255 Kan. 672 (1994), is factually distinguished.

Court of appeals treated Jarmon's out-of-time motion for a new trial as a motion under K.S.A. 60-1507, and erroneously mandated appointment of new counsel for a collateral challenge that had no support in the record. Remand for a hearing on the motion for new trial or for replacement of counsel is inappropriate. Court of appeals ruling on the motion for new trial is reversed. District court's denial of the motion for new trial is affirmed.

STATUTES: K.S.A. 2012 Supp. 21-5801; K.S.A. 22-4506, -4506(b), 60-1507, -1507(b)

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—FOURTH AMENDMENT
SEARCH AND SEIZURE
STATE V. JIMENEZ
GEARY DISTRICT COURT—AFFIRMED AND CASE REMANDED
COURT OF APPEALS—REVERSED
NO. 116,250 - JUNE 22, 2018

FACTS: Officer stopped car driven by Jimenez for following another vehicle too closely. While in patrol car waiting for issuance of a citation, Jimenez was questioned for almost five minutes about her travel plans before the officer called in the license information and requested warrant checks. Officer then deployed dog sniff of car, which led to discovery of currency bundles totaling $50,000. Jimenez charged with criminal transportation of drug proceeds, or in the alternative, criminal transfer of drug proceeds. She filed motion to suppress the traffic stop evidence, arguing in part that the officer measurably extended the stop by asking travel plan questions unrelated to the traffic violation, and no articulable facts supported a reasonable suspicion that other criminal activity was occurring to justify the delay. State filed interlocutory appeal. Court of appeals reversed in unpublished opinion, holding no constitutional violation occurred because travel plan questions were always within a stop's scope. Jimenez' petition for review granted.

ISSUE: Fourth Amendment—traffic stop

HELD: Kansas Supreme Court more fully explores for first time the Fourth Amendment jurisprudence in Rodriguez v. United States, 575 U.S. __, 125 S.Ct. 1609 (2015), relating to traffic stops which
clarifies that any traffic stop extension without reasonable suspicion or consent—by even a de minimis length of time—amounts to an unreasonable seizure when the delay is based on anything but the articulated components of the stop's mission. Under general principles in Rodríguez applicable to all traffic stops, circumstances will dictate whether and to what extent travel plan questions become part of the mission. State's reliance on State v. Morlock, 289 Kan. 980 (2009), and post-Rodríguez Tenth Circuit cases is misplaced. Here, detailed questioning of Jimenez about her travel plans delayed the officer's processing of license and warrant inquiries, and measurably extended the stop's duration with no justification of any reasonable suspicion or probable cause to believe there was other criminal activity. Panel's holdings are reversed. District court's decision to suppress is affirmed, and case is remanded for further proceedings.

STATUTES: K.S.A. 2017 Supp. 22-3603; K.S.A. 2014 Supp. 21-5716(b), -5716(c); K.S.A. 20-3018(b), 22-3216(2), 60-2101(b)

**CRIMINAL LAW—CRIMINAL PROCEDURE PROSECUTORS—STATUTES STATE V. KING**

**WYANDOTTE DISTRICT COURT—AFFIRMED NO. 116,146—JUNE 1, 2018**

FACTS: King and a codefendant were jointly tried on charges arising from a string of violent robberies. Jury convicted King of attempted capital murder, aggravated robbery, aggravated battery, conspiracy to commit aggravated robbery, and criminal possession of a firearm. Two weeks later King filed motion for a new and severed trial, citing statements by codefendant's attorney during closing argument. District court denied the motion. On appeal King claimed: (1) insufficient evidence that he was one of the robbers, and no evidence of a formal agreement to support the conspiracy conviction; (2) prosecutor improperly interjected his personal beliefs during closing argument; (3) district court erred by denying King's motion for a new trial; and (4) cumulative error denied him a fair trial.

ISSUES: (1) Sufficiency of the evidence, (2) prosecutorial Error, (3) motion for new and severed trial, (4) cumulative error

HELD: Sufficient evidence supported the convictions. Under facts in case, a rational fact-finder could have found beyond a reasonable doubt that King was one of the robbers, and there was strong circumstantial evidence of an agreement to commit a string of robberies.

Prosecutor's statements in closing argument are examined in detail. Prosecutor's use of "I submit" was not error. Two of prosecutor's "I think" statements impermissibly conveyed the prosecutor's opinion but were not error in this case which occurred before Kansas Supreme Court cases put prosecutor's on notice that such statements were improper. Three uses of "we know" were error, even if the inferences being drawn were reasonable, but these errors were harmless beyond a reasonable doubt.

King failed to request a severance before or during trial, did not object to the codefendant's closing argument statements, and first asked for severance in his motion for a new trial. By failing to comply with K.S.A. 22-3204, King waived his ability to seek severance.

Aggregate effect of the three harmless prosecutorial errors found in this case were harmless beyond a reasonable doubt.

STATUTES: K.S.A. 2017 Supp. 22-3601(b)(3); K.S.A. 2014 Supp. 21-5302(a); K.S.A. 22-3202(3), -3204

**CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—FOURTH AMENDMENT—SEARCH AND SEIZURE STATE V. LOWERY**

**GEARY DISTRICT COURT—AFFIRMED COURT OF APPEALS—AFFIRMED NO. 116,637—JUNE 22, 2018**

FACTS: Officer stopped car driven by Lowery for following another vehicle too closely. While in patrol car awaiting issuance of a citation, officer questioned Lowery about his travel plans for over six minutes before calling dispatch with license and registration information. Officer issued the citation, told Lowery he was free to go, and then asked if Lowery had anything illegal in car. Lowery said "no" and refused to consent to search. Lowery held until drug dog arrived and alerted on the car. State then charged Lowery with crimes based on drug-related evidence discovered in the car. He filed motion to suppress which the district court granted, finding in part the lawful stop ended when officer gave Lowery a warning citation and told him he was free to leave, a consensual encounter then occurred but quickly ended when officer told Lowery to sit down inside the police car, and there was no probable cause to justify the vehicle search. State filed interlocutory appeal. Court of Appeals affirmed in unpublished opinion, finding officer lacked reasonable suspicion to extend the stop. State's petition for review granted.

ISSUE: Fourth Amendment—traffic stop

HELD: Fourth Amendment jurisprudence relating to traffic stops, as set forth in Rodríguez v. United States, 575 U.S. __, 125 S.Ct. 1609 (2015), was explained and applied in State v. Jimenez (decided this same date) and State v. Schoeller (decided this same date). During a stop an officer may not conduct nonconsensual inquiries unrelated to the mission in a way that prolongs the stop—without the reasonable suspicion ordinarily demanded to justify detaining an individual. The present case centers on the lawfulness of Lowery's detention. Circumstances cited by the state as favoring reasonable suspicion include nervousness, inconsistent travel plan statements, operating a third-party vehicle, traveling to Colorado, the vehicle's recent presence in Missouri, and the officer's online research of airline fares. Each is specifically examined, finding as a whole the officer did not have reasonable suspicion to detain Lowery after the traffic stop. Affirmed.

CONCURRENCE (Johnson, J.): Concurs with majority's result, but does not join majority's observation that it perceived no impermissible detention stemming from the officer's travel plan inquiries. This did nothing to further resolution of the question framed by the majority, and should have no precedential effect with respect to the propriety of travel plan inquiries.

STATUTES: K.S.A. 2017 Supp. 22-3603; K.S.A. 2014 Supp. 21-5716(b), -5716(c); K.S.A. 20-3018(b), 22-3216(2), 60-2101(b)

**CRIMINAL LAW—JURY INSTRUCTIONS PROSECUTORS STATE V. NESBITT**

**SEDGWICK DISTRICT COURT—AFFIRMED NO. 116,550—JUNE 1, 2018**

FACTS: Nesbitt convicted of felony murder, rape, and aggravated burglary. The crimes arose from a violent attack on a 100-year-old victim in her home, and the victim's subsequent death. On appeal Nesbitt claimed: (1) insufficient evidence supported his felony murder conviction because the victim's death 21 days later was not within the *res gestae* of the underlying felony of rape, and no direct causal
connection between the rape and the victim's death; (2) insufficient evidence supported his aggravated burglary conviction because no evidence that he entered the home to commit rape; (3) prosecutor's reference in closing argument to victim as a family "treasure" was improper attempt to inflame the passions of the jury; (4) trial judge erred by refusing to give a defense-proposed instruction on a race-switching exercise; and (5) cumulative error denied him a fair trial.

ISSUES: (1) Sufficiency of the evidence—felony murder, (2) sufficiency of the evidence - aggravated burglary, (3) prosecutorial error, (4) race-switching instruction, (5) cumulative error

HELD: No legal merit to Nesbitt's res gestae argument. Sufficient evidence supported Nesbitt's conviction on felony murder, including the foreseeability of a rape victim's death 21 days after the attack, when injuries the victim suffered caused pain that immobilized her, giving rise to the development of fatal blood clots.

Sufficient evidence supported jury's verdict that rape, not theft, was the attacker's goal on entering the home. Victim's house was tidy and orderly but for the mutilated back door through which the attacker entered and the disorganized bedroom where the rape occurred. Nothing to indicate someone entered the house to commit theft—nothing was missing or moved, including valuable items in plain view.

Prosecutor's challenged remarks were improper, with no purpose other than inflaming passions of jurors, but under facts in case no reversible error.

No Kansas case found in which the proposed race-switching instruction has been given. Federal and state court cases are reviewed, with majority rejecting the instruction. Here, the proposed instruction was not legally appropriate under Kansas law, thus district court judge did not err in refusing to give it.

The single error found in this case does not support a cumulative error claim.


APPEALS—CRIMINAL PROCEDURE—MOTIONS

STATUTES

RENO DISTRICT COURT—AFFIRMED

NO. 116,172—JUNE 1, 2018

FACTS: Parks convicted in 1997 of the 1978 premeditated first-degree murder of his wife. State v. Parks, 265 Kan. 644 (1998). Over 16 years later, Parks filed pro se "Motion to Set Aside a Void Judgment," claiming his no contest plea was not knowing and intelligent. Appointed counsel argued the motion should be treated as one to withdraw Parks' plea. District court agreed and denied the motion, finding it untimely with no showing of excusable neglect for the delay. Parks appealed, arguing for first time that district court should have construed the pro se motion as one under K.S.A. 60-1507 that would have been timely under the manifest injustice exception.

ISSUE: Motion to withdraw plea

HELD: Under facts in the case, invited error doctrine applies where Parks repeatedly invited district court to construe a pro se motion as a motion to withdraw plea. Argument that the district court should have construed and treated Parks' motion as a K.S.A. 60-1507 motion is rejected. District court correctly held the motion was untimely filed. Parks failed to meet his burden of demonstrat-
**FELONY MURDER—JURY INSTRUCTION**  
**STATE V. ROBINSON**  
**DOUGLAS DISTRICT COURT—AFFIRMED NO. 115,483—JUNE 29, 2018**

FACTS: Robinson and his cousin were charged with the murder of an associate. A witness at the scene identified the cousin as the shooter, but both the cousin and Robinson were charged with aggravated burglary and felony murder. Robinson was convicted as charged and this appeal followed.

ISSUES: (1) Sufficiency of the evidence; (2) adequacy of jury instruction

HELD: Under the felony-murder statute, the State did not have to prove that Robinson was the triggerman. Rather, the State has to prove that Robinson acted as a principal in the crime which resulted in a death. The identity of the shooter was irrelevant. The State was only required to prove that one participant fired the gun. The jury instruction appropriately communicated that fact. And any error in the specific wording of the instruction was harmless.

STATUTES: K.S.A. 2016 Supp. 21-5402; K.S.A. 22-3201, -3201(f)

**CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—FOURTH AMENDMENT—SEARCH AND SEIZURE**  
**STATE V. SCHOOLER**  
**GEARY DISTRICT COURT—REVERSED AND REMANDED—COURT OF APPEALS—REVERSED NO. 116,636—JUNE 22, 2018**

FACTS: Officer stopped car for a partially obscured license plate. While driver sat in the patrol car, officer questioned him about travel plans and texted for a drug dog based on evidence observed in the car and Schooler’s responses. Seventeen minutes into the stop, officer issued a warning ticket, told Schooler he was “good to go,” and then asked if Schooler had contraband, large amounts of currency, or firearms in the vehicle. Schooler said “no” and denied officer’s request to search the truck. Following a dog alert, marijuana and scales found. Schooler arrested and charged with narcotics offenses.

He moved to suppress the marijuana and other evidence, arguing delays in calling for checks on license and rental documents resulted from questioning unrelated to the stop and were unsupported by reasonable suspicion to detain him after he was advised he was free to go. District court granted the motion, finding the detention was unlawful when officer exceeded the reason for the stop without reasonable suspicion of other crimes; finding Schooler’s responses did not provide reasonable suspicion to detain him after issuing a warning ticket and advising he was free to leave; and officer had no reasonable suspicion to detain Schooler while waiting for drug dog. State filed interlocutory appeal. In unpublished opinion, Court of Appeals affirmed the district court’s decision. State’s petition for review granted.

ISSUE: Fourth Amendment - traffic stop

HELD: Holding in State v. Jimenez, (decided this same date) is discussed. Under circumstances in this case, the officer’s progressive questioning did not impermissibly extend the stop. Up to the time the officer advised Schooler of his detention the officer was continuously engaged with Schooler as the officer processed the traffic stop while trying to satisfy his suspicions about the conflicts in what he was observing and being told. When officer advised Schooler he was being detained, the officer had an objectively reasonable, articulable suspicion of wrongdoing to justify detention for the dog sniff. Court discusses cited circumstances in this case which included: air freshener odor; multiple cell phones; Schooler’s vague, evasive and inconsistent statements about his travel plans and criminal history; and his actual criminal history. Lower courts are reversed and case is remanded.

CONCURRENCE (Rosen, J., joined by Beier and Johnson, JJ.): Concurs with majority’s reasoning and conclusion, but cautions law enforcement officers against using the promise of freedom in any attempt to circumvent constitutional protections. Here, when officer told Schooler he was free to leave, reasonable suspicion was already present and officer had no intention of letting Schooler depart. This specific technique reeks of fraud or coercion.

STATUTES: K.S.A. 2017 Supp. 21-5705(a), 22-3603; K.S.A. 20-3018(b), 22-3216(2), 60-2101(b), 79-5208

**CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—CRIMINAL LAW—DEATH PENALTY—EVIDENCE JURIES—STATUTES—VENUE**  
**STATE V. THURBER**  
**COWLEY DISTRICT COURT—AFFIRMED IN PART—REVERSED IN PART—REMANDED NO. 102,605—JUNE 15, 2018**

FACTS: Thurber was charged with crimes arising from the 2007 death of a 19-year old victim. State filed notice of intent to seek the death penalty based on single aggravating circumstance the murder was committed in an especially heinous, atrocious, or cruel manner. Jury convicted Thurber of aggravated kidnapping, and capital murder based on combined theories of attempted rape and aggravated criminal sodomy. It also sentenced him to death. At 2009 sentencing hearing, district court found insufficient reason in the mitigation evidence to grant Thurber’s motion for a determination of intellectual disability. Thurber appealed claiming: (1) district court erred by admitting statement Thurber made after reinitiating contact with law enforcement after previously invoking right to an attorney; (2) prosecutorial error in guilt phase by providing jury with “imaginary script” during opening and closing arguments, telling jury the prosecutor was personally responsible for the case and Attorney General had determined death was the appropriate sentence, and stating premeditation could be “instantaneous;” (3) jury was not instructed it must be unanimous as to whether capital murder was based on attempted rape or aggravated criminal sodomy; (4) district court erred by denying challenges for cause during voir dire of two seated jurors; (5) insufficient evidence supported the oral verdict when bailiff misread the verdict form to incorrectly say “criminal sodomy” instead of “aggravated criminal sodomy” as the crime underlying capital murder; (6) testimony of six women who had previous encounters with Thurber should not have been admitted because it constituted improper character evidence or inadmissible prior crimes evidence; (7) witness identification for first witness was not proper; and (8) admission of victim’s mother’s testimony concerning personal details of victim’s life, including antemortem photographs of the victim; (9) district court erred by not sua sponte instructing jury on felony murder as a lesser included offense of capital murder; (10) district court’s denial of motion filed prior to voir dire to change venue violated Thurber’s Sixth Amendment right to an impartial jury; and (11) he was denied his constitutional right to be present at all critical stages of his criminal trial when district court on first day of guilt phase excused a juror who became ill and replaced that juror with first alternate juror without advising Thurber. Court also considers whether cumulative
error denied Thurber a fair trial during the guilt phase. Concerning the penalty-phase proceedings, Thurber claimed in part the district court erred by denying his presentencing request for a hearing on whether he was intellectually disabled, as required by Atkins v. Virginia, 536 U.S. 304 (2002), and he attacked the Kansas statutory test for making such decisions.

ISSUES: (1) Invocation of right to counsel, (2) prosecutorial error, (3) multiple acts, (4) jurors challenged for cause; (5) sufficiency of evidence supporting the oral verdict, (6) character and prior crime evidence, (7) first time in-court witness identification, (8) victim's good character evidence, (9) felony murder as lesser included offense, (10) change of venue, (11) lack of presence when juror excused, (12) guilt-phase cumulative error, (13) penalty phase denial of hearing on intellectual disability, (14) constitutionality of statutory test for determining if a defendant is intellectually disabled

HELD: District court erred by admitting Thurber's statement to law enforcement. Applying rule in Edwards v. Arizona, 451 U.S. 477 (1981), Thurber reinitiated communication with a desire to talk about something other than the investigation. Under facts in case, however, this error was harmless in determining Thurber's guilt.

All allegations of prosecutorial error are examined, identifying specific missteps that were harmless under the facts in this case.

Jury unanimity not required because this was not a multiple acts case. Attempted rape and aggravated criminal sodomy were alternative means of committing capital murder.

Voir dire questioning of the two seated jurors is examined, discussing juror impartiality against Eighth Amendment standard, and reviewing juror's acquaintances with victim's friends and financial hardship. No abuse of discretion found in district court's denial of motions to strike.

No Kansas case has addressed whether the oral or written verdict controls. Absent strong indication the oral pronouncement better reflects the jury's will, the jury's written verdict controls. Under circumstances in this case, the written verdict clearly reflects the jury's intent.

The women's testimony demonstrated behavioral patterns rather than a particular character trait as contemplated by K.S.A. 60-447. Also, K.S.A. 60-455 did not bar admission because the testimony was not evidence of prior criminal conduct or civil wrongs. Court refuses to adopt rule barring evidence in guilt phase that would not be relevant in sentencing.

Court has not addressed whether a first time, in-court identification following an out-of-court failure to identify needs to be tested against reliability factors applicable in the traditional second prong of the out-of-court eyewitness identification analysis. Split of other jurisdictions noted. Under assumed error on facts of case, no reasonable possibility the verdict would have been different without the witness' in-court identification.

No abuse of district court's discretion found. College dance scholarship evidence was relevant and probative. Additional detail of victim as high school valedictorian was extraneous but not a detail that would inflame jury passions or prejudices. Photographs was probative of victim identity, an element of the crime charged. And previous court opinions have allowed antemortem photographic evidence.

Under K.S.A. 2016 Supp. 21-5402(d), felony murder is not a lesser included offense of capital murder.

Claim that trial's venue was constitutionally inappropriate due to presumed prejudice is rejected. Applying seven factors in Skilling v. United States, 561 U.S. 358 (2010), to Thurber's venue challenge based on community prejudice, only one factor weighs in favor of presumed prejudice, four weigh against it, one factor is inapplicable, and one factor is neutral.

Under facts of case, assumed error including failure to follow replacement procedure under K.S.A. 22-3412(c), was harmless.

Cumulative error did not substantially prejudice Thurber or deny him a fair trial during the guilt-phase proceedings. Thurber's convictions are affirmed.

Opinion discusses history of U.S. Supreme Court's development of constitutional standard for determining whether a defendant is intellectually disabled (previously termed as "mentally retarded"), and of Kansas legislative responses. Review of district court's 2009 determination in this not-yet-final criminal prosecution requires application of current constitutional standards and state statutes. K.S.A. 2016 Supp. 21-6622(h) is unconstitutional as it pertains to the incapacity limitation, but that incapacity language is severable. K.S.A. 2016 Supp. 76-12b01(i) allows criminal defendants to establish sub-average general intellectual functioning by means in addition to standardized intellectual testing. Understood for Eighth Amendment purposes in a manner compatible with federal caselaw, this means the statute's requirements are to be informed by—and cannot disregard—the clinical definition for intellectual disability currently used in the medical community, as recited in the caselaw. Under the unique circumstances of this case and the limited facts available for appellate review, remand is necessary. District court must reexamine Thurber's motion based on applicable caselaw, current statutes, and current diagnostic framework used by medical community for determining intellectual disability. Thurber is not entitled to have his death sentence automatically converted to a life sentence due to the constitutional infirmity identified in K.S.A. 2016 Supp. 21-6622(h). Court retains jurisdiction over the remainder of Thurber's penalty-phase appeal pending notification regarding outcome on remand.

DISSENT (Rosen, J.): Disagrees with majority's decision to remand. The questions are neither so unique nor facts so limited that the outcome of that remand cannot be determined with sufficient certitude. Would uphold the district judge's determination and proceed to important penalty phase issues without unnecessary delay.

DISSENT (Johnson, J.): With respect to the guilt phase, agrees with errors identified by the majority, but discards more error. Prosecutor's use of an imaginary script was intolerable; district court's rehabilitative coaching of mitigation-impaired venire person undermined the fairness of the jury; a cautionary jury instruction on eyewitness testimony was legally appropriate and it was error not to give one; photograph of victim had zero probative value because element to be proved was the killing of a human being who could have been unidentified; in light of community survey results, fundamental fairness calls for change of venue. With respect to the penalty phase, majority’s order remand is unnecessary and faulty. Would reverse Thurber's death sentence and remand for resentencing to life in prison without possibility of parole.

STATUTES: K.S.A. 2016 Supp. 21-5402(d), -6619(a), -6619(b), -6622, -6622(a), -6622(b), -6622(c), -6622(f), -6622(h), 76-12b01, -12b01(a), -12b01(d), -12b01(i); K.S.A. 2015 Supp. 21-6619(b), -6622(b); K.S.A. 2013 Supp. 76-12b01(i); K.S.A. 21-3438(a), -3439(a)(4), -3505(a), -4623, -4623(a), -4623(e), -4624, -4624(a), -4625(b), -4626(b), -4627(b), -4629, -4634, -4634(e), -4634(f), -22-2616(1), -3405(a), -3410(2)(l), -3412(c), 3421, 60-404, -407(f), -446, -447, -455, 76-12b01, -12b01(i)
**CONSTITUTIONAL LAW—FOURTH AMENDMENT—SEARCH AND SEIZURE—STATUTES**

**STATE V. TOLIVER**

**RILEY DISTRICT COURT—AFFIRMED**

**COURT OF APPEALS—REVERSED**

**NO. 111,897—MAY 18, 2018**

FACTS: Parole officer and others including law enforcement detectives arrested Toliver for possession of marijuana found during a “home visit” at Toliver’s residence. Toliver filed unsuccessful motion to suppress the marijuana. Court of Appeals reversed that decision. State v. Toliver, 52 Kan.App.2d 344 (2016). Panel majority invalidated the parole agreement, finding the condition in Toliver’s signed agreement allowing such searches was not authorized by Kansas law as required by State v. Bennett, 288 Kan. 86 (2009), and holding the search violated the Fourth Amendment. State’s petition for review granted.

ISSUE: Fourth Amendment—suspicion-less search of parolee

HELD: Under facts in this case, the warrantless and suspicionless search of Toliver’s home did not violate his federal or state constitutional rights. Holding in Bennett is clarified to comport with United States Supreme Court caselaw. An authorizing state statute or administrative regulation presents one of the ways a suspicionless search can withstand Fourth Amendment scrutiny. Under United States v. Knights, 534 U.S. 112 (2001), a parole or probation condition in a signed agreement can also establish a diminished privacy right. Applying a totality of the circumstances analysis, Toliver’s signed parole agreement alone supports the parole officer’s suspicionless search. Court of Appeals is reversed. District court’s decision and Toliver’s conviction are affirmed.


**SEARCH AND SEIZURE**

**STATE V. TORRES**

**LYON DISTRICT COURT—COURT OF APPEALS IS AFFIRMED**

**DISTRICT COURT IS AFFIRMED**

**NO. 114,269—JULY 5, 2018**

FACTS: After using his cell phone to make the arrangements, Torres was arrested after he conducted a drug deal with a confidential informant. After the deal was done, officers watched Torres enter an apartment. He only stayed for a few minutes, then left in a car. Law enforcement initiated a traffic stop. A plain-view examination of the car revealed cash, which was verified as money involved in the drug buy. Torres was arrested and later convicted of distribution of methamphetamine and unlawful use of a communication device. The Court of Appeals affirmed his conviction and Torres’ petition for review was granted.

ISSUES: (1) Motion to suppress; (2) sufficiency of the evidence

HELD: Under Gant, the search of Torres’ car was lawful because the officer had a reasonable basis to believe the car contained evidence of Torres’ crime. The search was allowable as incident to a lawful arrest. Torres’ complaint about sufficiency is really about venue. The confidential informant’s location was known when he initiated a call with Torres, and the drug deal occurred within the county where charged were filed.

STATUTE: K.S.A. 2017 Supp. 21-5705(a)(1)

**JUDICIAL MISCONDUCT—SEARCH AND SEIZURE—TRIAL ERRORS**

**STATE V. WALKER**

**DOUGLAS DISTRICT COURT—AFFIRMED**

**NO. 116,174—JUNE 29, 2018**

FACTS: Walker and his cousin were charged with aggravated burglary and felony murder after an associate was shot and killed. Eyewitnesses at the scene tentatively identified Walker as the shooter, but the story later changed to finger the cousin. Physical evidence placed Walker at the scene. At his first trial, the jury convicted Walker for aggravated battery but could not reach a verdict on the felony-murder charge. A second trial produced the same result, but Walker was convicted after a third trial. This appeal followed.

ISSUES: (1) Right to be present; (2) error to destroy juror notes; (3) error to admit evidence of custodial interview; (4) response to jury question

HELD: The trial judge violated Walker’s constitutional rights by meeting with two jurors outside of his presence. But under the federal constitutional error standard, the error was harmless. The ex parte communication concerned no critical matter and the strength of the evidence supported the verdict and excused the error. The trial judge shredded notes from a prior juror that were discovered by a current juror and reported. That act by the judge did not show partiality and any error was purged by subsequent actions. The act of shredding the notes was not judicial misconduct. Neither the length of the custodial interview nor the accusatory tone of law enforcement rendered Walker’s statements involuntary. The district court did not err by refusing to respond to a jury question by giving an aiding and abetting instruction. That instruction would have been legally inappropriate.

STATUTE: K.S.A. 2013 Supp. 21-5402(a)(2), 5807(b)

**CAUSATION**

**STATE V. WILSON**

**RILEY DISTRICT COURT—AFFIRMED**

**NO. 115,435—JULY 6, 2018**

FACTS: Wilson met his apartment neighbors in a hallway and started shooting. He then shot his way in to the apartment across the hall. A resident of that apartment got his own handgun, then mistakenly shot and killed his roommate after assuming he was Wilson. Wilson was charged with first-degree murder for that death. He pled no contest and his sentence was affirmed on direct appeal. Wilson later moved to withdraw his no contest plea. That motion was summarily denied and Wilson appealed.

ISSUES: (1) Factual basis for plea

HELD: Because Wilson moved to withdraw his plea post-sentence, the manifest injustice standard applies. In order to succeed on appeal, Wilson must prove that there was no factual basis for the plea. The question is not whether Wilson shot the victim, but whether Wilson’s actions caused the victim’s death. Here, Wilson was criminally liable for that death unless an unforeseeable event superseded his act and became the sole cause of death. That is not the case here. The second shot from the apartment dweller was completely foreseeable, rendering Wilson criminally liable for the death.

Civil

GRAND JURIES—STATUTORY INTERPRETATION
IN RE GRAND JURY PETITION OF DAVIS
DOUGLAS DISTRICT COURT—REVERSED AND
REMANDED
NO. 118,410—JUNE 8, 2018

FACTS: Stephen Davis filed a petition to summon a grand jury. He claimed that Secretary of State Kris Kobach committed various election-related crimes. The county clerk verified that Davis collected enough signatures. But the district court dismissed the petition without prejudice, finding that it did not contain allegations of specific facts that would warrant a finding that the inquiry might lead to information which, if true, would warrant a true bill of indictment. David appealed.

ISSUES: (1) Directory versus mandatory language; (2) specificity requirement; (3) sufficiency of petition

HELD: K.S.A. 2017 Supp. 22-3001(c)(1) provides that a petition for grand jury shall state the subject matter of the prospective grand jury. Despite the use of the word "shall", that language is mandatory and not directory. The plain statutory language does not require that the petitioner make allegations of specific facts; rather, the threshold for making "sufficient general allegations" is low. Davis' petition alleges facts which track the election crimes as established by statute, in much the same way as a charging document. A grand jury petition does not require pleadings sufficient enough to allow for a defense, since there is no defense lodged against a grand jury inquiry.


REVERSE MORTGAGE SOLUTIONS V . GOLDWYN
RILEY DISTRICT COURT—AFFIRMED
NO. 118,370—JULY 6, 2018

FACTS: Goldwyn’s mother took out a reverse mortgage in 2007. The reverse mortgage allowed Goldwyn’s mother to use her home as collateral and take out loans up to the value of the home. After the mother’s death, Goldwyn became the homeowner. But the reverse mortgage lender opted to make the balance due. Goldwyn did not pay that balance, and the lender initiated a foreclosure judgment. The suit was an in rem action against the property, and Goldwyn had no liability to cover an arrearage with her other assets. A prior appeal confirmed the propriety of the foreclosure judgment. Goldwyn now appeals the district court’s approval of the sheriff’s sale.

ISSUES: (1) Amount of the sheriff’s sale; (2) timing of the sheriff’s sale; (3) length of redemption period; (4) process of approval

HELD: The bid made at the sheriff’s sale was not substantially inadequate, as it came at 86% of the total judgment. Due to the in rem nature of the proceedings, there was no deficiency judgment; because of this, district courts may have more leeway to approve the sheriff’s sale in a reverse mortgage action. The district court should have waited to allow a response to the motion to confirm the sheriff’s sale. But the error was harmless, especially because the district court eventually held a hearing on Goldwyn’s motion to reconsider. The redemption period was properly set at three months by statute. The foreclosure notice was properly published in the correct newspaper.

STATUTES: K.S.A. 2017 Supp. 60-205(a)(1)(D), -261, -2414(a), -2414(m); K.S.A. 60-2410(a), -2415, -2415(a), -2415(b)

CONSTITUTIONAL LAW—WRONGFUL BIRTH
TILLMAN V. GOODPASTURE
RILEY DISTRICT COURT—AFFIRMED
NO. 117,439—JUNE 15, 2018

FACTS: Tillman filed a tort claim for wrongful birth after Dr. Goodpasture failed to diagnose several structural abnormalities in her baby’s brain. The baby was born with severe and permanent neurological impairments. In bringing suit, Tillman claimed that K.S.A. 2013 Supp. 60-1906 – the statute which bars a cause of action for wrongful birth – violates Sections 5 and 18 of the Kansas Bill of Rights. In addition to monetary damages, Tillman wanted a declaration that the statute is unconstitutional. Dr. Goodpasture’s motion for judgment on the pleadings was granted after the district court determined that the tort of wrongful birth did not exist at the time the Kansas Constitution was adopted. Tillman appeals.

ISSUES: (1) Constitutionality of statute under the Section 5 of the Bill of Rights; (2) constitutionality under Section 18 of the Bill of Rights

HELD: Section 5 of the Bill of Rights preserves the right to a jury trial for causes of action that existed when our Constitution was adopted. The tort of wrongful birth was first recognized in 1990, and at that time it was recognized as a new cause of action with unique elements, separate from the general tort of medical malpractice. Section 18 similarly applies only to causes of action that existed in 1859.

STATUTES: Kansas Constitution Bill of Rights Section 5, Section 18; K.S.A. 2013 Supp. 60-1906, -1906(a)

CONSENT—DUI—EVIDENCE
FORREST V. KANSAS DEPARTMENT OF REVENUE
RUSSELL DISTRICT COURT—REVERSED AND
REMANDED
NO. 118,154—JULY 6, 2018

FACTS: Law enforcement came upon Forrest’s vehicle stopped in the middle of the road. Continued monitoring revealed Forrest committing several more traffic infractions. After he was stopped, Forrest voluntarily exited his vehicle. Law enforcement immediately smelled alcohol and noted slurred speech. A cursory look at Forrest’s vehicle showed an open beer can. Forrest performed poorly on the field sobriety tests, but he initially refused to submit to a PMT. Forrest eventually complied, and the results showed that he was intoxicated. As a result, his driver’s license was suspended. After Forrest filed a petition for judicial review, the district court determined that
law enforcement only observed one minor traffic violation and that Forrest’s knee problems explained his poor performance on the field sobriety tests. After finding that law enforcement lacked reasonable grounds to ask for a breath test, the district court reversed the suspension of Forrest’s driver’s license. The Department of Revenue appealed.

ISSUES: (1) Reasonable grounds to request a breath test

HELD: The record shows that law enforcement watched Forrest commit multiple traffic infractions. His breath smelled of alcohol, he had slurred speech, he admitted to consuming alcohol, there was an open beer can in the car, and he performed poorly on the field sobriety tests. In ruling that the officer lacked reasonable grounds to request a breath test, the district court improperly ignored substantial uncontroverted evidence supporting such a request. The district court erred and the case must be remanded for further proceedings.

STATUTE: K.S.A. 2017 Supp. 8-259(a), -1001(a), -1001(b), 77-621(a)(1)

DUI—SEARCH AND SEIZURE
CITY OF LEAWOOD V. PUCCINELLI
JONATHAN DISTRICT COURT—AFFIRMED NO. 118,165—JUNE 22, 2018

FACTS: After being pulled over by a police officer, Puccinelli failed initial sobriety tests. After being ordered out of the car, Puccinelli was asked to perform the HGN test, the walk and turn test, and the one-leg stand test. Puccinelli either failed or refused to perform all three tests, and the officer noted Puccinelli’s bloodshot eyes and an odor of alcohol. After being taken into custody, Puccinelli refused to take either a blood or breath alcohol test, and he was charged with DUI. At a hearing, Puccinelli asked that the court suppress the results of the field sobriety testing. The motion was denied. Puccinelli was convicted and he appealed.

ISSUES: (1) Suppression of field sobriety tests; (2) use of HGN test

HELD: Field sobriety tests are not searches under the Fourth Amendment, and there is evidence that Puccinelli voluntarily submitted to the field sobriety tests. The state did not attempt to admit the results of HGN testing. Rather, there was an attempt to show Puccinelli’s behavior during the test instructions. That behavior was relevant to show inebriation and was properly admitted.

CONCURRENCE: (Schroeder, J.) Prosecutors are cautioned against the broad use of videotape of an HGN test. The safer course of action would be to redact that test from a video before it is shown to a jury.

STATUTE: Kansas Constitution Bill of Rights § 15

FEDERAL PREEMPTION—WORKERS COMPENSATION
EAGLEMED V. TRAVELERS INSURANCE
WORKERS COMPENSATION BOARD—AFFIRMED IN PART
REVERSED IN PART—REMANDED
NO. 117,903—JUNE 15, 2018

FACTS: EagleMed is a company which provides air ambulance transport. In four workers compensation cases, EagleMed was called upon to fly injured workers from rural hospitals to bigger care centers in Wichita or Garden City. In each case, Travelers provided workers compensation insurance coverage for the employer. After receiving invoices from EagleMed, Travelers objected and offered to make a lower payment based on the Medicare fee schedule that is used for air transport services. After the offer was rejected, EagleMed initiated a fee dispute proceeding with the director of Workers Compensation. It was undisputed that the federal Airline Deregulation Act of 1978 pre-empts any state law as it relates to setting air transport pricing. But the parties disagree about the scope of that pre-emption. The hearing officer ultimately concluded that the Division of Workers Compensation has no authority to set rates for payment for air ambulance services. The board ultimately ordered Travelers to pay the full amount billed by EagleMed. Travelers appealed.

ISSUE: (1) Federal preemption

HELD: The Supremacy Clause invalidates state laws which interfere with or are contrary to federal law. Pre-emption is either express or implied. The ADA expressly preempts states from making any law which affects air pricing. Because EagleMed is an air carrier, the ADA pre-emption provision broadly applies to the fee dispute it has with Travelers. The workers compensation fee schedule does not provide any guidance on what usual and customary fees are for air ambulance services, and setting those fees would be preempted by the ADA. Any question about the reasonableness of air ambulance fees must be addressed to federal authorities. The fee dispute must be dismissed by the Division of Workers Compensation.


AGENCY ACTION—WORKERS COMPENSATION
PIERSON V. CITY OF TOPEKA
WORKERS COMPENSATION BOARD—AFFIRMED IN PART—REVERSED IN PART—DISMISSED IN PART—REMANDED
NO. 117,987—JUNE 15, 2018

FACTS: Pierson was injured in September 2012 and immediately began treatment for his injuries. Pierson’s workers compensation claim was denied. The ALJ found that Pierson’s injury was compensable under workers compensation and that he had a 15 percent permanent partial impairment rating. The city appealed. The board agreed that Pierson’s injuries were compensable and affirmed the impairment rating, but it found that any medical treatment Pierson received prior to October 8, 2012, was unauthorized. The city appealed and the board’s findings were affirmed. While that first appeal was pending, Pierson filed an application for modification of medical benefits seeking post-award medical benefits. After he did not receive payment, Pierson filed a demand for payment plus requested penalties. The board ordered the city to pay post-award medical expenses and remanded the case back to the ALJ for further factfinding. The city appealed the award of pre-award medical expenses. Pierson cross-appealed the board’s rulings on attorney fees and penalties.

ISSUES: (1) Jurisdiction over pre-award medical expenses; (2) law of the case; (3) date of post-award compensation; (4) penalties and attorney fees

HELD: The board’s remand on the issue of Pierson’s pre-award medical expenses was a non-final agency action. The court does not have jurisdiction to review non-final agency action, and the city’s appeal is dismissed as premature. The current appeal, as it relates to Pierson’s post-award medical expenses, is new and is not barred by the law of the case doctrine. Pierson’s application for post-award
medical treatment was insufficient and lacked enough detail to serve as a request for post-award treatment. The date set by the board was erroneous. Pierson’s initial demand for payment lacked particularity and did not provide supporting documents. Because of these deficiencies, the board properly denied Pierson’s request for penalties. The board erred by arbitrarily setting an hourly attorney fee amount. This case must be remanded for proper consideration of attorney fees. Pierson is not entitled to appellate attorney fees.

STATUTES: K.S.A. 2017 Supp. 44-510j(h), -510k(a)(1), -510k(b), -536(b), -536(g), -556(a), 77-621(c)(7); K.S.A. 44-512a, 77-607(a), -607(b)(1), -607(b)(2)

DUE PROCESS—WORKERS COMPENSATION
PARDO V. UNITED PARCEL SERVICE
WORKERS COMPENSATION BOARD—REVERSED AND REMANDED
NO. 116,842—JUNE 1, 2018

FACTS: Pardo is a long-term employee of UPS, and he continues to work there to this day. Pardo injured his shoulder in 2013 during the course of his employment. The injury was surgically repaired and the parties agreed to a 15% permanent partial impairment rating. Pardo injured his left shoulder again in 2015 while at work. Surgery revealed a new injury. It was treated and Pardo returned to work, but he continued to have pain and a limited range of motion. All of the physicians who examined Pardo agreed that he had residual issues with the shoulder that warranted both future medical treatment and an impairment rating. An amendment to K.S.A. 2014 Supp. 44-510d(b)(23) required the physicians to consult the American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition, which allows for only one lifetime impairment rating with no exception made for a physician’s skill, experience, expertise, training, or judgment. Based on that decree, Pardo was assigned a zero percent impairment rating. The ALJ denied Pardo’s request for compensation. That finding was affirmed by the Board, and Pardo appealed.


HELD: UPS provided no evidence to prove that the change from the 4th edition of the AMA Guides to the 6th edition was reasonably necessary to promote the general welfare of the people of Kansas. But the State did prove that the amendment was made because the 6th edition is more medically sound than the 4th edition. Under the Workers Compensation Act, Pardo surrendered his right to seek a common-law award from his employer. When the 6th edition of the Guides is used, Pardo gets nothing in return for that surrender. This leaves Pardo with no remedy and renders K.S.A. 2014 Supp. 44-510d(b)(23) unconstitutional as applied to him. The remedy is to sever the portion of the statute that is unconstitutional as applied to Pardo. The case is remanded for further proceedings.

STATUTES: Kansas Constitution Bill of Rights, § 1, §18, Article 2; § 1, Article 3; § 1; K.S.A. 2014 Supp. 44-501(e), -501b(d), -510d(b)(23); K.S.A. 44-574(b)

ATTORNEY FEES—GRANDPARENT VISITATION
IN RE PATERNITY OF M.V.
RENO DISTRICT COURT—REVERSED AND REMANDED
NO. 118,189—JUNE 1, 2018

FACTS: Father’s paternity was established in 2009. Over the years, mother and father had many disagreements about custody, parenting time, and child support. In 2017, the paternal grandmother filed a motion requesting grandparent visitation of one weekend per month. Mother objected and asked for attorney fees, claiming that no provision in the Kansas Parentage Act allows for grandparent visitation. After a hearing, the district court concluded that M.V. had a substantial relationship with grandmother and that visitation was in her best interests. The district court granted visitation using grandmother’s proposed schedule and denied mother’s request for attorney fees. Mother asked the district court to reconsider and proposed a once-per-month visit of five hours, versus an entire weekend. Mother based this request on the fact that grandmother had an unknown man living with her and because grandmother took M.V. to visit father in jail, even though father was facing child sex abuse charges and the visits violated a court order. The district court denied reconsideration and mother appealed.

ISSUES: (1) Due process violation; (2) attorney fees

HELD: Grandmother does have the right to seek visitation in the context of a paternity action. And grandmother satisfied her burden to prove that there was a substantial relationship and that visitation was in M.V.’s best interests. But in any grandparent visitation action, the district court must presume that a fit parent is acting in the child’s best interests and must give special weight to the parent’s proposed visitation schedule. There is no indication in this case that the district court ever properly evaluated mother’s proposed schedule. This case must be remanded in order to allow the district court to make all necessary findings about mother’s proposed schedule, which cannot be rejected unless it is found to be unreasonable. On remand, the district court must also follow the statute when evaluating mother’s request for attorney fees.

STATUTE: K.S.A. 2017 Supp. 23-3301, -3301(b), -3304

CRIMINAL PROCEDURE—JURY INSTRUCTIONS—
STATUTES
STATE V. GREEN
SALINE DISTRICT COURT—AFFIRMED
NO. 116,635—MAY 18, 2018

FACTS: Jury convicted Green of crimes including aggravated battery. On appeal, Green claimed the district court erred by (1) providing an erroneous jury instruction on knowing aggravated battery, (2) not instructing on the lesser included offense of reckless aggravated battery, and (3) giving a burden of proof instruction that improperly discouraged the jury from exercising its power of nullification. He also challenged the district court’s use of Green’s prior convictions in calculating Green’s criminal history for sentencing.

ISSUES: (1) Jury instruction—knowing aggravated battery, (2) jury instruction—lesser included offense, (3) jury instruction—burden of proof and power of nullification, (4) sentencing

HELD: Pattern instruction that corresponds to K.S.A. 2017 Supp. 21-5413(b)(1)(C) is examined, finding modification of PIK Crim. 4th 54.310 is warranted to match the statutory definition of knowing aggravated battery. There is no clear error in the district court’s legally appropriate instruction on knowing aggravated battery.
An instruction on the lesser included crime of reckless aggravated battery would have been legally appropriate, but not factually appropriate in this case.

Any error in the burden of proof jury instruction was invited by Green. Even if no invited error is assumed, the district court’s burden of proof instruction was legally appropriate.

Controlling Kansas Supreme Court caselaw defeats Green’s claim that the district court improperly used his criminal history.


CONSTITUTIONAL LAW—FOURTH AMENDMENT
SEARCH AND SEIZURE
STATE V. KNIGHT
BARTON DISTRICT COURT—REVERSED
AND REMANDED
NO.117,992—MAY 18, 2018

FACTS: Car driven by Knight was stopped by police for an expired license plate. Officer viewed drug paraphernalia sticking out of passenger’s waistband, searched the car, and found drug evidence. Knight filed motion to suppress the narcotics and paraphernalia seized from the car. District court granted the motion, finding in part the law was in flux as to whether plain view of drug paraphernalia on the passenger established probable cause to search the driver’s vehicle. State filed interlocutory appeal.

ISSUE: Probable cause for search of car

HELD: State’s reliance on officer’s preliminary hearing testimony that Knight admitted to drugs being in the car is misplaced because during Knight’s motion to suppress, and State did not request transcript of the preliminary hearing until after filing notice of appeal. On the evidence presented by the State at the suppression hearing, the probable cause plus exigent circumstances exception to the Fourth Amendment warrant requirement is satisfied. Applying U.S. Supreme Court legal principles to facts in this case, the officer had probable cause to search enclosed areas within which the contraband was found, and which were in the reach of a person sitting in the passenger seat. District court’s order of suppression is reversed and case remanded for further proceedings.

STATUTES: None

CRIMINAL LAW—SENTENCING—STATUTES
STATE V. WALTER
JOHNSON DISTRICT COURT—SENTENCE VACATED
AND CASE REMANDED
NO. 117,324—MAY 18, 2018

FACTS: Walter pled guilty to aggravated battery. In sentencing, district court overruled Walter’s objections to the classification of Walter’s two previous Missouri burglary convictions as person felonies. Walter appealed, contending his Missouri convictions are not comparable to any form of burglary in Kansas.

ISSUE: Classification of out-of-state conviction

HELD: In State v. Wetrich, 307 Kan. 552 (2018), the Kansas Supreme Court created a new test to determine comparability of crimes, requiring the elements of the out-of-state crime to be identical to, or narrower than, the elements of the Kansas crime to which it is being compared. Charts comparing the Missouri convictions that Walter violated to the Kansas burglary statute in effect when Walter committed the current crime are set forth and discussed, finding the Kansas person crime of burglary of a dwelling is not comparable to Missouri’s first-degree or second-degree burglary offense. Sentence is vacated and case is remanded with directions to classify the two Missouri convictions as nonperson crimes.


APPEALS—CONSTITUTIONAL LAW
FOURTH AMENDMENT—SEARCH AND SEIZURE
STATE V. MESSNER
BUTLER DISTRICT COURT—REVERSED
AND REMANDED
NO.117,559—MAY 18, 2018

FACTS: Police stopped Messner in response to store employees’ call to police to report concern about Messner’s behavior and length of stay in the store. When Messner left the store, the police followed and stopped him for sole purpose of checking his welfare. Police seized his driver’s license, arrested him on an outstanding warrant, and found drug evidence in search of the car. Messner filed motion to suppress, arguing the arrest and search were unlawful. District court denied the motion and found Messner guilty in bench trial on stipulated facts. Messner appealed.

ISSUES: (1) Safety stops, (2) investigatory stop, (3) attenuation doctrine

HELD: A three-part test is applied to scrutinize safety stops. A public safety or community caretaking stop must be based upon specific and articulable facts, but must be divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute. Here, evidence supports district court’s finding that this was a public safety stop to check on Messner’s welfare, but the officer exceeded the scope of a public safety stop by seizing Messner’s driver’s license and running it for wants and warrants, but the officer exceeded the scope of a public safety stop by seizing Messner’s driver’s license and running it for warrants and warrants. Similarity of this case to State v. Gonzales, 36 Kan.App.2d 446 (2006), is discussed.

State’s alternative argument - that officer could stop Messner as part of an investigation based on store employee’s tip that Messner appeared confused, “meth’d out,” and “in no shape to drive”—is unpersuasive. Nickelson v. Kansas Dept. of Revenue, 33 Kan.App.2d 359 (2004), is distinguished because there was no real indication that Messner was unfit to drive. District court erred in finding the stop properly shifted from a safety stop to a justifiable investigatory stop. Reversed and remanded with directions to grant Messner’s motion to suppress.

State’s new argument - that the existence of a preexisting and untainted arrest warrant would allow evidence to be admitted - is deemed abandoned because State failed to explain why the issue was properly before the court for first time on appeal.

STATUTES: None

STATE V. WALTER
JOHNSON DISTRICT COURT—SENTENCE VACATED
AND CASE REMANDED
NO.117,324—MAY 18, 2018

FACTS: Walter pled guilty to aggravated battery. In sentencing, district court overruled Walter’s objections to the classification of Walter’s two previous Missouri burglary convictions as person felonies. Walter appealed, contending his Missouri convictions are not comparable to any form of burglary in Kansas.

ISSUE: Classification of out-of-state conviction

HELD: In State v. Wetrich, 307 Kan. 552 (2018), the Kansas Supreme Court created a new test to determine comparability of crimes, requiring the elements of the out-of-state crime to be identical to, or narrower than, the elements of the Kansas crime to which it is being compared. Charts comparing the Missouri convictions that Walter violated to the Kansas burglary statute in effect when Walter committed the current crime are set forth and discussed, finding the Kansas person crime of burglary of a dwelling is not comparable to Missouri’s first-degree or second-degree burglary offense. Sentence is vacated and case is remanded with directions to classify the two Missouri convictions as nonperson crimes.

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From the Appellate Court Clerk's Office

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comes down, call or email to learn more. Jennifer Hill, (316) 263-5851 or email jhill@mcdonaldtinker.com.

**Contract brief writing.** Former federal law clerk and Court of Appeals staff attorney available to handle appeals and motions. Attorney has briefed numerous appeals in both the Kansas and federal appellate courts. Contact me if you need a quality brief. Michael Jilka, (785) 218-2999 or email mjilka@jilkalaw.com.

**Estate & trust litigation.** Available to assist you in probate and trust litigation in Kansas, Missouri and other states. www.nicholsjilka.com.

**Florida legal needs.** I’m here to help. Florida Bar board certified appellate attorney and experienced trial lawyer. Contact tom@twwlaw.com or visit www.TomAppeals.com. Also admitted to active practice in Kansas, 10th and 11th Circuit Courts of Appeal, and U.S. Supreme Court.

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

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

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

**Office Space Available**


Office 1) Large window with large ledge; Office 2) Storage closet and large picture window. *Coffee bar, waiting area and reception/paralegal area. *Fax, Wifi and ground floor parking. Call Chris Fletcher: (913) 390-8555

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

**Leawood Law Office.** Looking for office sharing and/or work sharing arrangement, ideally with estate planning/probate attorney, although any civil practice is welcome. Conference room, phone system, internet, high-speed copier/printer, and lunchroom. Plenty of surface parking. In a great area in south Leawood—bright and modern space on second floor of bank building. Contact Paul Snyder (913) 685-3900 or psnyder@snuyerlawfirmllc.com.

**Office for Rent.** 12’ x 15’ office space for rent at 1-435 and Nall Ave., Overland Park, Kansas. Receptionist provided. Internet access and conference rooms are available. Rent $850 per month, with the possibility of trading rent for work on some cases. Possibility for referrals from three other attorneys in the suite. For more information, contact Samantha Arbogast at 913-652-9937 or scr@theronanlawfirm.com

**Overland Park Law Office.** Two offices available at SW corner of 119th & Quivira. Cubicle space available for paralegal. Use of large conference room and storage space included. Open to either office share or ‘Of Counsel’ arrangement. Contact Whitney at web@caldwellandmoll.com or 913-451-6444

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

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

**Other**

**Elegant hand-crafted cherry wood** counselor’s desk (29” high, 40.5” wide and 78” long) and a secretarial desk (29” high, 30” wide and 66” long”) from the law office of the late Clyde Hill (Speaker of the Kansas House of Representatives, 1965). One-of-a-kind pair; fine wood craftsmanship. Sell 620-496-7356.

**One of a kind walnut 4x8 conference table/desk/Board of Directors table.** Four drawers each side and embossed leather top. Priced to sell $675 by retiring lawyer. Topeka location. 785.766.2084.

**The following books from my library are available due to retirement.**

- Kansas Reports Vol. 1-300 (Current)
- Kan. App. 2d Vol. 1-50 (Current)
- West Digest 2nd Vol. 1-36
- Kansas Judicial Counsel Probate Forms
- Trial Lawyer Series Depositions x2
- Trial Lawyers Series Premises Liability x2
- Trial Lawyers Series Damages
- Am. Jur. 2nd Vol. 1-83 Complete (not current), Index
- Vernons K.S.A. Forms
- Rabkin & Johnson Current Legal Forms
- Kansas Codes of Civil Procedures Vol. 1 & 2
- House of Representatives, 1965). One-of-a-kind pair; fine wood craftsmanship. Call dograham@gmail.com.

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