Does Discrimination "Because of Sex" Cover Sexual Orientation and Gender Identity Discrimination?
The Evolution of Title VII
Teresa Shulda
P 54

Reflections on Jim Logan
Matt Keenan, with Mike Davis, Max Logan and Brad Manson
P 7
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54 | Does Discrimination "Because of Sex" Cover Sexual Orientation and Gender Identity Discrimination? The Evolution of Title VII
   Teresa Shulda

7 | Reflections on Jim Logan
   Matt Keenan, with Mike Davis, Max Logan and Brad Manson

Special Features

11 | 2019 KBA Membership Registration/Renewal
19 | 2018 KBA Photography Contest Results
24 - 27 | 2019 KBA Award Nomination Info & Form
28 | FEMA and Animals: Hurricane Katrina 13 Years Later ............... Katie Barnett
38 | Fall Swearing-In Photo Collage
40 | 2018 Robert L. Gernon Award

Regular Features

13 | KBA President
   Defenders of the Process ............ Sarah E. Warner
15 | KBF President
   Follow the Money and Find Your Inspiration
   Amy Fellows Cline
17 | YLS President
   How Does Your Hobby Make You a Better Attorney?
   Sarah Morse
32 | Law Practice Management Tips & Tricks
   Holiday Gift Guide 2018 .......... Larry N. Zimmerman
35 | Diversity Corner
   Harvard Bias Trial: The Asian-American Community’s Affirmative Action Lawsuit
   Katherine Lee Goyette

41 | From the Editor .......................... Patti Van Slyke
42 | Math and the Law Series:
   Math Moves Forward .................... Adam Dees
44 | ABLE Accounts:
   A Special Needs Planning Tool .......... Samantha L. Shepherd
50 | Law School Trivia Night Photo Collage
   & Thanks to Sponsors, Participants
65 | KALAP: Do You Want to Exercise One Hour a Day
   or Be Dead 24 Hours a Day? ............ Lou Clothier

46 | Substance and Style
   Illegal Possession ........................ Betsy Six
68 | Members in the News
72 | Obituaries
76 | Appellate Decisions
83 | Appellate Practice Reminders
   Timely-filed Appellate Briefs .......... Douglas T. Shima
89 | Classified Advertisements
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Reflections on Jim Logan

by Matt Keenan
with Mike Davis, Max Logan and Brad Manson

Jim Logan passed away last month. Perhaps you read Jim Oliver’s fitting tribute in the October issue of The Journal. It offered a summary of his life, described his dedication to his wife of 66 years, Beverly, and his many legal accomplishments.

In the year following my law graduation, I had the privilege to be his law clerk along with Greg Kerwin and Jo Lynn Haley.

I suppose it is a cliché to say someone lived the American dream. Not here. Consider his birthplace of Quenemo, a town named by the Sac and Fox tribe. A town of 300 residents, it peaked when its basketball team won the state title. That was 1960.

Jim’s parents, Maurine and John, were both 19 at the time of his birth. His grandparents lived in a log cabin. Jim’s dad worked on the railroad. In 1943, John Logan was in charge of a 125-man section composed of Japanese Americans from the west coast due to irrational fear of invasion.

When Jim was at KU in 1952, his classmate was Clyde Lovellette. If that name is foreign to you, call your dad and ask him about the man who at KU was known as “the beast.” Jim spoke at his KU graduation, the first student to be asked. Jim clerked for Judge Huxman who, before he was a federal Judge, had another title: Governor.

Jim was sworn in on the 10th Circuit at the Johnson County courthouse on December 28, 1977. Those assembled included all the sitting federal judges in Kansas. These were his remarks:

I am grateful to the President for his confidence in me in appointing me to this high office where I can serve both the profession I love and my country. A number of people in this room had a role helping me during the long appointment process, and some were very important in their assistance. They know who they are, and I want to thank them today.

I realize how easily someone else might be here instead of me. Slight differences in timing, politics, age and a dozen other things, could have me in the audience instead of on the bench. My old boss and special friend Judge Walter Huxman used to say frequently that to be appointed to the position of circuit judge was a matter of being in the right political position at the right time – only he had a more colorful way of saying it. I will try not to forget it.

The opportunity for service and the responsibility are mine, however.

My promise to you all is that I will try my best to live up to the oath I have just taken. I will make mistakes, no doubt. No one is ever prepared to judge the entire range of controversies that come before the Federal Appellate Courts. But I will try to keep an open mind. I will vote for justice, as I see it, in the particular controversy before the court, and at the same time try to be aware of the implications the case may have upon other cases and upon society. If I fail, it will not be for a lack of effort.

James K. Logan. Godspeed.
MIKE DAVIS

My often restated view is that James K. Logan was the first Dean of the modern KU School of Law. He returned to KU as a law professor in the early ’60s, and shortly thereafter—at 31—became the Dean. Over the next seven years, he expanded the student body, created the still-vibrant Board of Governors, appointed Paul Wilson director of one of the first law school clinics in America and initiated the school’s first annual fund raising program.

Perhaps most memorably, he brought new and exciting talent to the faculty. Some of those left over the following years, but at least three giants of our history remained for the duration of their careers: (in order of their hiring) 1) Jim’s KU undergrad friend Bob Casad, who blossomed into one of the school’s greatest scholars and carried the KU Law name to many significant visiting teaching spots around the country; 2) former Chicago Big Law partner, Ray Goetz, the terrifying and beloved Contracts and Labor Law teacher to a generation of KU law students, who also became Major League Baseball’s first arbitrator; and 3) Martin Dickinson, from the beginning a nationally recognized tax expert, a great classroom instructor, and, eventually, himself a highly successful Dean. With all these people and improvements in place, when Dean Logan departed in 1968 to run for the U.S. Senate, Green Hall was surging with energy, structure and promise.

When I arrived in 1971, Jim and I quickly became friends. By the time I was Dean myself (1980), he was a 10th Circuit judge and a frequent visitor to my office in the new Green Hall. I always welcomed his advice on how to improve the school, and he was always ready to offer his views . . . sometimes at length. Never, however, was he anything but positive about either the school or my own performance. Indeed during that decade, he became one of our most faithful and substantial donors.

Everyone who knew Jim would agree that he was not a “character.” There are only a few Jim Logan stories. But everyone he touched, from clerks to clients to litigants to friends, would agree, I think, that he was smart, perceptive, insightful, articulate, kind, helpful and loyal. They would agree also that from Green Hall to Strong Hall to Memorial Stadium to Allen Fieldhouse, he was a Jayhawk for life. Lucky KU.

MAX LOGAN
JIM’S YOUNGER BROTHER

My first memory of my brother is the hanging on his leg as he left for the Army in 1947. I had little physical contact with him after that until around 1959. Jim was 13 years older than I, and was gone to the Army, KU, Harvard and California between 1947 and 1960. His leaving in 1947 was the first of many firsts that became beacons for the rest of his brothers and sisters. Our family grew up in Quenemo, Kansas, during a time of cultural isolation. It was a small town. No one was rich, everybody poor but not aware of it. A town of blue collar workers and small town merchants. There was no internet, no TV; we did have radio and telephones, but the phones were party lines and long distance calling was an exotic adventure. Quenemo was connected with the other little towns that surrounded it. Most everyone born there stayed there.

This was taken summer 1943. It is a picture of the five boys. Mom was pregnant with my sister who was born in Dec. of 1943. Jim is at the top followed by Dick, John, Bill and I am the small one on the left end.

-- Max Logan

Thus Jim’s initial departure was a monumental event. He followed that with many other monumental events. Returning from the Army, he left for Lawrence and KU; hardly anyone was college educated in Quenemo, but education was a way out of the Quenemo way of life and was stressed by our Father and Mother, and Jim took it to heart. He made straight A’s at KU and won a Rhodes Scholarship, which he turned down to get married and go to law school at Harvard where he was on the law review. He then got a job with Gibson Dunn and Crutcher in Los Angeles.

All of these events I witnessed from afar. The most impressive fact I took from Jim’s accomplishments was that he made personal and independent choices made available to him by his accomplishments. He turned down the Rhodes because he wanted to get married. Others thought he should have deferred marriage, but he knew his mind. He left L.A. to return to Kansas to teach. Others thought this was foolish.
Jim was a man who knew his mind and made his own choices. That lesson I learned from him and it served me well. When Jim decided to return to Kansas, he asked my brother Bill and myself to help them move back.

We traveled by train to L.A. and Bev flew home. We drove cross country, losing Gus the cat along the way. I was finishing high school and enrolled at KU in the Fall of 1960. Jim had established this as the thing that we did. All of my brothers had gone to KU before me, following Jim’s lead. At KU Jim’s and my relationship became close. He always liked to advise everyone, and he advised me as well. What to wear, activities to engage in, what kind of girls to date, rich ones preferably but smart ones always. Jim and I had similar interests and I followed his path. He majored in economics, I majored in economics; he was president of the KU young democrats, as was I. He engaged in campus politics—and I followed—though not as successfully. He went to Harvard Law School, I followed. He tried to give me a heads up about Harvard by allowing me to enroll in two law school courses my senior year at KU, his property course and Bob Casad’s procedure course. It helped. He advised me to establish a study group of fellow students at Harvard and what we should do in the study group. The people in my study group are some of my greatest friends still. After law school, we took different professional paths, Jim as an academic and Judge, me as a practitioner.

We joined forces a couple of times when he practiced with me after his failed senate race and after he retired as a judge.

We became great friends as well as brothers. Jim was the beacon that lead all of my family out of Quenemo and into the larger world. He did it by example and by his willingness to be with you when you needed him.

BRAD MANSON
JUDGE LOGAN’S FIRST LAW CLERK

Jim Logan was confirmed by the United States Senate in mid-December 1977, and a few days later, he interviewed to hire law clerks. I was lucky enough to be interviewed. Jim had testified a few days earlier before the Senate Judiciary Committee. During college, I worked for the Judiciary Committee, and I talked first in the interview by asking then Judge Logan, "Did you enjoy your appearance before the Committee?" We made an immediate connection, in part because we shared a liberal political ideology, and in part because Jim loved to talk about himself. Being hired Judge Logan’s law clerk was like winning the lottery for an unemployed third year law student.

Circuit Court Judges are allowed to office wherever they wish, so Jim wanted to have his office in O lathe, Kan., where he lived. The only federal building in Olathe was the post office. The government built an office for Jim and his staff in the basement of the post office. Before construction was completed, Judge Logan worked out of the visiting judge’s quarters in the old Federal Courthouse in Wyandotte County. We shared the law library with Judge O’Connor. Kathy Vratil (later to become U.S. District Judge Vratil) was Earl O’Connor’s law clerk. Our desks were in a space in the law library, and it was heaven. There were no computers, and therefore, no computer research, and we typed all draft opinions on IBM electric typewriters. Only Judge Logan had dictation equipment; there was one secretary, and she most certainly did not work for the law clerks.

Soon we moved into our basement quarters, and filled Judge Logan’s library with an entire set of the United States Code, all of the official Supreme Court reporters, all of the West regional reporters, and all of the statues of the states in the Tenth Circuit. And the two prominent weekly tax reporters, because Judge Logan continued to keep up his expertise in tax law. I physically unboxed, stamped “US Courts” and shelved every book. Jim had clerked for Judge Walter Huxman in the Tenth Circuit after graduation from Harvard, and Judge Logan located Judge Huxman’s old desk from the General Services Administration, had it refinished and put a beautiful, new burnt orange leather top on the working space. He had a spare office in the old post office basement, and the law clerks worked in the stacks without windows. But we had a nice conference room with windows at the top looking onto the street above. There is no better way to begin a legal career, and Jim Logan—forever the teacher—was a wonderful boss and mentor, a role he assumed from the first day on the job and never stopped, up through dinner last December. Every day we learned something new. That was and is the nature of appellate court work. And Jim shared all of his thinking and reasoning on the cases with his clerks.

As a law clerk working for Jim Logan, you were essentially an aide-de-camp, at least in the early days, before there were written manuals governing federal law clerks. You were expected to do anything he needed you to do, beyond legal research and writing. Jim and Bev made a gift of undeveloped land in Douglas County to the University of Kansas, and I was sent to make sure the survey was correct, the legal description in place and the land unencumbered by encroachments. Judge Huxman had allowed his law clerks to engage in some pro bono legal work, so Judge Logan believed learning how to practice law was important. I represented the janitor in the post office, and did some other legal aid-type pro bono work, even meeting with clients in our law library, until Judge Logan learned there was a law clerk manual being written prohibiting any outside work, so that ended my short pro bono legal career.

Jim’s best friend on the Court was Monroe McKay, from Salt Lake City, Utah. Judge McKay is 90, and was confirmed by the Senate the same day Jim was confirmed. But Judge McKay’s brother was a congressman from Utah, and he convinced President Carter to sign his brother’s appointment a
day before Jim’s appointment—so Judge McKay always had seniority. They were very, very close. So close that then Chief Judge Seth, from New Mexico, wouldn’t allow them to sit on the same panel for many years. Judge McKay spoke at Jim’s memorial gathering, and I talked to him about their friendship, and experiences on the Court. Judge McKay captured Jim’s spirit in his remarks, and said he had never met anyone smarter, with a greater legal mind, as incisive and insightful, or with as good a heart and belief in the best of human nature.

Jim Logan was my first employer, a teacher for life, and a trusted friend. I loved him and will miss him.

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About the Author

Matthew Keenan grew up in Great Bend, and attended the University of Kansas, where he received his B.A. in 1981 and his J.D. in 1984. For the last 21 years, Keenan has practiced with Shook, Hardy & Bacon LLP. He may be reached at mkeenan@shb.com.
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The last couple of months have been tough for our nation. Every day feels like it brings a new bombshell: Justice Kavanaugh’s confirmation hearings. The attempted bombings of high-level officials and offices throughout the country. The mass shooting at a Pittsburgh synagogue. The vitriolic rhetoric surrounding a heated election. I see the cumulative impact of these developments in my daily interactions with friends, family, clients and fellow lawyers. People look tired. How much more polarizing news can we as a society endure?

As I sit here on the eve of Election Day, I can’t help but ask myself: What is a lawyer’s role in picking up the pieces and putting society back together again? And what is the role of the KBA—the statewide voice of lawyers—in healing these social, political, and ideological rifts?

Too often, society portrays lawyers as seeds of division. Television shows depict us as compassionless suits who seek to win, whatever the cost. Jokes make light of our representation of our clients, implying that we thrive on strife and lawsuits. (“Q: Why won’t sharks attack lawyers? A: Professional courtesy.” “Q: What’s the difference between a good lawyer and a bad lawyer? A: A bad lawyer makes your case drag on for years. A good lawyer makes it last even longer.”) We lawyers get caught up in the narrative because it’s easier than correcting it. I often jokingly respond to the question, "How’s business?” with "Great! People keep suing each other."

Sometimes this is all in fun. But sometimes it’s not. For example, I cringe whenever I hear a colleague describe litigation that does not come out as hoped with, "That judge was against us from the start." The same is true whenever I hear someone describe a law as one written by "(roll your eyes) legislators."

The inevitable result of these comments over time is clear: Division, disillusionment, and disengagement. If we who interact with our governmental and public structures on a daily basis cast doubt on the reliability of those institutions, how can we be surprised when our friends, family, and clients do the same?

The solution, I believe, lies in the preamble to our Kansas Rules of Professional Conduct. "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." And there’s more:

• "A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer’s duty, when necessary, to challenge the rectitude of official action, it is also a lawyer’s duty to uphold legal process." KRPC Preamble, ¶ 5.

• "[A] lawyer should further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority." KRPC Preamble, ¶ 6.

• "Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system." KRPC Preamble, ¶ 13.

These provisions indicate our most fundamental responsibility as lawyers is not merely to our cases and clients, or each other, or the court over us—at our core, we are defenders of the legal process itself.

The importance of this charge cannot be understated. Consider the example of the lawyer complaining to her client that
a loss was based on a judge’s bias. That client will undoubt-
edly tell his family and friends about the statement. A whole
group of people will lose faith, to one extent or another, in their
ability to turn to the judicial system to fairly resolve their dis-
putes. And they might look with a jaundiced eye on any court
decisions, assuming the deciding judges or justices made those
rulings for personal or political reasons, rather than on the law.

Or ponder the denigration of a particular elected body. If
we as lawyers cast doubt on the legislative process, we under-
mine the system of laws our society relies on. We give the
impression the "system is rigged against" someone. The conse-
quence? Cynicism and disengagement from the public sphere.
Refusing to participate in the elective process, viewing voting
as futile.

These observations do not mean that we should not be hon-
est when we have a grievance with a judicial decision or law.
Nor does it mean we do not have an important role to play in
civic discourse or civil disobedience. Rather, it means we must
be cognizant of the impact of our words and actions. People
look at lawyers differently; our statements reach far beyond
what is directly in front of us.

The good news is that the KBA is here to help. Arguably,
everything our organization does—from providing legal edu-
cation to networking opportunities to ethics opinions—can be
framed in terms of strengthening public regard for our pro-
fession. But two of our efforts specifically aim to defend and
lift public regard for the legal institutions on which we rely.

First, the KBA spends significant time and effort in the area
of law-related education. Our organization provides resources
to educators across the state about the legal process and im-
portant legal issues, including classroom materials and discus-
sion points. For example:

- Our publication Law Wise provides an in-depth look at
  issues of interest in Kansas grade schools and high schools.
  (Our October publication is all about census data, its col-
  lection, and its uses. It is available to view and download from
  www.ksbar.org under the drop-down menu for Publications.)

- The KBA provides speakers who travel throughout the
  state to present to local business groups and other organiza-
tions about how the legal process works. (Just last month, I
  presented to a group of Southeast Kansas women about Kan-
sas’ various judicial selection methods and how voters can
  make informed decisions in retention elections.)

- Each year, the KBA Young Lawyers Section puts on Kan-
sas’ only statewide mock trial tournament for high school
  students. These students make opening statements, present
evidence and examine witnesses, and offer closing arguments.
  They are scored by lawyers and judges in their communities,
  providing insight into how the process works and how deci-
sions are made.

Second, the KBA engages in advocacy on behalf of lawyers
and the cause of justice in our state. While we do not take part
in discussions where various lawyer groups may have differ-
ing interests, we regularly engage our legislative and judicial
branches on issues of critical importance to the legal process.
E.g.:

- We discuss the importance of adequately funding our
  judiciary, both to attract and keep excellent judges and staff,
  and to ensure our courts have the resources to provide fair,
  efficient, and effective access to justice.

- We participate in comment on rule-making, particularly
  with regard to the Kansas Supreme Court’s rules regulating
  the judicial process and attorney discipline. As recent ex-
  amples, the KBA has offered comments on behalf of Kansas
  lawyers on recent proposed changes by the Kansas and federal
  courts relating to pro bono participation and requirements
  regarding post-verdict jury instructions.

These examples are only a starting point. If you have any
questions about any of these efforts, or think there is another
way the KBA can make a meaningful impact, contact me! Or
call any of your representatives on the KBA Board of Gov-
ernors. If lawyers are called to fight for the legal process, the
KBA is our first line of defense.

The tough part about elections is that there are inevitably
winners and losers, meaning after November 6, some Kansans
will be elated; others, less so. As we as lawyers work to put
the pieces back together, be cognizant of the power of your
words and the reach of your influence. Remember that we at
the KBA have resources that can shore up public understanding
of the importance of this great republic we have established.
Regardless of whether a particular candidate prevails, we support
the institutions. We trust the process. And we move forward.

About the Author

Sarah E. Warner is an attorney at Thompson
Warner, P.A., in Lawrence. Before becoming
president of the KBA, 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 has
never held elected office.

sarah.warner@333legal.com
Follow the Money and Find Your Inspiration

by Amy Fellows Cline

Over the years, following the “money trail” has proven to be a tried and true way for people to track and understand how an organization operates. Money serves as a powerful motivator (both for good, and sometimes not-so-good, intentions). Today, I urge you to follow the Kansas Bar Foundation money trail. I challenge you to not only donate your hard-earned money to the KBF, but to also follow how that money is spent. I want you to have a personal stake in the KBF’s success, because we cannot achieve that success without your help.

The KBF needs your money, but it also needs your awareness to maximize the impact of the projects supported by your donations. And, if you take interest, you will be inspired by the impact you can have on our profession and the lives of your fellow Kansans.

For example, consider contributing to a KBF scholarship for a Kansas law student, then taking the time to support and follow that student’s success. The KBF currently administers 12 annual scholarships for law students. Thanks to generous donations from KBF fellows—both those who established specific scholarship funds and those who directed their general contributions to the scholarship funds—the KBF will provide more than $21,000 in scholarship dollars to Kansas law students this year. I encourage you to visit the KBF scholarship web page, www.ksbar.org/mpage/scholarships, to not only make a donation to this worthy cause, but to take inspiration from how it impacts the lives of the scholarship recipients. The past year’s recipients are listed on the KBF website along with a short description of how the KBF scholarship impacted their lives. Read their stories, then reach out to one of them. Find out how your donation helped them succeed. When the 2019 scholarship recipients are posted on the KBF website next January, do the same thing with those students. Follow your scholarship donations so you can see just how meaningful that donation can be.

Another way you can contribute is by setting up an IOLTA account, then following the programs the KBF funds through its IOLTA program. If you don’t already have an IOLTA account, you can find out how to set one up at www.ksbar.org/mpage/kbf_grants (under the “For Attorneys” tab). Everyone
enrolled in the IOLTA program should explore the “Past Recipients” tab on the KBF website. Thanks to earnings from Kansas attorneys’ IOLTA accounts, the KBF will fund more than $78,000 in grants this year, helping to support worthy causes such as the Kansas CASA (Court Appointed Special Advocates) Program, the Kansas Coalition Against Sexual & Domestic Violence, SAFEHOME, the Kansas Institute for Peace & Conflict Resolution, Catholic Charities, various KBA law-related education projects for Kansas students, the NITA Public Service Advocacy Skills Program and Kansas Legal Services. Follow your IOLTA funding, so you can see how that funding helps your fellow Kansans.

I also encourage you to follow KBF grant funding by volunteering at one of the “clean slate” clinics administered by Kansas Legal Services (KLS) across the state. The KBF funds these expungement clinics through its Community Redevelopment and Homeowners Assistance (CHRA) grants. In 2019, KLS and KBF plan to replicate successful expungement programs from Sedgwick and Riley Counties in other parts of the state, including Reno, Lyon and Wyandotte counties. If you practice in one of those areas, sign up to help KLS attorneys process expungement pleadings at one of the clinics.

Please contact KLS Statewide Pro Bono Director Christine Campbell at campbellc@klsinc.org to sign up or to ask any questions you may have. KLS will provide training for attorneys, legal assistants or law students who wish to participate. Follow KBF CHRA grant funding; help redevelop Kansas communities by clearing away barriers to employment and housing.

Last, I invite you to follow your money by visiting (and using) the home of the KBF: the Robert L. Gernon Law Center, located at 1200 S.W. Harrison Street in Topeka. Thanks to your KBF donations, including donations to the Robert L. Gernon Fund and last year’s “Burn the Mortgage” campaign, the KBF was able to retire the mortgage on its building. To celebrate this milestone, last November the building was renamed the Robert L. Gernon Law Center in honor of the late Kansas Supreme Court Justice. The law center has conference rooms of varying sizes which are available for use by KBA members, KBF Fellows and law-related, non-profit organizations. Follow your KBF donation by using this building for a client meeting or another event, to see what a great space we have, thanks to your donations.

If you follow the money trail, you will be inspired by how your KBF contributions are spent. If you take an interest in the KBF programs supported by your donations, you will not only improve the lives of your fellow citizens, but I dare say, you will enrich your own.

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 Comm., Kansas Human Rights Comm., Kansas Department of Labor and U.S. Equal Employment Opportunity Comm.

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Attorneys are an interesting group of people as much for what we do outside of the profession as for what we do within the profession. I am fascinated by the wide range of "extracurricular" activities attorneys engage in—from volunteering, to serving on local community organization boards and committees, to coaching youth sports, to hobbies. Like many attorneys, I have several hobbies I enjoy pursuing. And, like many attorneys early in their careers, I remember "interview season" well. As a law student and a new attorney in search of a job, it feels as though you are constantly in interview mode and have answers to standard questions at the top of mind all while being on the lookout for the out-of-left-field question. One question that I quickly learned to anticipate during interviews was about one of my life-long hobbies: softball. I played fast-pitched softball in local youth leagues, on travel teams, in college, and I continue to play slow-pitch softball as time allows. It was not uncommon for interviewers to ask how playing a collegiate sport prepared me to be an attorney.

I liked this question. I strongly believe that sports—and other hobbies and extracurricular activities—can teach many lessons and provide many benefits that attorneys can carry into their law practice. Through softball, I learned obvious skills such as time management, drive and teamwork. But I also gained less obvious benefits.

You may be surprised to learn that I experienced an undefeated softball career. Just kidding, of course I didn’t. Instead, I experienced countless losses. From big, career-ending, World Series games to small, missed ground balls in practice, each loss taught me something. When you lose, you can discover your weaknesses, how to prepare better, and which strategies are successful. And you learn that sometimes, no matter what you do or how much you prepare, the ball will fall just out of reach allowing the other team’s winning run to score.

I found that the lesson of how to respond to loss translated well to my professional career. In reading my first deposition transcript, for example, I realized there were several instances where I did not ask the right follow up question to really pin down the witness on a point. While not amounting to a full "loss" on a case, it was a moment I could learn from and hone my technique for future depositions. And from my softball career, I knew that sometimes, even that would not matter. Sometimes, the facts just are not clear or other variables come into play that affect the outcome no matter what you do as an attorney.

Sports are not the only avenue for learning lessons that you can apply to other areas of life, and in reflecting on lessons learned from softball, I began to consider how attorneys’ "outside" interests might influence and impact their legal careers. I encourage you to consider the list below and think about how your own outside interests may influence your skills as an attorney.

1. **Hobbies may help you view issues in a novel way.**

   Do you like to read? Reading, and particularly fiction, may encourage empathy and “a skill known as theory of mind, the ability to imagine what might be going on in someone else’s head.” By devouring books in your free time, you may be finding ways to empathize with your client or opposing coun-
sel which can lead to better cooperation and, ideally, better outcomes for all parties involved.

Maybe you are more interested in visual arts and love to paint, sculpt, build or sew. A personality trait known as openness drives creative pursuits, and by cultivating that aspect of your personality, you may be honing your ability to bring a different perspective to a situation, see things differently than others and even see things that others miss. Your ability to bring a different perspective may help solve a difficult business dilemma by finding a solution others do not see or may catch.

2. A healthier attorney is a better attorney

If your hobbies involve physical activity, you are reaping benefits on many levels. Physical activity is great at managing stress levels, which is good for your physical health but can also provide positive benefits to your career. A study showed that people who exercised during work hours reported that their concentration increased by 21 percent, they reported a 41 percent increase in being motivated for work, a 27 percent increase in better dealing with stressful situations in a calm manner, and almost 80 percent of participants reported that their interpersonal skills were better on the days they exercised.

Maybe you are drawn to exercising your mind through meditation. Meditation has been shown to reduce your body’s stress response by strengthening your relaxation response and lowering stress hormones—but it also can improve productivity.

One company found that employees who participated in the company’s mindfulness program experienced an increase in productivity worth an estimated $3,000 per employee per year. In a profession where work is never ending and there are always more projects to tackle, those who have boost of productivity are surely the envy of the profession.

All hobbies can help with stress relief, and even if you are not interested in applying lessons learned from your hobby to your career and do not want to mix your personal and pleasurable pursuits with client development as discussed below, you can still receive indirect benefits from your activities. By providing an escape from work, hobbies can help stave off burnout, increase your self-confidence and help you stay excited about and interested in life, all of which ultimately benefit your professional life as well.

3. Hobbies provide avenues for networking and client development

If the intangible or health benefits of hobbies are not motivating, maybe the ever-present need to network and cultivate relationships with clients can provide the incentive you need to jump back in to your hobby. Golfing is the quintessential networking activity, but other hobbies offer opportunities too. Maybe you are a wine or whiskey aficionado, and you can host a tasting or pairing dinner and invite current or potential clients. Or invite a client to a painting, gardening or other type of class. By connecting with clients in unexpected ways, you can get to know them better and understand their motivations and goals on a deeper level allowing you to serve them better. Plus, the fun and out-of-the-ordinary experience may help you stand out as a potential business contact.

Admittedly, finding time for hobbies and other extracurriculars is hard. Between work demands and family activities, often very little time (or energy) is left for other pursuits. But after considering the list above and the potential benefits that may come to your career—not to mention the personal satisfaction and enjoyment you may receive from pursuing an activity that interests you—I hope you will make it a priority in the new year to pick up an old hobby or dive with renewed vigor into current pursuits and encourage others in your firm or organization to do the same.

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.

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5. Id.
The Inaugural (will it become annual?)
KBA Photography Contest

Grand Prize Winner: Chris Golden "Keeper of the Plains"
First Runner-Up – Jerry R. Palmer: "Avocets & Egrets"
Second Runner-Up – Jean B. Menager: "Blocked Out"
Third Runner-Up – Brian Kong: "The Split"

Winners in Individual Categories:
The Law – Brian Kong: "The Split"
The Land – Chris Golden: "Keeper of the Plains"
The Life – Jean B. Menager: "Capricorn"
The Look – Jean B. Menager: "Blocked Out"
More Winners in the 2018 KBA Photography Contest

First Runner-Up Overall: Jerry R. Palmer
“Avocets & Egrets”

Second Runner-Up Overall: Jean B. Menager
“Blocked Out”
Winner in The Look Category
KBA Photography Contest

Third Runner-Up Overall: Brian Kong
   "The Split"
   Winner in The Law Category

Jean B. Menager
   "Capricorn"
   Winner in The Life Category

Editor's Choice: Laura Ice
   "The Gathering Storm"
Warmest thanks to our winners, our participants and our panel of judges.

Chris Golden
Laura Ice
Eun Jin Kim
Brian Kong
Phillip Livingston
Brian Martin
Jean B. Menager
Jerry Palmer
Eunice Peters
Diana Stanley
Janet Walsh
Helen White
Ania Wlodek Moncrief
Hailey Zimmerman

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

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

One of our proudest projects involved several communities and hundreds of volunteers when our photograph of four little friends from an area school was featured in a Coca-Cola commercial developed for Coca-Cola which was debuted to the Kansas audience May of 2015.

We are Kirkwood and Julie Kirkwood, owners of Kirkwood Kreations Photography, and are full time farmers and photographers residing in the beautiful country between Lawrence and Topeka. Our rural setting adequate photography allows us many opportunities to capture images of Kansas nature, landscapes, sunrises and sunsets, and often take off on photographic “boonie cruizin” excursions. We currently have two running photography exhibits in Juli’s Coffee and Bistro and Hazel Hill Chocolates in Topeka.

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Spotlight the BEST & BRIGHTEST attorneys you know with a 2019 KBA Awards Nomination

- Phil Lewis Medal of Distinction
- Distinguished Service
- Professionalism
- Pillars of the Community
- Distinguished Government Service

NEW Christel Marquardt Trailblazer Award

- Courageous Attorney
- Outstanding Young Lawyer
- Diversity
- Outstanding Service
- Pro Bono

Learn more about the awards online at www.ksbar.org/awards
The KBA Awards Committee is seeking nominations for award recipients for the 2019 KBA Awards. These awards will be presented in June at the KBA Annual Meeting in Topeka. Below is an explanation of each award and a nomination form for completion. The Awards Committee, chaired by Sara Beezley, of Girard, appreciates your help in bringing worthy nominees from throughout the state of Kansas to the committee’s attention!

Deadline for nominations is Friday, March 1.

**Phil Lewis Medal of Distinction**

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

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

**Distinguished Service Award**

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

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

**Professionalism Award**

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

**Pillars of the Community Award**

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

- The variety/diversity of law practiced
- Impact/high profile law work
- General contributions to the law and legal profession
- Specific contributions to the legal profession
- Mentoring and support for legal education
- Contributions to the State/community
- Notable civic activities
- Periods of elected or appointed public/government service
- Military service
- Examples of volunteerism and charitable activity
- Reputation in the organized bar, state and community

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

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

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

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

Distinguished Government Service Award

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

Courageous Attorney Award

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

Outstanding Young Lawyer

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

Diversity Award

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

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

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

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

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

Outstanding Service Awards may recognize:

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

Pro Bono Award(s)

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

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

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

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

Nominee’s Name ________________________________________________________________

Please provide a detailed explanation below of why you have nominated this individual for a KBA Award. Attach additional information as needed. Award descriptions can be found at ksbar.org/awards.

☐ Phil Lewis Medal of Distinction
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Return Nomination Form by Friday, March 1, 2019, to:

KBA Awards Committee
Attn: Deana Mead
1200 SW Harrison St.
Topeka, KS 66612

NOTE: a fillable PDF version can be downloaded at https://www.ksbar.org/awards
When the New Orleans levees broke on August 29, 2005, one of our country’s worst natural disasters was underway. Like many Midwesterners, I felt compelled to travel down to New Orleans to help families, and quickly learned that helping family pets was a great need. I was lucky enough to bring back a stocky little dog, whom I aptly named Katrina, but I always wondered how she came to be in the shelter after the hurricane. Pets were not accepted by rescue transportation or relief shelters in Louisiana or Mississippi, so many families were faced with risking their lives to stay or leaving their pets behind. The Hurricane Katrina rescue and recovery efforts demonstrated the shortcomings of the Federal Emergency Management Agency (FEMA) and ultimately led to the Pets Evacuation and Transportation Standards Act (PETS Act) of 2006.

What happened with the animals of New Orleans could have been predicted, as a FEMA report conceded, “[h]istorical incidents have shown that citizens may refuse to evacuate from a disaster area when first responders will not provide for the care of their pets.” Coupling what happened in New Orleans with historical records, FEMA recommended that “ensuring animal welfare by incorporating household pet and service animal considerations into emergency operational plans is vital to protecting human life and safety.”

Our country has faced annual natural disasters since the PETS Act was enacted twelve years ago, from hurricanes to wildfires—and while policies have changed for pets, or owned domestic animals—the federal government has yet to address the millions of commercially bred dogs and cats, and the billions of farm animals regulated by the United States Department of Agriculture.

The PETS Act

The PETS Act was an amendment to the Robert T. Stafford Disaster Relief and Emergency Assistance Act, which provides for federal assistance for states in times of disaster. The PETS Act amended the Stafford Act as follows:
The Director shall ensure that such plans take into account the needs of individuals with household pets and service animals prior to, during, and following a major disaster or emergency.3

Kansas lies in FEMA’s Region VII for funding and response management. In an interview, Jono Anzalone, the 2010 Regional Voluntary Agency Liaison for FEMA Region VII, discussed what the PETS Act looks like in practice:

The example I use with animal sheltering is, even if there is terrible lack of care for pets in a disaster, until the state makes a request of us and says "we need help with veterinary care or feeding of animals or finding a facility for sheltering of animals," we can’t, by law, go in and do it. That request has to come through the state. Most importantly because they [the state] end up paying a portion of that cost. It’s what is called a “cost share agreement.”4

Those “cost-share” agreements are regulated by Disaster Assistance Policy entitled "Eligible Costs Related to Pet Evacuations and Sheltering."5 Considerations must be made for transporting, sheltering and tracking pets. Studies show that over 68 percent of households have pets6 and an estimated 600,000 pets died in Hurricane Katrina.7 It is easy to imagine how caring for those pets can spiral into a huge expense.

The biggest impact of the PETS Act was to broaden coverage for pets under the umbrella of federal planning and funding. After the PETS Act, there were subsequent state bills that addressed animals, and today thirty states have disaster statutes or regulations that cover the management of pets. Kansas is one of those states.

FEMA and Local Emergency Response Teams

FEMA is a federal organization that has no assets of its own and no funding except in times of disasters; it does, however, have resources in terms of people and money that can be routed to local teams helping on the ground. Local county response teams have funds for strategic planning and execution if disaster strikes, in addition to any necessary federal funds. Kansas has an emergency management program governed by the federal Stafford Act and Chapter 48, Article 9 of the Kansas Statutes Annotated.8 State law requires each county to maintain a disaster agency responsible for emergency preparedness and coordination of response to disasters. There are state and local agreements that govern assistance on daily operations in times of disaster. Most important, federal, state, and local organizations work together on training exercises to ensure effective operations when disaster strikes.

For animals, these local arms are usually called County Animal Response Teams, or CARTS. For the Lawrence area, there is a Douglas County Animal Response Team (DCART), Johnson County (JoCART), and Kansas has a statewide team called Kansas State Animal Response Team (KSSART).9 The State of Kansas has a Division of Emergency Management that offers a template animal sheltering form for any county to use to organize and mitigate intake of animals during disasters.10 The twelve page “Animal Disaster and Protection Plan” details procedures for a coordinated response among counties to provide for animals affected by disaster. Considerations are emergency medical care, evacuation, rescue and recovery, temporary shelter and care, disease diagnosis, prevention and control, and disposition. Within each consideration are services to be provided, for example, in “recovery,” the template outlines identification, waste disposal, determining conditions for repopulation, returning to owners, disposition for abandoned animals, and recordkeeping.11

The complexity of housing pets is only one of the reasons that Kansas has provided resources to local emergency response teams. Not only does strategic planning help protect the human-animal bond in times of disaster, but it also enhances public health and safety. Reports indicate that all of the changes in law, policy and training have achieved a higher rate of success for preserving human lives and their pets than pre-Hurricane Katrina.12

United States Department of Agriculture Animals

Congress limited the PETS Act to “household pets” and “service animals”, not all animals, and not even all domestic animals. That acknowledged the importance of the human-animal bond, but did not go so far as to require states to have a plan for animals that are not “traditionally kept in the home for pleasure” and specifically excluded “reptiles (except turtles), amphibians, fish, insects/arachnids, farm animals (including horses), and animals kept for racing purposes.”13 While there may not be as strong of a bond as a household pet, those animals, regardless of the purpose for which they are kept, rely solely on us for their health, safety and welfare.

The United States Department of Agriculture (USDA) Animal and Plant Health Inspection Service published the “Animal Welfare Act Contingency Plan Final Rule,” which requires all those regulated under the Animal Welfare Act, commercial animal breeders, animal research facilities, and animals exhibited to the public (e.g. zoos) to take additional steps to be better prepared for potential disaster situations.14 According to the final
FEMA estimated that over 1,800 people and about 600,000 pets died in Katrina. It is known that at least some of the lives that were lost were pets who wouldn’t leave without their pets. I will never know why or how my dog Katrina was abandoned, but I am grateful for the nine years we had together, and without her, I would have never pursued a career in animal law. I am certain the PETS Act has saved the lives of families affected by natural disasters since 2006, and am hopeful that Congress will continue to find the best way to manage all animals who rely on us in times of disaster.

Conclusion

FEMA estimated that over 1,800 people and about 600,000 pets died in Katrina. It is known that at least some of the lives that were lost were pets who wouldn’t leave without their pets. I will never know why or how my dog Katrina was abandoned, but I am grateful for the nine years we had together, and without her, I would have never pursued a career in animal law. I am certain the PETS Act has saved the lives of families affected by natural disasters since 2006, and am hopeful that Congress will continue to find the best way to manage all animals who rely on us in times of disaster.

About the Author

Katie Barnett is a graduate of the University of Kansas School of Law. During law school she worked as a contract lobbyist for Best Friends Animal Society and as a legislative attorney upon graduation. After traveling across the country working with animal shelters and local governments, Katie opened Barnett Law Office in Lawrence, KS, in 2012, where she focuses on animal law and municipal law; representing pet owners, municipalities, nonprofit and municipal animal shelters, and training law enforcement on animal issues.

katie@barnettlawoffice.com

2. Id.
9. More information about regional animal response teams can be found at https://kssart.org/about/history/ (last visited October 24, 2018).
13. See supra note 5.
15. Id.
17. Call with Kansas Department of Agriculture, October 25, 2018 (notes on file with author).
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Holiday Gift Guide 2018
by Larry Zimmerman

The holidays are upon us and the number of shopping days left is dwindling. There are no earth-shattering technological innovations this year as gadgets are in a refinement stage. Old ideas are being tweaked to improve quality and features. While quality is increasing, prices are decreasing—often into stocking-stuffer range. It is an especially good time to be a road warrior as gadgets to make the office away from home base more workable are more accessible than ever.

JBL Flip4 Speaker ($99) – The Flip4 delivers room-filling sound via a Bluetooth connection from a device barely larger than a pop can. The rechargeable battery onboard lasts for up to 12 hours of playtime and the speaker is even waterproof (IPX7 rated). The selling point for lawyers is the Flip4’s usefulness as a conference phone on the go. The Bluetooth connection to a cellphone is rock solid and its microphone sensitivity and clarity rival big-name conference phones clocking in at five times the price. The Flip4 is now a regular part of our travel kit.

Duet Display ($20) – Working with a single laptop screen on the road instead of a dual or triple monitor at the office can slow you down. Duet Display solves that problem by turning an iPad into a second monitor for your PC or Mac. The software was developed by former Apple engineers, and it shows in the simplicity of setup. A comparable product for Android tablets exists – iDisplay – but it is much buggier and nonexistent support. (There may be issues with Duet Display on Mac OS depending on version; read FAQs and releases before dropping a credit card.) Available at duetdisplay.com.

ActiveWords ($30/year) – ActiveWords is a powerful “macro” tool for Windows that allows you to trigger certain programs or actions by simply typing a word. For example, if you regularly send an email report to a partner, you can type “partner” and your email client would fire up with a message composed to her email address. If you want to insert a boilerplate section in an agreement or import an Excel table to a document, you can set a trigger word to initiate those actions. ActiveWords understands lawyers may work on multiple PCs,
so it is cloud-based and allows access to the triggers you set from any PC. Available at activewords.com.

**3 in 1 Display Adapter** (About $40) – This little dongle converts the display output of my Surface into either HDMI, VGA, or DVI so I am ready for any connection a venue’s projector might throw at me. Virtually all such adapters available are basic, no-name products from China and lifespan can be suspect. That said, Microsoft-branded cables—HDMI in particular—are not terrifically reliable either. Maybe pack a spare? Available from a variety of sellers on Amazon.

**SanDisk Extreme Portable SSD** ($90-500) – A portable hard drive is incredibly handy and the solid state drives (SSD) are many times faster than and more durable than prior generations with spinning platters. The drives are available in sizes up to 2 TB and incorporate drive level encryption for genuine security. If a portable drive is still too bulky for your needs, SanDisk also makes 400 GB microSD cards in multiple speeds. Just be aware how incredibly easy it is to lose a microSD card (smaller than a dime).

**Omnicharge Omni 20 Battery Bank** ($200) – The Omni 20 is a monster of a battery bank capable of outputting 60W to charge even laptops via two USB-C connections. An OLED screen displays detailed battery level and remaining time to charge as well as access to other features like depletion control which prevents discharge at rates that would damage the unit’s cells. The Omni 20 can be restored to full charge in just three hours and even serve as a USB hub. The compact device is available on Amazon.

**TaoTronics Active Noise Cancelling Bluetooth Headphones** ($55) – Noise cancelling, over ear headphones are a lifesaver on planes and the TaoTronics are as cheap as you can go for a set that actually works. Battery life approaches 30 hours for listening only but the headphones also incorporate a mic for hands-free phone use. An airplane-compatible power cord is also included. Available on Amazon.

**Clio (+ Lexicata)** – Clio has long been one of the most popular, robust, and reliable law practice management platforms for solo and small firms (and it’s a member benefit of the Kansas Bar Association). Clio offers a full range of features from matter management to billing to document creation. In late 2018, Clio purchased Lexicata, a market-leader in client experience management. Lexicata provides client intake software, contact management, and automations that Clio will begin incorporating in 2019, securing its place as the market leader for affordable cloud-based case management.

**Personalized Lawyer Gifts at Etsy** – Etsy is a one-stop-shop for personalized gifts – either vintage or handmade. My personal favorite is a mug proclaiming, “I am a lawyer but I can’t fix stupid.” Etsy is a marketplace so you are buying from a variety of sellers. Unfortunately, that means shipping can add up fast but that has been the only down side in the years I have used them.

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**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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Harvard Bias Trial:  
The Asian-American Community’s Affirmative Action Lawsuit  
by Katherine Lee Goyette and Linda Long, Fendley & Etson, Clarksville, Tennessee

On the first day of trial in Boston, hundreds of demonstrators protested Harvard University’s admissions practices outside the federal courthouse, holding signs that read “I AM ASIAN AMERICAN. I HAVE A DREAM TOO” and “DISCRIMINATION IN THE NAME OF DIVERSITY IS WRONG”. The lawsuit, filed in 2014 by the Students for Fair Admissions, Inc. (SFFA), alleges that the University’s admissions policies are racially and ethnically discriminatory in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., because the University limits the number of Asian-American students admitted by giving preference to other racial groups for purposes of balancing the racial makeup of the incoming freshman class. Thus, if you’re Asian-American and applying to Harvard University, you are expected to perform better than all other racial or ethnic groups in order to have the same chance at admission. Harvard University maintains that grades and scores are only factors it considers in its undergraduate admissions, utilizing a “holistic” review of what each applicant brings to the table, including diversity, to create the best learning environment for all of its students.

Plaintiffs in the Harvard suit argue that as a group, Asian-Americans are the most underrepresented racial minority in the applicant pool (and studies support that Asians have the lowest acceptance rates of all racial groups). Further, they argue that these low acceptance rates aggravate their case, as Asian Americans tend to be significantly more qualified than the average applicant. Finally, despite the increase of Asian-American applicants over the years, the number of accepted Asian-American students has remained the same—which the SFFA argued is akin to the discrimination “formerly used to limit the number of Jewish students in [Harvard’s] student body” in the early 1900s.

The controversy surrounding Asian-American undergraduate admissions has been around for decades. In the 1980s, Stanford University’s Committee on Undergraduate Admissions and Financial Aid admitted negative treatment against Asian applicants. An internal investigation at Brown also found that “Asian American applicants have been treated unfairly in the admissions process.” The U.S. Department of Education launched civil rights investigations into both Harvard and UCLA in the late 1980s; two years later the Office of Civil Rights found that only UCLA had wrongfully discriminated against Asian applicants, finding that Harvard’s preference for legacy applicants and athletes justified lower Asian-American admission rates. Most recently in September of 2018, the U.S. Departments of Education and Justice opened an investigation into alleged anti-Asian bias in Yale University’s admissions process.

Current law on affirmative action continues to reflect back to Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), which held that while affirmative action programs can be constitutional, the use of ‘racial quotas’ in the admissions process was unconstitutional (striking down UC Davis Medical School’s practice of reserving 16 seats for minority students). The University of Michigan Law School’s affirmative action admissions policy was upheld in Grutter v. Bollinger, 539 U.S. 306 (2003), where the Supreme Court ruled in support of the University’s race-conscious admissions process favoring underrepresented minority groups, and that the process did not violate the Equal Protection Clause since the law school’s admissions policy was narrowly tailored to “serve its compelling interest in obtaining the educational benefits that flow from a diverse student body.” Most recently, SCOTUS has upheld the University of Texas’ affirmative action program in Fisher v. University of Texas, 135 S. Ct. 2198 (2016) (“Fisher II”). The program survived a strict scrutiny examination, where two white applicants sued under Title IV grounds after being denied acceptance under an admissions policy that evaluated students by their talents, leadership ability, familial circumstances, and race.
What has been the effect of “race-conscious” admissions policies at selective undergraduate schools upon the Asian-American community? The Princeton Review has advised that “Asian-sounding surnames” may disadvantage applicants in admissions decisions, and Pacific Islanders, who are often grouped together with Asian-Americans, have expressed concern about the “Asian-handicap” that they have withdrawn from the racial category all together and classified themselves as Native Hawaiians.10 In a NYT interview, Feng Zhang, a hedge fund manager, admitted that he urged his son to apply to Harvard as a “gay Asian-American who fought with his parents over being gay” just as a “social experiment” to see if he would be admitted to the University.11

The Asian-American community struggles with the concept of affirmative action, balancing the desire to support underrepresented minorities, but not to the extent of “negative action”, or negative treatment as compared to the white majority; thus, while some affirmative action policies may give a “plus” factor to African-American, Hispanic or American Indian applicants, “negative action” occurs when a “minus” factor is applied to Asian-American applicants.12 Since WWII, the academic achievements of the Asian-American community has been used to perpetuate a “model minority” myth to disparage other racial/ethnic minority groups, namely, African-Americans.13 In viewing Asian-Americans as superior in the context of their achievements, blacks, specifically, are undermined: “Whenever someone says, ‘Asians are naturally (insert positive characteristic),’ the unspoken corollary has been, and continues to infer, ‘and black people are not.”’14 The irony of the Asian-American community’s affirmative action complaints is that a perception is created that they are at odds with the African-American and Hispanic populations (both populations that are also vastly unrepresented in highly selective undergraduate programs), though all the plaintiffs are requesting is a blanket prohibition of using race as a factor at all in future undergraduate admissions decisions, for a race-blind admissions process.15 Regardless of the federal district court’s upcoming decision in the Harvard lawsuit, the issue of whether race-conscious affirmative action policies as it affects the Asian-American community will likely not be resolved until a final decision is issued by the U.S. Supreme Court. ■

About the Author

Katherine Lee Goyette (McBride) is a 2010 graduate of Washburn Law (JD) and a 2012 graduate of the University of Kansas School of Law (LLM). She is an associate attorney for Fendley & Etson in Clarksville, TN and practices in the areas of criminal defense, family law and personal injury. Linda L. Long, a 2017 graduate of Northern Kentucky University (JD) contributed to the writing of this article.

1. The SSFA is a nonprofit group advocating against the use of racial classifications and preferences in college admissions. More information about SSFA and its lawsuit can be found at https://studentsforfairadmissions.org.
2. One study showed that Asian-American applicants at certain selective universities needed to score 140 points higher than whites, 270 points higher than Hispanics, and 450 points higher than African-Americans in order to receive an offer of admission. Thomas J. Espenshade & Alexandriad Walton Radford, No Longer Separate, Not Yet Equal, 90 table 3.5 (2009). Harvard contests this, indicating that “the large majority of the 40,000+ applicants to Harvard are academically qualified, requiring the College to consider more than grades and test scores. In a recent admissions cycle (in which there are fewer than 2,000 available slots): more than 8,000 domestic applicants had perfect GPAs; over 3,400 applicants had perfect SAT math scores; and over 2,700 applicants had perfect SAT verbal scores.” Harvard University, Harvard Admissions Lawsuit: Key Points, available at https://admissionscase.harvard.edu/key-points.
3. This Harvard approach was endorsed in 1978 by Justice Powell in Regents of the University of California v. Bakke, 438 U.S. 265 (1978). “...Schools can choose students who exhibit qualities more likely to promote beneficial educational pluralism [diversity].”
5. Top ranges of submitted SAT scores are composed of mostly Asian applicants, as is the case for recipients of the National Merit Scholarship, Intel Science Talent Search, and other awards earned by high school students. See, Complaint, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 308 F.R.D. 39, 47 (D. Mass 2015)(No. 14-cv-14176). Notably, one of SFFAs members that was denied admission to Harvard’s 2014 entering class was an first-generation Asian-American, ranked first out of 460 students at a high school that was in the top 5% of all U.S. high schools; had perfect scores on the ACT and SAT; and was an AP Scholar with distinction, a National Scholar, and a National Merit Scholarship semifinalist.
7. Id. at 29.
15. See, Complaint, supra note 5 at 119.
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Stephen Angermayer, Pittsburg, Kansas, has been selected by the Kansas Continuing Legal Education Commission as the recipient of the 2018 Robert L. Gernon Award.

Stephen Angermayer is an attorney with the firm of Fern and Angermayer in Pittsburg, Kansas.

Angermayer was nominated by John Mazurek and by Michael Gayoso of the Crawford County Attorney’s Office. In his nomination letter, Gayoso highlighted the impact that Angermayer has had on the legal profession in the southeast area of Kansas. “He took it upon himself to organize monthly one hour continuing legal education (CLE) luncheons, although he was and is not on the board. Living in Southeast Kansas, it is difficult to obtain quality CLE’s on a consistent basis and Steve strives to achieve this every month.” In addition, Angermayer has presented CLE programs around the state on a variety of topics and served as a member of the Kansas Continuing Legal Education Commission for six years (two as chair).

Steve received his Bachelor of Science in Animal Science from Kansas State University in 1985, and his Juris Doctor with Honors from Washburn University School of Law in 1988. He is a member of the Kansas Bar Association, Southeast Kansas Bar Association, and the Crawford County Bar Association.

Justice Robert Gernon worked tirelessly to improve the training, education and professionalism of attorneys in Kansas and across the nation. Stephen Angermayer is an outstanding representation of what it means to be a recipient of the Gernon award. The award was presented at the October 17 meeting of the Crawford County Bar Association.

Established in 2005 and presented annually by the Kansas Continuing Legal Education Commission, the Robert L. Gernon Award for Outstanding Service to Continuing Legal Education in Kansas recognizes those individuals or organizations that have demonstrated a unique commitment to legal education for lawyers in Kansas and have provided outstanding service to continuing legal education.

The award is named for Kansas Supreme Court Justice Robert L. Gernon (1943 - 2005), whose career included tireless devotion to the training, education and professionalism of attorneys in Kansas and across the nation. The building that houses the Kansas Bar Association and the Kansas Bar Foundation was renamed in honor of Justice Gernon in November of 2017.

Previous award recipients include:
With this final issue of The Journal of the Kansas Bar Association for 2018, we also conclude our exclusive series: Math and the Law. On behalf of the KBA, I thank our outstanding contributing authors for their excellent articles. And most of all, on behalf of the KBA Board of Editors, I thank our wonderful coordinator of this series, Adam Dees, of the Clinkscales Elder Law Practice in Hays. You may recall the series was Adam's brainchild. He did all the groundwork, recruited the authors and coordinated the process from day one. I am deeply indebted to him for his unflagging enthusiasm for seeing this through for the entire year. If you have appreciated his work, feel free to reach out to him and to our individual authors to say thank you.

If ANY of you, our readers, have an idea for a series or a feature or a substantive article for The Journal, please reach out to me. I would be so happy to hear from you.

Adam Dees, coordinator of Math and the Law series: adam@clinkscaleslaw.com

January 2018
Adam Dees
“I Went to Law School So I Wouldn’t Have to Do Math”
adam@clinkscaleslaw.com

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Kenneth Titus
“A Lawyer Who Works with Water Also Relies on Math”
Kenneth.titus@ks.gov

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“The Calculation of Child Support in Kansas”
charris@cfharrislaw.com

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“Using Math to Determine How Best to Pay for Long Term Care”
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Danielle Hall
“The Future of Law Includes Math”
ahald@kscourts.org

June 2018
John T. Bird
“A Bird in the Hand: Mathematics and Divorce—Making Things Add Up”
jtbird@haysamerica.com

July/August 2018
Adam Dees
“The End is the Beginning: Navigating the Maze of Veterans’ Pension Benefits”
adam@clinkscaleslaw.com

September 2018
Michael Koss
“The Math Behind Representing Municipalities in Public-Private Partnerships”
kosslaw11@yahoo.com

October 2018
William Schmidt
“How Much Math Does Tax Advocacy Require?”
schmidtw@klsinc.org

November/December 2018
Adam Dees
“Math Moves Forward”
adam@clinkscaleslaw.com

Math Moves Forward

by Adam C. Dees

The year of the math and the law series comes to a close. We heard from attorneys in private practice, practicing for governmental entities, from the disciplinary administrators’ office, and attorneys engaging in public service doing pro bono work. We have put the classic law school statement—I became a lawyer so I would not need to do math—to the test, and discovered that appropriate mathematical applications can help us find our way through the trees (and weeds) of practicing law. This article recaps the ways math skills are used every day and were explored in the last year. I hope this series has encouraged you not to shy away from math but continue exploring how you use math, how math can enhance your practice, and how math gives you another tool to serve your clients. These are the lessons I learned while exploring law and math with my colleagues over the last year.

Kenny Titus demonstrated that attorneys need to know the language behind math to communicate with engineers, planners, hydrologists, and scientists. That understanding math allows us to communicate on a professional level with those who are more scientifically and mathematically minded. This allows an attorney to digest data provided by those professionals, thereby allowing attorneys to clearly communicate with their clients. Kenny urged us not to shy away from math because those requesting our guidance do not, and many times cannot.

We learned from Charles Harris the effect of mathematical computations on the $415,000,000 of child support payments handled by the Kansas Payment Center in 2016. Also, we found that the formula is updated as the understanding of the financial needs of raising children evolves, including
the additions of distance parenting time costs, parenting time adjustments, income tax consideration, special needs, agreements for payments made past majority and the overall financial considerations of a household. These calculations become more relevant in the age of the two-income households.

In tandem, John Bird described how to walk a divorcing client through the calculation of the values of businesses, retirement accounts and other difficult-to-divide assets. He discussed how the time-value of money could change a client’s perspective on the value of resources during a divorce. This allows the client to consider what assets are truly of value and can lead to successful mediation or court division. Ultimately, math adds to the understanding of the client’s goals, potential outcomes, and the effect of the divorce on the client’s lives.

While John described how math creates analysis, Jennifer Walters reminded us that math can also create facts. She reminded us that math can give a clear answer when balancing multiple, sometimes competing, issues. Math is essential when finding the most efficient way to pay for long-term care without the client and their family going broke. The answer is found only after balancing the income to a family, the monthly expense of long-term care, and the resources a family can draw upon. Paying may mean privately paying each month or relying on Medicaid or other governmental programs to help pay for care.

I discussed using math to find your way through the maze of potential veterans benefits and life circumstances. The article reminded us that the calculations continue after the initial consult as the client’s circumstances evolve. Veterans, and many people we work with, have multiple benefits they are eligible for; but those benefits can change given the person’s changing situation. To effectively represent our clients requires reviewing the case periodically to see if there are other options. This continuing analysis can help us navigate the maze of veteran’s pension benefits as well as other benefits.

As always, the law and the world around us continue to change. Danielle Hall explored the ever growing world of artificial intelligence and its current and future impacts on attorneys. She reminded us that even if you do not use Artificial Intelligence (AI) in your practice, other lawyers will; and you may find it becomes relevant to your practice. Like math, the robots and AI do not become our enemies. Rather, they remind us that math and its implications for our profession will never go away.

To bring us full circle, Michael Koss described working with municipalities and businesses to encourage the businesses to invest in a municipality while protecting the municipality’s taxpayers. He gave three examples of options municipalities have to help bring businesses into a community. But without running the numbers and doing the math, neither the municipality nor the business can determine whether the transaction is beneficial for both parties.

To sum up (pardon the pun), math is integral to the practice of law. Daily, attorneys interact with math. From litigators to general counsel, from elder law attorneys to family law attorneys, and in between, we all use math. Math will only become more prevalent as statistical analysis improves and AI advances. Over the last 12 months, I have enjoyed learning about my colleagues mathematical endeavors, and I hope you have, too. I extend thanks to the authors for their contributions and the Kansas Bar Association Journal for its support in allowing us to discuss a topic that is sometimes lost in advocating, arguing and analyzing. As we grow as a profession, I encourage you to take math with you—and to follow the mathematical paths laid out for you to better serve yourself, your clients, and the legal profession.

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.
ABLE Accounts: A Special Needs Planning Tool

by Samantha L. Shepherd, JD, LLM, CELA*

ABLE Accounts are an extremely beneficial and yet still largely under-utilized tool available for individuals with disabilities. In response to a call for a change in public policy related to the extraordinary financial demands of individuals with special needs and their families, a bi-partisan movement resulted in a new federal law. The Achieving a Better Life Experience (ABLE) Act is federal legislation passed in 2014 that allows states to create and operate a savings program for individuals with disabilities. The savings program allows for the creation of accounts called ABLE Accounts. The concept behind such an account is to allow an individual with a disability to save money while not losing federal and state needs-based and means-tested benefits. The concept of the ABLE Account is a welcome one, since the current federal rules are extremely limiting for individuals with disabilities regarding the accumulation of personal funds and having access to them.

The ABLE Account and SSI

The primary monthly income source for individuals with disabilities is called Supplemental Security Income or “SSI”. SSI is a means-tested federal benefit administered through the Social Security Administration. Means-tested benefits are benefits based on an individual’s means, including the individual’s assets, income, and other resources. For 2018, the monthly SSI benefit is $750. Eligibility for SSI is twofold: the individual must be disabled and the individual must have assets less than $2,000. The ABLE Account provides an exception to the asset limitation. The assets in an ABLE Account do not count toward the $2,000 asset limit. It is now possible for an individual with a disability to have a bank account with $2,000 (or less) and an ABLE Account with as much as $100,000 and maintain eligibility for SSI benefits.

The ABLE Account and Medicaid

The primary healthcare payment source for individuals with disabilities is Medicaid. Like SSI, Medicaid is also a means-tested federal benefit. In Kansas, Medicaid is referred to as KanCare. The Medicaid program has eligibility criteria similar to the SSI program, including an asset limit of $2,000. The funds in an ABLE Account, however, are not subject to this $2,000 Medicaid asset limitation. To maintain eligibility for KanCare, the asset limit for an ABLE Account is $370,000. What this means is that a disabled individual (or his/her legal representative, such as an agent under a durable power of attorney or a conservator) can elect to have an account balance over $100,000, and thereby lose SSI benefits, but keep the account balance under $370,000 and retain KanCare benefits.

An ABLE Account is Similar to a 529 Plan

The ABLE Account is similar to a 529 education savings plan. The rules for the ABLE Account are set forth in the Internal Revenue Code section 529A. Earnings in an ABLE Account are not subject to income taxation, just as earnings in a 529 plan grow income tax free. Non-qualifying withdrawals from an ABLE Account may be subject to income taxation, just as non-qualifying withdrawals from a Section 529 Education account may be subject to income taxation as well. More on withdrawals from ABLE Accounts is discussed below.
ABLE Account Rules

The ABLE Account is not without strict compliance rules. First, an individual may have only one ABLE Account. There may be many contributors to the account, but only one owner and beneficiary. The ABLE Account owner and no one else is the beneficiary of the account. In addition, ABLE Accounts are not simply available to open at a local bank on a whim. Rather, an ABLE Account must be established through a state run program. It is important to note that it is not legally required to create an ABLE Account in the state where the disabled individual resides. Any state run ABLE Account program is acceptable for use by a Kansas resident with a disability. Although the legislation allowing for the establishment of an ABLE Account was passed in 2014, the State of Kansas only recently opened its own ABLE Account. It is not hard to find a way to open an ABLE Account, however. A quick Google search reveals that Kansas and Missouri each have ABLE Accounts that one can establish online. There are no fees to open an ABLE Account and no minimum balance requirements beyond an initial deposit of $25. The Kansas ABLE Account is called Kansas ABLE savings plan. More information about Kansas ABLE Accounts can be found at savewithable.com.

Another rule for ABLE Accounts is the age limitation of the disabled beneficiary. Not all individuals with disabilities qualify for an ABLE Account. One limiting factor is the age of disability onset. The individual must have a disability that began before the age of 26. Accident or stroke victims who become disabled after age 26 are not allowed to have ABLE Accounts. There is also a cap as to the amount of money that can be deposited into a disabled individual’s ABLE Account on a yearly basis. The annual maximum that can be deposited into an ABLE Account is currently $15,000. The deposit can be made by anyone, but the cumulative annual deposit(s) must not exceed $15,000. The annual deposit amount is set to match the annual federal gift tax exclusion amount and, accordingly, increases when the federal gift tax annual exclusion amount increases. There is an exception to the $15,000 annual contribution limit. If the disabled beneficiary works and does not contribute to a 401(a), 401(k), 403(b), or 457 plan, the beneficiary can contribute an additional amount in excess of the normal deposit limit. The additional amount is equal to the lesser of the beneficiary’s annual compensation or the federal poverty level for an individual, which is $12,060 in 2018.

ABLE Account funds can be used for any “qualified” spending needs of the beneficiary. The following are examples of qualified expenses:

- Education
- Health and wellness
- Housing
- Transportation
- Legal fees
- Financial management
- Employment training and support
- Assistive technology
- Personal support services
- Oversight and monitoring
- Funeral and burial expenses

The ABLE Account Housing Advantage

There is one particular advantage that ABLE Accounts provide in the area of housing: normally, if someone such as a parent provides room and board to an SSI recipient, then the SSI monthly benefit is reduced. Even if a parent simply allows an adult child (who is an SSI beneficiary) to live in the parents’ home without a charge or without rent, the SSI monthly benefit is reduced. SSI rules are clear that if parents provide for shelter for a child receiving SSI, then in the eyes of the social security administration the SSI beneficiary does not need the full $750. However, if the adult child uses funds from an ABLE Account (which, remember, can be funded by the parents) to pay for shelter expenses, such as rent, there is no reduction of SSI. Thus, in such an instance, an ABLE Account provides a method for the parents to subsidize the room and board for their disabled child without the child losing some of his/her monthly SSI income.

An ABLE Account is not appropriate in every circumstance. There are other options which may be appropriate, including the use of a special needs trust. In addition, the ABLE Account has a downside for all participants. If there are funds remaining in an ABLE Account upon the death of ABLE Account owner/beneficiary, then these funds are subject to a payback to whatever state(s) provided Medicaid benefits.

Although long overdue, ABLE Accounts may now be established by Kansas residents who became disabled prior to reaching the age of 26 and remain disabled. This is a welcome change and provides opportunities for these individuals to have greater control of their financial lives while remaining eligible for federal and state benefits to the greatest extent possible.

Samantha L. Shepherd JD, LLM, CELA practices exclusively in the areas of Elder Law, Estate Planning, and Special Needs Law. She earned her law degree from Boston College Law School and received an LLM. in Estate Planning from the University of Missouri, Kansas City. Samantha currently serves on the Board of the National Academy of Elder Law Attorneys and as Chair of the Kansas City Metropolitan Bar Association Trust and Estates Committee. Formerly the Chair of the Missouri Bar Elder Law Committee and past President of the Missouri Chapter of NAELA, she is an accredited attorney with the Veterans Administration and is Certified as an Elder Law Attorney* by the National Elder Law Foundation in both Kansas and Missouri. She is the founder and managing attorney of the firm.
Illegal Possession

by Betsy Six

We are all guilty.

Most of us have, at some point in our lives, illegally possessed something, whether it was a piece of candy or fruit from a store that we failed to pay for, or alcohol we consumed before we were of legal age, or perhaps even marijuana or some other controlled substance. While I cannot be certain that every reader has committed a misdemeanor crime of possession, I can be certain that every reader has improperly used the apostrophe: We have all committed the grammar crime of illegal possession.

Maybe you wrote in a brief, “The defendants motion should be denied.”¹ Maybe you said, “The plaintiff’s are in error.”² Perhaps you have written, “The corporation, in its brief, argues its reasonable.”³ Perhaps you sent a card to the Smith family that said: “Happy Holidays Smith’s!”⁴

Why do we all struggle to use apostrophe’s apostrophes correctly? Why is illegal possession so rampant? As a parent of four teenagers, and as someone who used to be a teenager, I am aware of the excuses teenagers use to justify illegal possession of the misdemeanor kind. They will argue there is no real harm, the rules are too complicated and do not make sense, and the perennial favorite, everybody is doing it. We use these same excuses to justify illegal possession when using apostrophes.

Excuse #1: There is No Real Harm

Teenagers often argue that their illegal possession of stolen goods, alcohol, or marijuana did not result in any actual harm. As adults, however, we know that there is harm associated with petty theft and with alcohol and drug use. While an occasional misstep often results in a diversion and forgiveness, a pattern of errors can cause significant problems.

The same is true for grammar errors of possession. Even if the reader almost always knows what we intended to say, as lawyers we lose credibility when we make simple mistakes. Particularly when there are multiple errors, the reader questions our thoroughness and attention to detail and wonders if we are similarly careless with our statement of the facts or with our legal analysis.
Excuse #2: The Rules are Too Complicated and Do Not Make Sense

In my youth, the rules of alcohol consumption for minors were complicated. My senior year of high school, the Kansas legislature raised the drinking age from 18 to 21. When it did so, the legislature created an exception for most, but not all of those who were already 18. Many of my peers fell into the gap of those who could legally drink for some brief period of time, five months to one day, before they were again underage. Today, at least in states other than Kansas, laws about marijuana use are complicated. Someone travelling to another state may find their use of marijuana legal under state but not federal law. Its legality may depend on whether you are using it for medical reasons or recreational ones. Many have used these inconsistencies as an excuse for not following the rules.

While some may argue they fail to follow the grammar rules for possession because they are also inconsistent and complicated, the rules are actually relatively simple. For most nouns, those that do not end in s or with the s sound, you make a singular noun possessive by adding ’s and a plural noun possessive by adding an apostrophe after the s. If the plural of the noun does not end in s you add ’s. (See chart below.)

Sometimes the rules do get a bit more complicated, like when you have two nouns that possess the same thing. If the plaintiff and the defendant each submitted a brief, you would refer to the plaintiff’s and defendant’s briefs. But if two people submitted one combined brief, you only put the ’s only after the second noun: Lee and Harris’s brief.

There are some exceptions to the rules, and the one that causes the most trouble is the possessive for the word “it.” The possessive form of “it” is just “its” without the apostrophe. But the exception is not limited to the word “it.” We do not use an apostrophe to indicate possession for any of the personal pronouns: I and my; he and his; she and her; you and our; you and your; they and their; who and whose. The confusion arises because we also use apostrophes for contractions like “it’s,” “you’re,” “they’re,” and “who’s” to shorten “it is,” “you are,” “they are,” and “who is.” But because lawyers generally do not use contractions, the distinction should be easier in legal writing. We just have to remember never to use apostrophes with personal pronouns.

<table>
<thead>
<tr>
<th>Plural, Non-possessive</th>
<th>Singular Possessive</th>
<th>Plural Possessive (regular)</th>
<th>Plural Possessive (irregular)</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Rule</td>
<td>Add s but do not use an apostrophe</td>
<td>Add ’s</td>
<td>Add an apostrophe</td>
</tr>
<tr>
<td>Word ends in a letter other than s (or s sound)</td>
<td>The Smiths owned a house</td>
<td>A tree fell on Maya Smith’s house</td>
<td>A tree fell on the Smiths’ house.</td>
</tr>
</tbody>
</table>

Possessives can appear more complicated when the noun ends in s or with the s sound, but the rules are still relatively straight-forward. In fact they are the same as the rules for words that do not end the s sound. The rules only seem different because the rule for making the noun plural is different: for plurals you add an es rather than just an s. (See chart below.)

<table>
<thead>
<tr>
<th>Plural, Non-possessive</th>
<th>Singular Possessive</th>
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<tbody>
<tr>
<td>The Rule</td>
<td>Add es but do not use an apostrophe</td>
<td>Add ’s</td>
<td>Add an apostrophe</td>
</tr>
<tr>
<td>Word ends in a letter other than s (or s sound)</td>
<td>The Joneses owned a house</td>
<td>A tree fell on Manuel Jones’s house.</td>
<td>A tree fell on the Joneses’ house.</td>
</tr>
</tbody>
</table>
Excuse #3: Everybody is Doing It

So if we know mistakes cause harm by affecting our credibility and the rules are really are not that complicated, why do we continue to make mistakes?

Typographical errors are often difficult to spot in our own writing because we read what we know we meant rather than what we actually typed. That is why we find other people’s typographical errors more frequently than our own and why we are more likely to find an error in our own writing if some time has passed since we wrote it.

But possession errors add other levels of difficulty to the challenge: They do not look or sound like errors. Like some misspelled words -- statute when we meant statute -- most errors of possession do not look wrong. Computer software is becoming more sophisticated, and many grammar-check programs will identify incorrect uses of apostrophes. But they do not identify all of them, and this inconsistency contributes to the problem. Because some of the errors are identified for us, we can become complacent about looking for others. But unlike many misspelled words, possession errors also do not sound wrong. We frequently proofread by reading what we have written aloud, at least in our heads, and most incorrect uses of the possessive still read correctly: “Its” and “it’s” are pronounced the same.

Because they are so difficult to notice, we have to force ourselves to slow down and specifically look for them. We have to train ourselves to notice. No more excuses. We have to set a good example for the teenagers.

1. The sentence should read, “The defendant’s motion should be denied,” because “defendant’s” is a singular possessive.
2. The sentence should read, “The plaintiffs are in error” because “plaintiffs” is a plural non-possessive.
3. In the phrase “The corporation, in its brief,” “its” is the correct possessive form of “it.” In the phrase “argues it’s reasonable,” “it’s” is the correct form for the contraction of “it is.” Most legal writer avoid contractions and would properly write the sentence as follows: “The corporation, in its brief, argues it is reasonable.”
4. The card should read, “Happy Holidays Smiths!” because “Smiths” is a plural non-possessive.
5. Before 1985, persons 18 or older could legally possess and consume beer with less than 3.2% alcohol content by weight. On January 1, 1985, the drinking age was raised to 21 for all forms of alcohol, but that rule applied to those who were born after July 1, 1966. In other words, many young adults were “grandfathered in.” But for some reason, the legislature did not grandfather in everyone. If you were born between July 2 and December 31, 1966, you turned 18 before the law took effect but nonetheless were not grandfathered in when it did take effect on January 1, 1985. See Kansas Legislative Research Department, “Kansas Liquor Laws (2003 Edition)” (February 24, 2003) available at The Kansas Government Information Online Library, http://cdm16884.contentdm.oclc.org/cdm/ref/collection/p16884coll8/id/300.
7. Not everyone would add an ‘s to a noun that ends in s. Some would just add the apostrophe. For example, some would say, “Kansas’ death penalty statute is facially unconstitutional.” Kansas v. Marsh, 548 U.S. 163, 168 (2006) (J. Thomas). But others would argue that because you would another s sound when reading the sentence aloud, you must add the apostrophe and the s: “Kansas’s death penalty statute is facially unconstitutional.” See id. at 182 (J. Scalia concurring); Id. at 203 (J. Souter dissenting). I previously advocated for always adding the ‘s in “Take it Easy: Five Lazy Grammar Rules,” 84 JOURNAL OF THE KANSAS BAR ASSOCIATION 12-13 (May 2015).
8. In the paragraph of errors at the beginning of the article, my version of Microsoft Word identified three of the five errors.
9. That reality has led some people, include George Bernard Shaw to argue we should abolish the apostrophe. Not surprisingly, there is even a website devoted to the idea: http://www.killtheapostrophe.com/.

About the Author

Betsy Brand Six, a native Kansan, practiced environmental law for thirteen years before she began teaching legal writing in 2004. A graduate of Stanford Law School, she is a Clinical Associate Professor, the Director of Academic Resources, the Director of Diversity & Inclusion, and the Robert A. Schroeder Teaching Fellow at the University of Kansas School of Law. She knows she has four children and thinks her husband is worth keeping around the house.

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Does Discrimination “Because of Sex” Cover Sexual Orientation and Gender Identity Discrimination?

The Evolution of Title VII

by Teresa Shulda
I. Introduction
The scope of sex discrimination under Title VII of the Civil Rights Act has come a long way from its roots in 1964 to the current battle over whether Title VII protects employees from discrimination based on sexual orientation and gender identity. Recent decisions from federal appellate courts indicate that lesbian, gay, bisexual, transgender, and queer (“LGBTQ”) employees may see some light at the end of that tunnel, with the Second, Sixth, and Seventh Circuits holding that Title VII does protect gay and transgender workers. But Justice Kennedy’s recent retirement has created uncertainty as to what the future holds for LGBTQ employees who bring sex discrimination cases based on their sexual orientation or gender identity.1

II. The History of Title VII’s Prohibition of Sex Discrimination

A. Legislative History and Early Cases
Congress passed Title VII of the Civil Rights Act in 1964,2 making it illegal for employers to discriminate against applicants and employees on the basis of certain protected categories. Title VII states:

It shall be an unlawful employment practice for an employer to:

(1) fail or refuse to hire or to discharge any individual, or otherwise to discrimi-
nate against any individual with respect to his compensation, terms, condi-
tions, or privileges of employment, because of such individual’s race, color, 
religion, sex, or national origin; or

(2) limit, segregate, or classify his employees or applicants for employment in 
any way which would deprive or tend to deprive any individual of employ-
ment opportunities or otherwise adversely affect his status as an employee, 
because of such individual’s race, color, religion, sex, or national origin.3

But the story of how “sex” ended up a protected category in this game-changing employment law is intriguing on its own.

Virginia Congressman Howard Smith proposed adding “sex” to the list of protected classifications only near the end of the legislative debate of the bill. And most commenters believe that Smith’s motivation was to derail the bill’s passage. Smith was an ardent and public opponent of civil rights legislation that benefited black citizens, leading many legal scholars to conclude that Smith thought adding “sex” to the bill would be unpopular enough with his mostly-male colleagues that the bill was sure to falter.4 In the end, the amendment to the bill adding “sex” as among the protected categories passed by a margin of 168-133.5
Because of this unique history, there is scant legislative history to help courts interpret “sex discrimination” in accordance with Congressional intent. As a result, early Title VII sex discrimination cases yielded decisions holding that pregnancy discrimination, “single women only” employment policies, policies that barred working mothers, and workplace sexual harassment were not prohibited by Title VII because the offensive conduct did not perfectly and clearly differentiate between all women and all men. Rather, the offensive conduct impacted only some women. But over the two decades following the passage of Title VII, Congress, the Equal Employment Opportunity Commission (“EEOC”) (which administers Title VII), and the courts expanded Title VII’s coverage to prohibit these forms of sex discrimination.

B. Sexual Harassment as Sex-based Discrimination

By 1986, the Supreme Court recognized “hostile work environment” sex harassment. Meritor Savings Bank v. Vinson was the first case to go before the Supreme Court that posed the question of whether a work environment permeated by sexual harassment could be actionable under Title VII. Vinson sued her employer alleging that her male supervisor had subjected her to constant sexual harassment, including propositioning her for sex, sexual touching in the workplace in front of other employees, and even rape, among other conduct. It also came out during trial that Vinson entered a consensual sexual relationship with the supervisor, which she testified she acquiesced to because of her fear of losing her job. After the trial, the lower court ruled that Vinson had not been the victim of sexual harassment or sex discrimination, focusing on the admittedly consensual nature of her sexual relationship with the supervisor.

The Supreme Court rejected the trial court’s conclusions. The Supreme Court found that the lower court erred in determining that a “voluntary” sexual relationship cannot give rise to a Title VII violation; instead, the proper inquiry is whether the conduct from the alleged harasser was “unwelcome.” In addition, the Court relied in part on the EEOC’s 1980 guidance advocating the position that sexual harassment violates Title VII, even when there is no economic injury. Ultimately, the Court adopted decisions by several federal appellate courts holding that sexual harassment that is sufficiently severe or pervasive “to alter the conditions of [the victim’s] employment and create an abusive working environment” violates Title VII.

C. Early Sexual Orientation and Gender Identity Cases

Despite the expanding view of what constituted discrimination “because of sex,” until recently, courts were unanimous in their view that sexual orientation and gender identity discrimination were not covered by Title VII. The early cases that considered the question relied on the scant legislative history to conclude that Congress could not have intended to include LGBTQ employees within the protections of the law.

For example, in Holloway v. Arthur Anderson & Co., a case decided by the Ninth Circuit in 1977, the plaintiff sued under Title VII alleging that her employer terminated her employment because she was transgender and preparing for sex reassignment surgery. The plaintiff argued that the term “sex” in Title VII should encompass gender, which would then protect transgender employees. By contrast, the employer argued that “sex” should be given the “traditional definition based on anatomical characteristics.” The court agreed with the employer, relying on the limited legislative history to conclude that “Congress has not shown any intent other than to restrict the term ‘sex’ to its traditional meaning,” and the manifest purpose of the law was to ensure that men and women are treated equally. The court thus declined to extend Title VII to transgender employees.

Two years later, the Ninth Circuit followed the same reasoning regarding sexual orientation discrimination. In the consolidated cases of Desantis v. Pac. Tel. & Tel. Co., four men and two women sued their respective employers under Title VII, alleging they were harassed and discriminated against due to their sexual orientation. The court followed the decision in Holloway and held that “Title VII’s prohibition of sex discrimination should not be judicially extended to include sexual preference such as homosexuality.”

The other federal appellate courts followed these early decisions, holding that Title VII does not protect LGBTQ employees from sexual orientation or transgender status discrimination. Like the Ninth Circuit, the courts routinely relied on the lack of legislative history to support their decisions that “sex discrimination” could only be interpreted to include “traditional concept[s] of sex.”
D. Sex Stereotyping and Opening the Door to LGBTQ Employees

While the interpretation of discrimination “based on sex” continued to evolve in the case law, protection for LGBTQ employees seemed to stall. But one landmark case decided 25 years after the enactment of Title VII had an enormous impact on which workers could seek protection from sex discrimination, and what conduct was prohibited under Title VII.

In 1989, the Supreme Court considered *Price Waterhouse v. Hopkins*. Ann Hopkins was a senior manager for the accounting giant Price Waterhouse. Though her performance in many regards appeared stellar, when it came time to vote for admittance to the partnership, the firm held her application for reconsideration until the following year. Hopkins sued for sex discrimination. The evidence revealed that her detractors described her as “macho,” and one suggested that she “overcompensated for being a woman.” She was advised to take a charm school course and told that to improve her chances for partnership she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”

The Supreme Court agreed with the lower court’s conclusion that sex stereotyping, which was evident by the partners’ comments about Hopkins’s appearance and personality traits, can establish prohibited sex discrimination under Title VII. The Court stated, “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for ‘[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.’”

The *Price Waterhouse* decision extended Title VII protections further and led to decisions holding that same-sex sex harassment was discrimination “because of sex.” For example, in *Doe v. City of Belleville, Ill.*, a Seventh Circuit decision from 1997, twin brothers sued their employer for relentless harassment by male co-workers. The twins and their co-workers were heterosexual, but the harassment (primarily targeting one brother) was grounded in homosexual slurs and taunts. The Seventh Circuit upheld the harassed brother’s right to pursue a Title VII claim against his employer, finding that “the language of Title VII… does not purport to limit who may bring suit based on the sex of either the harasser or the person harassed.” In coming to this conclusion, the court spent little time wondering what Congress might have intended when it included “sex” among Title VII’s protected categories; instead, it found that the unambiguous, plain language of the statute to support its ruling.

The court, relying on *Price Waterhouse*, concluded that the harassment at issue was “because of sex.” The court found that the victim was singled out for abuse because of the way in which he projected the sexual aspect of his personality and did not conform to the harassers’ view of appropriate masculine behavior, conduct the Supreme Court had found was prohibited sex discrimination in *Price Waterhouse*. The Supreme Court followed suit shortly after the Seventh Circuit’s decision in *Doe*. In 1997, the Court decided *Oncale v. Sundowner Offshore Servs., Inc.*, holding that Title VII’s prohibitions extend to same-sex sexual harassment. The Court recognized that same-sex sexual harassment in the workplace was most certainly not the principle evil Congress was concerned with when it enacted Title VII. Nonetheless, the Court found that the statutory prohibitions “often go beyond the principal evil to cover reasonably comparable evils.”

The *Price Waterhouse* decision also opened the door for LGBTQ employees to seek protection under Title VII. A 2004 case decided by the Sixth Circuit, *Smith v. City of Salem*, was one of the first federal appellate court decisions to address this issue. Smith, who worked for the City’s fire department, was biologically male and presented as male when hired. After several years, Smith was diagnosed with Gender Identity Disorder, and began to express a more feminine appearance, including at work. Shortly thereafter, co-workers began commenting that Smith’s appearance and mannerisms were not “masculine enough.” Smith’s supervisors then devised a plan to terminate her, and ultimately suspended her.

In considering Smith’s Title VII sex discrimination claim, the lower court, relying on pre-*Price Waterhouse* case law, found that Title VII protections were not available to transgender employees. On appeal, the Sixth Circuit reversed, finding that, by recognizing Title VII claims for sex stereotyping, *Price Waterhouse* eviscerated prior rulings on the subject. The court explained:

After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex. It follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex.
Other federal appellate courts followed Smith, permitting employees to proceed with Title VII claims based on gender non-conformity. However, these decisions were careful to distinguish between gender non-conformity and discrimination due to a person’s status as gay or transgender.

The Tenth Circuit’s decision in Etsitty v. Utah Transit Authority in 2007 provides a good example of how courts addressed this line of legal reasoning. Etsitty involved a bus driver who was born male but identified as female. After Etsitty informed her employer that she was transitioning and would present as female at work, her employer became concerned about which restroom Etsitty would use during the transition. Because the employee typically used public restrooms on her bus route, the employer ultimately terminated the employee out of concern that it would face liability if an anatomically male employee used public restrooms for women. The employee brought Title VII claims against the employer on two theories: (1) that discrimination on the basis of the employee’s transgender status is itself sex discrimination; and (2) she was discriminated against because she did not conform to sex stereotypes.

First, the court held that Title VII does not extend to transgendered employees as a protected class. The Etsitty court agreed with the Seventh Circuit reasoning in Ulane v. E. Airlines, Inc. that the definition of sex should be restricted to its traditional meaning; thus, Title VII prohibits discrimination “against women because they are women and men because they are men.” Because the plain language of the statute supported only a binary conception of sex, the court reasoned, “[t]ransgender employees] may not claim protection under Title VII from discrimination based solely on their status as [transgender].”

The court then went on to consider Etsitty’s gender non-conformity claim. It recognized that several other circuit courts had upheld Title VII claims by transgender employees based on gender non-conformity. But in Etsitty’s case, the court declined to decide if Title VII could be extended in such a manner. Rather, the court found that Etsitty had not presented sufficient evidence that gender non-conformity had been the motivating reason behind her termination.

That the decision does not require employers to allow biological males to use women’s restrooms, and use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes. According to the court, if use of the women’s restroom is an inherent part of one’s identity as a male-to-female transsexual, then the purported discrimination is because of the employee’s transgender status and that status is not protected by Title VII.

Until 2017, all of the circuit courts that considered the question fell in line with this reasoning: LGBTQ employees may be able to establish Title VII gender non-conformity claims, but the law does not protect LGBTQ employees due to their sexual orientation or transgender status.

III. The Latest Wave of Cases Addressing Sexual Orientation and Gender Identity Discrimination

A. EEOC Administrative Cases: Macy v. Holder and Baldwin v. Foxx

Perhaps not surprisingly, it was the EEOC that made the first break with the prevailing case law. In 2012, the agency decided Macy v. Holder, an administrative case that involved a transgender woman alleging discrimination based on both gender non-conformity and her transgender status. The EEOC held that the employee’s claim of discrimination based on her gender identity, change of sex, and/or transgender status is cognizable under Title VII because it is discrimination “based on… sex.”

Then, in 2015, the EEOC decided Baldwin v. Foxx, an administrative case wherein the employee alleged he was discriminated against due to his sexual orientation. In this case, the agency recognized that discrimination because of sexual orientation is sex discrimination. In the Baldwin decision, the EEOC set out three rationales to support its decision: (1) suspending a woman for displaying a photo at work of her same-sex wife but not suspending a man for displaying a photo of his opposite-sex wife is sex discrimination; (2) sex discrimination is “associational discrimination,” likening it to
associational race discrimination where an employee is treated less favorably because of her interracial marriage – a practice long considered in violation of Title VII’s prohibition on race discrimination; and (3) sexual orientation discrimination is sex discrimination because it is based on heterosexually defined gender norms.62


While the EEOC was active on the issue of Title VII and protections for LGBTQ employees, the federal appellate courts were quiet until 2017. Then, in March 2017, a divided panel of the Eleventh Circuit decided Evans v. Georgia Reg’l Hosp., in which a lesbian employee alleged Title VII violations based on her sexual orientation.63 Like employees before her, Evans claimed she was targeted for harassment both because of her sexual orientation and because she failed to conform to gender stereotypes.64 The lower court dismissed both of Evans’ claims, first holding that Title VII “was not intended to cover discrimination against homosexuals,” and second that Evans’ gender non-conformity claim failed because it was “just another way to claim discrimination based on sexual orientation.”65

On appeal, the Eleventh Circuit vacated the lower court’s decision with regard to the gender non-conformity claim, holding that “[d]iscrimination based on failure to conform to a gender stereotype is sex-based discrimination” and is a separate and distinct avenue for relief under Title VII; not merely “just another way” to claim sexual orientation discrimination.66 But the court reaffirmed precedent in the Eleventh Circuit holding that “there is no sexual orientation action under Title VII.”67


But just a month later, in April 2017, the Seventh Circuit, sitting en banc, became the first circuit court of appeals to rule definitively that Title VII’s protections against discrimination “because of ... sex” extends to protection from sexual orientation discrimination.68 In Hively v. Ivy Tech Community College, a lesbian professor alleged that she was denied a promotion because of her sexual orientation.69 The court dispensed with the rationale relied on in so many prior decisions regarding Congressional intent in 1964, stating:

It is therefore neither here nor there that the Congress that enacted the Civil Rights Act in 1964 and chose to include sex as a prohibited basis for employment dis-

In overruling Seventh Circuit precedent, the court found that both the logic of Supreme Court cases like Price Waterhouse and Oncale (and other cases), and the “common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex,” required its holding that sexual orientation is sex discrimination under Title VII.71

D. Second Circuit: Zarda v. Altitude Express, Inc.

This issue has continued to be a hot judicial topic in 2018. Within the first few months of the year, two additional federal appellate courts overturned circuit precedent to hold that Title VII’s prohibitions extend to sexual orientation and transgender status discrimination.

In February 2018, the Second Circuit, sitting en banc, issued a ruling in Zarda v. Altitude Express, Inc., joining the Seventh Circuit in finding that sexual orientation discrimination is motivated, at least in part, by sex, and is thus a subset of prohibited sex discrimination under Title VII.72 Zarda, a skydiving instructor, claimed he was terminated due to his failure to conform to male sex stereotypes solely because he was gay. The plaintiff’s claim did not center on a failure to conform to a masculine look or behavior. Rather, he claimed it was simply the fact that he was gay and referenced his sexual orientation to clients and coworkers that led to his termination.73 In other words, according to the plaintiff’s theory, being gay in and of itself did not conform to heteronormative male stereotypes.74

The court largely agreed with the plaintiff. The court dove into the meaning of “sexual orientation,” arguing that one cannot consider or define a person’s sexual orientation without considering that person’s sex.75 The court reasoned that sexual orientation is a function of sex; or rather, it is a function of both the person’s sex and the sex of the person to whom he or she is attracted.76 Therefore, “because sexual orientation is a function of sex, and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected.”77
The court also concluded that sexual orientation discrimination is rooted in stereotypes about men and women, reasoning that when an employer takes action against a man because he “cannot be” or “must not be” attracted to other men but does not take action against a woman who is attracted to men, the employer has engaged in sex discrimination.

Finally, the court agreed with the EEOC’s finding in Baldwin that sexual orientation discrimination is associational discrimination based on sex and is prohibited under Title VII. The court described a scenario in which an employer disapproved of close friendships among persons of opposite sexes and fired a female employee because she had male friends. There would be no controversy, the court reasoned, in finding this conduct sex discrimination. Thus, “it makes little sense to carve out same-sex [romantic] relationships as an association to which these protections do not apply.”

Like the Seventh Circuit, the Second Circuit made short work of the legislative history argument that a 1964 Congress could not have possibly intended to include sexual orientation discrimination as among Title VII’s prohibited conduct. The court recognized that this statement may very well be true, but then went on to note that other forms of discrimination that are currently prohibited by Title VII, like sexual harassment and hostile work environment claims, were initially believed to fall outside the scope of Title VII. In the court’s view, “because Congress could not anticipate the full spectrum of employment discrimination that would be directed at the protected categories, it falls to courts to give effect to the broad language that Congress used.” The court, thus, overruled precedent in its circuit to hold that sexual orientation discrimination is an actionable subset of sex discrimination.

E. Sixth Circuit: EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.

In March 2018, a month after the Zarda decision, the Sixth Circuit joined the discussion with its ruling in EEOC v. R.G. & G.R. Harris Funeral Homes, Inc. that terminating a transgender employee due to her transgender and transitioning status violated Title VII. This decision also added a layer to the debate by considering the employer’s Religious Freedom Restoration Act (“RFRA”) defense, and holding that requiring an employer to comply with Title VII did not substantially burden the employer’s religious practice.

The funeral home hired the plaintiff, who was born biologically male, when she presented as a man. Years later, she informed her employer that she was transgender and intended on transitioning and presenting as a woman while at work. She was fired shortly thereafter and sued her employer for sex discrimination based on gender stereotyping.

The owner of the funeral home did not mince words as to why he terminated the plaintiff, testifying the termination was because the plaintiff “was no longer going to represent himself as a man. He wanted to dress as a woman.” But the owner claimed that the termination was consistent with his religious belief that a person’s sex is “an immutable God-given gift” and it would be “violating God’s commands” if the owner were to permit the employee to continue to work at the funeral home after transitioning to a woman. Though the funeral home was not affiliated with any particular religion, the owner was a devout Christian, and the funeral home’s website stated its “highest priority is to honor God in all that we do as a company and as individuals,” and included a bible verse below its mission statement. The employer relied on RFRA to defend the termination, arguing that even if Title VII prohibits discrimination against transgender employees, the government cannot enforce a religiously neutral law against an individual if that law substantially burdens the individual’s religious exercise.

First, the court found that there was direct evidence that the employer discriminated against the employee on the basis of sex stereotypes. But the court went beyond a reliance solely on gender stereotyping to hold that discrimination on the basis of an employee’s transgender and transitioning status is necessarily discrimination on the basis of sex. The court found that it is analytically impossible to fire an employee based on her transgender status without being motivated, at least in part, by the employee’s sex. In the plaintiff’s case, had she been a biological woman seeking to conform to female dress standards, she would not have been fired. The fact that the plaintiff was terminated because she was a biological man seeking to conform to female dress standards necessarily meant that her sex was a factor in the termination. And, the court went on, “there is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender non-conformity.”

Next, the court rejected the funeral home owner’s RFRA defense. The court stated that bare compliance with Title VII – without actually assisting or facilitating the transgender employee’s transition efforts – does not amount to an endorsement of any views about being transgender or transitioning.
In other words, requiring the funeral home to refrain from firing an employee with different religious views from its owner does not, as a matter of law, mean that the owner is endorsing or supporting the employee’s views. Thus, requiring the funeral home to comply with Title VII’s prohibitions against discrimination on the basis of sex was not a substantial burden on the owner’s religious practice. And, the court continued, even if the funeral home owner’s religious exercise would be substantially burdened by following Title VII’s mandates, the court held that the employer’s compliance with Title VII was the least restrictive means of furthering the government’s compelling interest in eradicating sex discrimination.

F. Eleventh Circuit Revisited: Bostick v. Clayton Cty. Bd. of Comm’rs

The Eleventh Circuit had another opportunity to consider this issue just recently. In May 2018, a three-judge panel of the court affirmed a lower court decision in Bostock v. Clayton Cty. Bd. of Commissioners that Eleventh Circuit precedent foreclosed a claim for sexual orientation discrimination under Title VII. The court then declined to review the panel decision en banc.

In the en banc ruling, two judges submitted a strong dissent, finding the issue of whether Title VII protects LGBTQ employees from discrimination “is indisputably en banc-worthy.” The dissent chided the majority for clinging to 39-year-old precedent in the face of social statistics showing that 25% of the 8 million Americans who identify as lesbian, gay, or bisexual report experiencing workplace discrimination. The dissent also made clear that had the full circuit panel heard the case, these two judges would join their sister circuits, the Seventh and Second, to overrule circuit precedent and hold that Title VII prohibits sexual orientation discrimination.

IV. Looking Into the Future

So as things stand today, three circuit courts have now ruled that Title VII prohibits discrimination on the basis of an employee’s sexual orientation or transgender status, one circuit court has recently held the opposite, and the remaining circuit courts have their historical precedents.

The Eighth Circuit is slated to revisit this issue soon. In Horton v. Midwest Geriatric Management, the plaintiff sued after the employer withdrew a job offer shortly after discovering the plaintiff is gay. The plaintiff brought suit alleging sex discrimination, making clear in his complaint that his claim was based solely on his sexual orientation. The Eastern District of Missouri dismissed the case upon finding that Title VII does not include sexual orientation as a protected status, leading to the plaintiff’s appeal to the Eight Circuit. Notably, sixteen state attorneys general (but not Kansas) and nearly 50 businesses (including Levi Strauss & Co., Airbnb, Microsoft, eBay, Dropbox, PayPal, and Morgan Stanley, among others) filed legal briefs in support of the plaintiff’s position that Title VII should protect against sexual orientation discrimination.

The split of decisions among the circuit courts may lead to the Supreme Court taking up the issue in the very near future to settle the matter once and for all. The Supreme Court denied certiorari on the Eleventh Circuit’s Evans v. Georgia Reg’l Hosp. decision. But there are currently two new petitions for certiorari pending before the Supreme Court: the plaintiff from the Eleventh Circuit’s Bostock case and the defendant from the Sixth Circuit’s E.E.O.C. v. R.G. & G.R. Harris Funeral Homes case.

In recent history, Justice Kennedy has been the swing vote and author on several Supreme Court cases involving LG-BTQ rights. In 1996, Justice Kennedy wrote the 6-3 majority opinion in Romer v. Evans, striking down a Colorado law that prevented gay individuals from being recognized as a protected class in municipal ordinances. Then, in 2003, Justice Kennedy again wrote for another 6-3 majority in Lawrence v. Texas, holding that laws that criminalized sex between gay couples were unconstitutional. In 2013, Justice Kennedy authored United States v. Windsor, where the 5-4 majority struck down the section of the Defense of Marriage Act that interpreted the term “marriage” to apply only to opposite-sex unions. And in 2015, Justice Kennedy authored Obergefell v. Hodges, the 5-4 ruling that same sex marriage was legal in every state.

With Justice Kennedy’s retirement, many LGBTQ employees and advocates are wondering how the Title VII issue would be decided by the court’s current make-up with the recent addition of Justice Kavanaugh. And there is a split even among administrative agencies on this issue. The Office of Solicitor General, presenting the position of the Department of Justice and the Trump administration, filed a brief associated with the pending petition for certiorari in the E.E.O.C. v. R.G. & G.R. Harris Funeral Homes case, taking the opposite position from the EEOC and arguing that Title VII’s prohibition of sex discrimination does not apply to discrimination based on gender identity. The EEOC has not changed its position, however, and continues to enforce its position that Title VII prohibits sexual orientation and gender identity discrimination. In any event, this is a “must watch” issue for workers, businesses, and employment lawyers in the years ahead.

This article contains viewpoints of the individual author. Nothing in this article reflects the views of Foulston Siefkin LLP or any of its clients. This article is for general informational purposes only and is not a legal opinion.

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The evolution of Title VII

1. Twenty states have enacted statutes that protect against sexual orientation and gender identity discrimination in both public and private employment. Kansas is not among them. See Kan. Stat. Ann. § 44-1001 et seq. (prohibiting discrimination in employment on the basis of race, religion, color, sex, disability, national origin, or ancestry). Bills that would add sexual orientation and gender identity to the list of protected classifications under the Kansas Act Against Discrimination (“KAAD”) have never gained traction. Nor have Kansas courts extended the KAAD’s prohibition of sexual orientation discrimination to cover sexual orientation or gender identity. However, a few Kansas cities have enacted municipal ordinances that include sexual orientation and gender identity among the categories protected from employment discrimination and extending anti-discrimination laws to these two categories. See, e.g., Lawrence City Code, 10-101 et seq; Roeland Park City Code, 5-1201 et seq; Manhattan City Code, 10-1 et seq. Given the absence of state law on this issue, the question of whether Title VII covers sexual orientation and gender identity is of particular significance to Kansas employers and employees.


5. 110 Cong. Rec. 2577, 2584 (1964).
6. Franklin, supra note 4, at 1309.
10. Corne v. Bauch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975) vacated, 562 F.2d 55 (9th Cir. 1977) (allegations of verbal and physical sexual advances by supervisor was not prohibited by Title VII because “[t]he plain meaning must be ascribed to the term ‘sex’ in absence of clear congressional intent to do otherwise”).
11. Franklin, supra note 4, at 1309.
16. Id.
17. Id. at 61.
18. Id. at 68.
19. Id. at 65.
20. Id. at 67.
22. Id. at 662.
23. Id. at 663.
24. Id. at 664.
26. Id. at 330.
27. See, e.g., Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979) (discharge for homosexuality is not prohibited by Title VII); Dillon v. Frank, 952 F.2d 403 (6th Cir. 1992) (“homosexuality is not an impermissible criteria on which to discriminate with regard to terms and conditions of employment”); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) (per curiam) (rejecting transgender employee’s Title VII claim, finding that “the plain meaning must be ascribed to the term ‘sex’ in absence of clear congressional intent to do otherwise”).
28. Oncale v. Sundowner Offshore Servs., Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) (holding that Title VII does not prohibit discrimination against a person who has a sexual identity disorder).
30. Id. at 235.
31. Id. at 251.
32. Id. (internal quotations omitted).
34. Id. at 566-67.
35. Id. at 572.
36. Id. at 572-73.
37. Id. at 580-81.
39. Id.
40. Smith v. City of Salem, Ohio, 378 F.3d 566 (6th Cir. 2004).
41. Id. at 568.
42. Id. at 572.
43. Id. at 573.
44. Id. at 574 (emphasis in original).
45. William N. Eskridge Jr., Title VII’s Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections, 127 Yale L.J. 322, 404 (2017) (summarizing post-Smith sex stereotyping cases involving LGBTQ employees); Hunter v. United Parcel Service, Inc., 697 F.3d 697, 702-04 (8th Cir. 2012) (holding that an employee could bring a Hopkins-style claim but in this case failed to establish a prima facie case of sex discrimination); Glenn v. Brumby, 663 F.3d 1312, 1317-19 (11th Cir. 2011) (same); Proulx v. Wise Business Forms, Inc., 579 F.3d 285, 290-93 (3d Cir. 2009) (gay male employee who was self-described as effeminate could bring gender non-conformity Title VII claim); Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005), overruled by Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018) (recognizing that gender
stereotyping violates Title VII, but cautioning that such claims should not be used to "bootstrap protection for sexual orientation into Title VII") (quoting Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000)); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999) (gay employee could bring gender non-conformity claim under Title VII).

56. Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007).

57. Federal employees who file discrimination complaints with their respective federal agencies can appeal Final Agency Actions to the EEOC under Title VII.


59. Id. at *1 and 11.


61. Id. at *5.

62. Id.

63. Evans, 850 F.3d 1248.

64. Id. at 1250.


66. Id. at 1254-55.

67. Id. at 1255.


69. Id. at 341.

70. Id. at 345.

71. Id. at 351.


73. Id. at 109.

74. Id.

75. Id. at 113.

76. Id.

77. Id.

78. Id. at 120-21 (quoting from Price Waterhouse, 490 U.S. at 250).

79. Id. at 125.

80. Id. (quoting Christiansen v. Omnicom Grp., Inc., 852 F.3d 195, 204 (2d Cir. 2017)).

81. Id. at 114.

82. Id.

83. Id. at 115.

84. Id. at 132.


86. RFRA is only a defense when the government is a party to a lawsuit, as the EEOC was here. It does not apply when a private litigant sues an employer. Id. at 584.

87. Id. at 581.

88. Id. at 566.

89. Id. at 569.

90. Id.

91. Id. at 568.

92. Id. at 581.

93. Id. at 572.

94. Id. at 575.

95. Id.

96. Id.

97. Id. at 576-77.

98. Id. at 589.

99. Id.

100. Id. at 589-90.

101. Id. at 596-97.


104. Id. at *1.

105. Id. at *2 (citing Blum, 597 F.2d at 938).


107. Id. at *2.

108. The Tenth Circuit has continued to follow circuit precedent that sexual orientation and transgender status discrimination claims are not cognizable under Title VII. See, e.g., Larson v. United Air Lines, 482 F.
App’x 344, 351 (10th Cir. 2012) (retaliation claim failed because plaintiff complained about sexual orientation discrimination, not sex discrimination, and Title VII does not protect against sexual orientation discrimination).

110. Id. at *4.
111. Id. at *4.
114. Bostock, 723 F. App’x 964.
"Do You Want to Exercise One Hour a Day, or Be Dead 24 Hours a Day?"

by Lou Clothier

That is the caption to a cartoon I recently ran across while preparing a seminar presentation. The picture was of a doctor speaking to a middle aged man sitting on the examination table at the doctor’s office. I immediately renewed my efforts to walk 10,000 steps each day and “use the stairs.” The legal profession is very rewarding, but can also be very stressful. Stress can lead to cynicism and depression. A healthy lifestyle helps us cope with the stress in our lives. We must learn to take care of ourselves physically and emotionally to be effective attorneys, friends and family members. As flight attendants tell us before take-off: “…put on your own oxygen mask before helping put on another person’s.”

Regular exercise and good diet can improve our lives physically and help reduce stress. If we are physically healthy we can cope with people and problems that challenge us each day. Physical activity not only reduces stress, but improves stamina and contributes to better sleep. Eating well contributes to feeling well. A diet rich in fruits, vegetables, whole grains and lean meats is recommended. Cut out fast foods, processed foods, fried foods, empty calories and too many carbs. Take time to savor the taste of your food.

There are also ways to improve our emotional well-being and combat the effects of stress. We can organize our time better. Time pressure is inherent in the legal system. Make sure you have a good calendaring system that assures that you will always be available for scheduled court hearings and client appointments. Tackle projects one step at a time. Make sure your projects are completed in a timely manner. Don’t continuously find yourself “cramming for the final exam.” Be proactive rather than reactive. Just put one foot in front of the other. Feeling in control of one’s environment contributes to one’s happiness.

Avoid being drawn into the soap operas of your clients’ lives. Develop a detached attitude. This is especially true for family law attorneys and prosecutors and defense counsel. Try not to become emotionally involved in outcomes. Be professional. Advise your clients and advocate on their behalf without being antagonistic to others. You can disagree without being disagreeable.

Relax and breathe to improve clarity of thought. Close your eyes, and allow yourself to focus on your breathing for at least five minutes. Clear your mind. Let the stress flow out of yourself. Develop your spiritual side. Do something that brings you in touch with something greater than yourself such as prayer, meditation or yoga. Take walks. Allow yourself to pause and wonder at the beauty of nature. Notice sunrises, sunsets, rainbows, beams of sunlight streaming through the clouds, harvest moons, butterflies and trees in brilliant fall colors.
Reduce your focus on acquiring material things and increase your focus on acquiring experiences with family, friends and colleagues. Volunteer. Help others without the thought of getting something in return. You will feel better about yourself. My former legal secretary gave me a plaque that reads: "To the world you may be one person, but to one person you may be the world."

Leave your work at the office. Hug your family when you get home. Listen to their stories. Allow yourself to be "in the moment." Attorneys have learned to work but many have forgotten how to enjoy life. Quality time with family and friends can enhance your well-being. Satisfying relationships are the best predictors of longevity.

Accentuate the positive and avoid cynicism. Be optimistic. Attitude is everything. Henry Ford once said: "Whether you think you can or think you can’t—you are right!" Most of our parents read us the book, "The Little Engine That Could." "...I think I can, I think I can..." the little train said. Most of our parents told us that we could accomplish anything we put our minds to. They were right. Look what we have accomplished. We are graduates of law schools, we are taking care of ourselves and our families, we are helping others, making a difference and are respected in our communities. Be grateful.

We make every effort to understand and empathize with our client’s fear, frustration and anger, but we are not as understanding with ourselves. We need to learn to be our own best friends. We need to take care of ourselves physically and emotionally. To paraphrase Lee Swanson, the founder of Swanson Health Products Inc.: "If you think the pursuit of good physical and mental health is expensive and time consuming--try illness."

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New Positions

Joseph R. Aker has joined the Cottonwood Law Group in Hillsboro. Aker graduated from Fort Hays State University with degrees in agriculture business and agriculture with an emphasis in agronomy. He received his law degree from Washburn University School of Law. He was a summer associate at Ag & Business Legal Strategies in Iowa, and a legal intern at the Kansas Department of Agriculture. He was to begin working primarily out of the firms Abilene office in October.

Kim Bushek has joined the Spencer Fane Overland Park office where she will serve as of counsel in the Business Transactions group, adding depth to the firm’s growing tax practice. Bushek holds a degree in accounting from the University of Missouri. She completed her Juris Doctor and an LLM in tax law at the University of Missouri-Kansas City School of Law. She has extensive experience in tax litigation and has also worked as a tax professional.

Jason T. Gray, on November 1, became a partner at Duncan & Allen a Washington, DC-based law firm that focuses on energy law, regulation of public utilities and administrative law.

D. Randall Heilman has announced the sale of his practice, Heilman Law Office, effecting Jan. 2, 2019. Heilman has practiced law in Council Grove since 1982, and intends to continue to serve as City Attorney for the City of Council Grove. Heilman sold his practice to Morris County resident, attorney Steve Iverson, who previously practiced with Graber & Johnson Law Group, LLC, in Manhattan. Iverson’s practice will include estate planning, probate and trust administration, special needs planning, elder law/Medicaid, Medicaid crisis planning, veterans benefits and appeals, succession planning for farmers and ranchers and more. He holds a juris doctor degree from Washburn University School of Law.

Patrick Henderson was appointed by the Horton City Commission to serve as municipal judge following the resignation of Gerald Kuckelman who was recently appointed as the district judge for Atchison and Leavenworth counties. Henderson, an Atchison attorney, currently serves as assistant Atchison County attorney.

Brandon Jones was selected to succeed Stephen Hunting as Franklin County attorney. Jones brings with him the experience of being county attorney for Osage County for 12 years. He has resigned from that position but will continue as Anderson County attorney until the end of 2020, when his term expires. At that time, he intends to run for election to the Franklin County post.

Nanette Turner Kalcik and Uzo Nwonwu have joined Lewis Brisbois as partners, along with associates Annie Calvert, Candice Farha, Kevin Miller, and Francis Schneider.
Notables:

Craig C. Blumreich, managing director of Topeka Law Firm Larson and Blumreich Chartered, was included in The Best Lawyers in America 2019 in Personal Injury Law—Defense. He was also recognized as 2019 Topeka Personal Injury—Defense Lawyer of the Year.

Christine Campbell of Kansas Legal Services and some volunteer attorneys, including Deputy Riley County Counselor Craig Cox, offered Riley County’s first Clean Slate Day (or Expungement Day) in October in Manhattan. Criminal records often hinder people’s ability to obtain affordable housing or secure employment. Expunging the record can improve the person’s quality of life. Not all crimes—such as rape, murder, child abuse or manslaughter—are eligible to be expunged. The event made it possible for the process, which can take weeks, to be handled in one day. Riley County District Court, Riley County Attorney’s Office, Manhattan Municipal Court and the Manhattan City Prosecutor’s Office assisted with the event.

Erise IP, an intellectual property and high-technology boutique law firm based in Overland Park joined Ford Motor Company’s Legal Alliance for Women in a Global Day of Service on Sept 27. Employees joined volunteers from more than 90 law firms around the world partnering with LAW to volunteer time and perform pro bono work on the designated day. Erise IP’s volunteers worked with a group of area Girl Scouts to earn their IP Patch which educates girls on the basics of intellectual property. It includes teaching them how they can become innovators and promotes careers in Science, Technology, Engineering and Math—and the legal profession. U.S. District Court Judge Holly L. Teeter participated, speaking about her career practicing intellectual property law and her work in the judiciary.

The Honorable Jeffrey W. Gettler of Independence, Kan., judge for the 14th Judicial District Division 3, has been appointed to the Kansas Children’s Service League board of directors. Gettler presides over cases in Montgomery and Chautauqua counties. He hears a wide array of cases, including civil, domestic and criminal cases. He is a graduate of Independence Community College, Loyola University in Chicago and the University of Kansas School of Law. Gettler is actively involved in a number of civic, state and national organizations, including the KBA.

John H. Hutton, the managing partner of the Topeka law firm Henson, Hutton, Mudrick, Gragson, & Vogelsberg, LLP, was selected by his peers for inclusion in the 25th edition of The Best Lawyers in America® 2019 in Real Estate Law, Commercial Litigation, and Construction Law. In addition, the Best Lawyers organization announced that Hutton has been recognized by his peers as 2019 Topeka Real Estate Law Lawyer of the Year. Hutton earned his undergraduate and Juris Doctor degrees from the University of Kansas.

Joseph, Hollander & Craft LLC—which employs 18 attorneys with offices in Kansas City, Lawrence, Topeka and Wichita—was honored by U.S. News & World Report and Best Lawyers in America® with six separate 2019 Best Law Firms Tier 1 rankings in the following practice areas: Criminal Defense – General Practice, Topeka; Criminal Defense – White-Collar, Topeka; DUI/DWI Defense – Wichita; Employment Law – Management, Wichita; Labor Law – Management, Wichita; and Litigation – Labor & Employ-
ment, Wichita. The firm’s primary practice areas include complex criminal defense, DUI defense, employment law, family law, medical malpractice, professional liability defense and commercial law.

Katherine L. “Kathy” Kirk, an attorney with the Law Offices of Jerry K. Levy PA in Lawrence has established the Equal Justice Scholarship. The scholarship is available to single-parent, female law students. Kirk began planning for the scholarship while president of the Kansas Bar Foundation. Following a career in public education, Kirk entered the Washburn University Law School. She found herself facing divorce and the care of her three school-age children. She benefited from an opportunity to be a research assistant and a scholarship from the women’s law student association. Kirk served as the first Alternative Dispute Resolution coordinator for the Kansas Supreme Court; in her current position with Levy, she focuses on ADR, personal injury, professional negligence, and family law. The scholarship is one of a dozen scholarships offered by the KBA.

Joselyn M. Kusiak, of Kelly & Kusiak Law Office LLC in Independence, Kan., has been appointed by the Kansas Supreme Court to the Kansas Continuing Legal Education Commission. The commission oversees continuing legal education requirements for lawyers licensed to practice in the state of Kansas. Kusiak, whose legal practice includes estate planning and administration, business formation and providing on-going business consulting and advice, and civil litigation, is active in the community and the profession, serving in many capacities, including as the KBA’s Young Lawyer Delegate to the ABA.

Christopher McElgunn and the firm of Klenda Austerman Attorneys have been engaged by Cherokee County to step up the county’s efforts to collect delinquent property taxes. McElgunn will work with the county treasurer to identify all the delinquent properties not currently being handled by an attorney so McElgunn can begin the process of holding a delinquent property tax sale. Klenda Austerman Attorneys has handled the tax sale process for Sedgwick County for 25 years and has several other counties in Kansas as clients.

Roger McEowen, a leading expert in the area of agricultural law and economics, will teach a Kansas State University three credit hour online undergraduate course on the topic to interested students in the spring of 2019. McEowen is the Kansas Farm Bureau professor of agricultural law and taxation at Washburn University School of Law and an adjunct professor with KSU’s agriculture economics department. The course is aimed at helping farm firms, families and individuals in a number of areas, including contracts, financing, bankruptcy, tax issues, cooperatives, civil liabilities including trespass, tourism, fence law, water environmental and regulatory laws.

Laurel Michel, associate attorney in the law firm of Kennedy Berkley Yarneovich & Williamson, was profiled in the Oct. 28, 2018 edition of the Salina Journal in an article written by Eric Wiley, entitled “Young and Eager”. Michel, who earned her undergraduate degree in English from the University of Kansas and her Juris Doctor from the University of Kansas School of Law, was given the opportunity to expound upon her perspective of the job; her focus is primarily in family law and general civil litigation.

Dan Monnat of Monnat & Spurrier, Chartered has been named one of the world’s leading business crime defense attorneys for both corporations and individuals by Who’s Who Legal: Business Crime Defense 2018. That is a strategic research partner of the ABA’s Section of International Law. Monnat authored the chapter on “Sentencing, Probation, and Collateral Consequences”, a chapter of the KBA’s Kansas Criminal Law Handbook, 5th edition. He is an active member and supporter of several professional associations, including the KBA, the ABA, the Kansas Association of Criminal Defense Lawyers and the National Association of Criminal Defense Lawyers.

Monnat & Spurrier, Chartered has been awarded three “Best Law Firms” Tier 1 Rankings in the areas of General Practice Criminal Defense, White-Collar Criminal Defense and Appellate Practice by U.S. News & World Report and Best Lawyers in America. The firm was founded in 1985 by defense attorney Dan Monnat and legal scholar Stan Spurrier. It has built an international reputation for its defense of high-profile clients.

Dave Mudrick, a partner in Henson, Hutton, Mudrick, Gragson & Vogelsberg, LLP, in Topeka, was selected for the 2019 edition of The Best Lawyers in America® for Employment Law-Management, Labor Law-Management, and Litigation-Labor and Employment. Also, the Best Lawyers organization announced that Mudrick was recognized as 2019 Topeka Labor Law-Management Lawyer of the Year. He is a past president of the Employment Law section of the Kansas Bar Association and is a Civil Mediator. He attended law school at Duke University (where he was on the Duke Law Journal) and the University of Kansas, and earned a Juris Doctor degree from the University of Kansas, where he was selected for Order of the Coif.

Peter Peterson, a Salina attorney practicing with the Clark, Mize and Linville in Salina for 45 years, has been added to the board of directors for American State Bank. A graduate of KU and the University of Kansas School of Law, Peterson is active in the Salina community, serving on an number of boards and foundations.

Aline E. Pryor has been recognized as a Professional of the Year for 2018 by Strathmore’s Who’s Who Worldwide for her outstanding contributions and achievements for over 31 years in the field of law. Ms. Pryor specializes in family law, protection from abuse, divorce, paternity, support and personal injury cases. She also litigates criminal cases. Pryor graduated
with honors from Emporia State University and earned her Juris Doctor from the University of Kansas School of Law. She owns Aline E. Pryor, Attorney at Law, in Kansas City, Kansas. She was also honored as one of the Top 100 Litigation Lawyers from the American Society of Legal Advocates this year and in 2014 and 2017.

F. James Robinson, Jr., of Hite Fanning & Honeyman, LLP in Wichita, was selected for membership in the Warren E. Burger Society of the National Center for State Courts. The NCSC honors individuals who have demonstrated an exemplary commitment to improving the administration of justice through extraordinary contributions of service or support to the NCSC. The honor was publicly bestowed at an induction ceremony on November 15, 2018, at the NCSC Annual Recognition Luncheon in Washington, D.C.

John Rubow, a Chanute attorney and rancher, was honored as a Kansas Hospital Association Trustee of the Year. Rubow serves as chairman of the board for Neosho Memorial Medical Center in Chanute, and was one of 10 trustees from across the state who were recognized at the KHA’s annual convention in Kansas City in September. Rubow has served on the board of trustees for 17 years, overseeing three major building expansions, the opening of an orthopedic clinic, a women’s health center and two rural health clinics.

Alan Rupe and Jessica Skladzien of Wichita’s Lewis Brisbois firm have been recognized by Best Lawyers for outstanding work in litigation—labor and employment. Rupe, managing partner at the firm, was also recognized in civil rights law, employment—management, and litigation—municipal.

Richard Samaniego, an attorney with Gibson Watson Marino LLC in Wichita, was given preliminary approval for his appointment to serve as chair of the state’s Crime Victims Compensation Board. The approval by the State Senate Confirmation Oversight Committee allows Samaniego to begin serving as his confirmation process continues. The Crime Victims Compensation Board reviews claims by victims of violent crime who are eligible for financial assistance through the Crime Victims Compensation program, established in 1978. Samaniego’s practice includes family law, estate planning and probate law, and representation of municipalities in South Central Kansas. He received his law degree from Washburn University School of Law.

Timothy Starosta, Kansas City bankruptcy attorney, recently marked 10 years as a legal professional and founder of the Starosta Law Firm. Starosta received his Juris Doctor from the University of Tulsa College of Law. The firm focuses on bankruptcy law, including civil litigation, divorce, child support, real estate and mortgage issues, personal injury, and workers’ compensation.

Vince Wheeler, Wichita attorney, was the featured speaker for the October Kansas Authors Club in Cherryvale. Wheeler’s debut novel in 2017, “The Things of Man,” won the silver medal for Best Midwest Fiction in the 2017 Independent Publisher Book Awards. Wheeler spoke on the different ways in which authors can be published.
Obituaries


James M. Caplinger, Jr. ("Jim" or "JR"), 62, of Topeka, passed away on October 10, 2018.

Jim was born on May 5, 1956, the son of James M. Caplinger and Barbara Caplinger (Simmer).

Jim graduated from Washburn Rural High School in 1974 and went on to receive his Bachelor’s degree in Business from the University of Kansas. He earned his Juris Doctorate from Washburn University School of Law in 1982. He then went on to work alongside his father at James M. Caplinger Chartered.

He began his career within the Kansas telecommunications industry and became well known for his work nationally. Through the years, James honed his entrepreneurial skills by becoming a self-made real estate developer, business owner, and philanthropist.

Jim was active in his community as a member of the Topeka Bar Association, Kansas Bar Association, and CASA Board. He was a partner in the Evel Knievel Museum and was the co-creator and previous owner of the Blind Tiger Brewery and Restaurant, as well as the North Star Steak House. Among other innovative business ventures, he started an independent oil company with locations nationwide. He enjoyed mowing, NASCAR, and his family in his free time.

Jim married Pam Eldridge on April 17, 1987 by a Kansas Supreme Court Justice. They spent 31 years as partners in life and business.

Jim will be remembered as a loving husband and father, and he will be missed by all who knew him. He is survived by wife, Pam Caplinger; daughters, Christine Caplinger (Nick Reynolds) and Allison Caplinger; siblings, Sharon Keyes and Mark Caplinger; special uncle, Bob Caplinger (Helen Caplinger); several nieces and nephews; as well as numerous extended family members.

In following his specific wishes, no services will be held at this time.

Memorial contributions may be made to CASA of Shawnee County, 501 SE Jefferson St #2002, Topeka, KS 66607 or to The Jim and Pam Caplinger, Jr. Family Foundation 823 SW 10th Avenue, Topeka, KS 66612. This organization makes annual contributions to animal’s and children’s charities.

Penwell-Gabel Mid-Town Chapel handled arrangements. To leave a message for the family online, please visit www.PenwellGabelTopeka.com. James M. Caplinger, Jr.


Dewey, David W. 85, lifelong Wichitan, went to be with the Lord on Saturday, October 20, 2018.

He was born on January 4, 1933 to Forrest and Doris (Van-Fossen) Dewey.

David was a graduate of North High School, Wichita University, and Washburn University School of Law. After college, he spent time traveling as a Lieutenant in the U.S. Army,
practiced as an attorney for the Farm Credit Bank, worked as a private-practice attorney, and retired as a Sedgwick County District Court Judge.

David was very active within the United Methodist Church, a supporter of Wichita State University, Historic Midtown Association and Old Cowtown Museum. He was an advocate for Wichita which he loved, and was crazy about his family. Wedded on June 21, 1954, David spent nearly 65 years married to the love of his life, Sally (Lambert) Dewey. Together they share 5 children, Jeff, Sarah (Scott), Ben, Nellie and Hank; 11 grandchildren; 14 great-grandchildren; and a host of other relatives and friends. David was a "Grandad" to the community.

A celebration of his life was held at 10:00a.m. on Friday, November 2, 2018, at First United Methodist Church located at 330 N. Broadway, Wichita, KS 67202. In lieu of flowers, memorials in his name may be sent to Old Cowtown Museum, 1865 W. Museum Blvd., Wichita, KS 67203.

Jacob May Jr.(12/31/1928 – 9/30/2018)

Jacob F. May Jr. Jacob F. (Jack) May, Jr., age 89, of San Mateo, California, died Sunday, September 30, 2018.

Born December 31, 1928, in Bartlesville, Oklahoma, Jack was the first son of the late Jacob F. May, Sr. and Helen Jacobs May.

The May family emigrated from Russia to St. Louis, Missouri in 1886. They later made their way to Bartlesville, Oklahoma, at the time of the oil boom of that era. Jack's father and uncles started a clothing store called May Brothers, which at one time had four stores across Oklahoma. The Bartlesville store was ultimately listed by the Oklahoma Historical Society as the oldest continuously operated retail establishment in the State.

Jack was a nationally respected real estate lawyer and for most of his career a partner with the law firm of Spencer Fane Britt & Browne in Kansas City, Missouri. He represented a number of prominent real estate development and brokerage firms and other business clients both in Kansas City and nationally. Prior to joining Spencer Fane, he was a founding and managing partner at the law firm of Schnider, Shamburg & May, also in Kansas City.

He was married to the late Janet Schnider May, also from Kansas City, from July 6,1957 until her untimely death in 1994. Janet’s father, Charles S. Schnider, a pioneering trial attorney in Kansas and Missouri, was for Jack a loving father-in-law and law partner. Jack attended the University of Michigan where he earned a Business Administration degree in 1950. At Michigan, he was a proud member of the Zeta Beta Tau fraternity. He went on to earn his JD and LLB degrees from the University of Oklahoma Law School, where he graduated second in his class in 1953, was voted Order of the Coif, and was an editor of the law review. Following law school, Jack served as a First Lieutenant in the Judge Advocate General Corps of the United States Air Force, and was stationed at Clark Air Force Base in the Philippines. During his career, Jack was an active member of the Johnson County, Kansas and Kansas Bar Associations. He authored numerous law review articles for both the County and State Bar associations on both real estate and tax law. He was eventually elected to the American College of Real Estate Lawyers. Jack devoted charitable time to the Jewish Family and Children’s Services in Kansas City. He was a member of The Temple, Congregation B’Nai Jehudah and Oakwood Country Club, and was on the boards of the Lyric Opera Guild and William Jewell College in Kansas City.

Jack is survived by his two younger brothers: Mike May of Tulsa, Oklahoma, and Larry May of Seattle, Washington. Jack is also survived by his two children: John May of St. Louis, Missouri and Kerry May Williams of Burlingame, California; four grandchildren: Kelsey Williams of Berkeley, California, Jake Williams of Burlingame, California, Hadley May and Matthew May of St Louis, Missouri; his son-in-law, Scott Williams of California, and daughter-in-law, Rebecca Glass May of St Louis, Missouri, and by his nephews, Mark May, of Los Angeles, California, Scott May of Atlanta, Georgia, Craig May of Denver, Colorado, William May of Seattle, Washington, and Chris May and Lisa May of Seattle, Washington. Jack is also survived by his dear friend Patricia Roberts Smith and many loving cousins and other relatives.

Memorial services for Jack May were held Sunday, October 7, 2018, at Louis Memorial Chapel, 6830 Troost Avenue, Kansas City, Missouri. Burial followed at Rose Hill Cemetery south of the Chapel immediately following the service. Serving as pallbearers will be Mike May, Larry May, Mark May, Craig May, William May and Scott Williams. In lieu of flowers, memorial donations may be sent to the American Cancer Society. Online condolences for the family may be left at www.louismemorialchapel.com (Arr: The Louis Memorial Chapel, 816-361-5211)


Marc Alan Salle died peacefully on October 23, 2018 with his devoted family by his side.

A truly remarkable man, Marc is remembered for his great kindness, intellect, encouragement, and dignity. Marc and Briana Beuke have been inseparable for their 38 years of marriage, bound by an unwavering and monumental love nurtured by sweetness, humor and deep respect.

Father of two daughters, Taylor and Nora; Marc has spent the past 31 years encouraging his girls to be curious and true to themselves. Among those who he loved and respected most
obituaries

was his dear brother, David Salle, with whom he shared a love of language, art and simple pleasures.

Marc was born on November 10, 1949 in Tulsa, Oklahoma. He possessed a commendable work ethic and was an honors student at the University of Kansas, later graduating Cum Laude from Creighton University School of Law. Many were fortunate to know him through his professional achievements. He was a gifted writer and thinker who contributed his talents as a partner in various select law firms in Kansas City. Most recently he worked as the Associate General Counsel for AWL, Inc.

One of Marc’s most notable qualities was his steadfast moral compass, a lens through which he focused his keen fascination and understanding of history and politics. His was a life filled with love, which extended beyond the home to a group of lifelong friends he considered chosen family. All who were close with him will sincerely miss time spent outside sharing in his wisdom through insightful conversations and laughter.

A remembrance to honor his life was held at 3:00 pm on Sunday, October 28, 2018 at the Simpson House at 4509 Walnut Street, Kansas City, Missouri, 64111.

Keith W. Sprouse (1/6/1934 – 10/17/2018)

Keith W. Sprouse, 84, of Marysville, Kan., passed away peacefully with the love of his family surrounding him on Wednesday, Oct. 17, 2018, at St. Elizabeth’s Hospital in Lincoln, Neb. A celebration of life was held at 2 p.m. Saturday, Oct. 20, at Kinsley Mortuary in Marysville.

Keith was born Jan. 6, 1934, in Kansas City, Mo., to Gertrude DeYoung Sprouse and Orion W. Sprouse. In 1952, he graduated from Seaman High School in Topeka, Kan. After completing two years of his undergraduate degree at Washburn University, he enlisted in the United States Army in 1955 until 1957, when he was discharged as a sergeant. He received a Bachelor of Arts in chemistry in 1959 and went on to receive his Juris Doctor of Law from Washburn University in 1961.

In 1962, he moved his family to Marysville, where he began practicing law with Galloway Wieger’s Law Firm and later became a partner. During his law career, he served as Marshall County attorney for two terms and served as district judge of the 22nd Judicial District for eight years. He retired in the year 2000. On Feb. 12, 1954, he married Peggy Hill in Topeka.

Throughout his lifetime, Keith was involved with the Boy Scouts of America, served as a Marysville USD 364 school board member and was a member, director and president of the Marysville Chamber of Commerce. He was also a member of the Arab Shrine Temple, Oriental Band, Jesters, NeMar Shrine, Masonic Lodge, American Legion, Jaycee’s and the Rotary Club where he was awarded the Paul Harris Fellow Award. He was also a member of the Marysville Country Club, the Old Buzzards coffee club, Moose Club, elder and member of Memorial Presbyterian Church, member of Sigma Phi Epsilon, Phi Alpha Delta Law Fraternity, a Fellow with the Kansas Bar Association and the American Bar Association.

Keith enjoyed collecting vinyl records and preserving them, photography, hunting, fishing, boating and most of all spending time with his family members, who were everything to him. He was also part owner of the Establishment, a popular pizza place enjoyed by many, in downtown Marysville during the late 1960s and early 1970s.

He was preceded in death by his parents; stepfather, Marvin Brummett; sister,

Kay Scharfenberg; and daughter, Stefanie Jo. Survivors include his wife, Peggy; two daughters, Suzanne (Ron) Gill, Dewitt, Neb., and Stacie Mayer, Marysville; four grandchildren, Carissa (Scott) Horton, Junction City, Cameron (Kristen) Bruna, Cleveland, Ohio, Kelsie (Adam) Tryon, Olathe, Kan., and Gannon Mayer, Kansas City, Mo.; and four great grandchildren, Aiden, Logan, Grady and Landrie.

Memorials can be made to the Marysville Union Pacific Depot Restoration Society and sent in care of Kinsley Mortuary.


Wendell “Wink” Winkler, 94, of Wamego, KS and formerly of Paola, KS, passed away peacefully, surrounded by loved ones, on Sunday, November 4, 2018, at Home of the Flint Hills of St. George, KS.

On November 22, 1923, Wink was born at his childhood home in Paola, Kan., to parents Garrett and Sarah Eleanor Roberts Winkler. He was united in marriage to the love of his life, Louise Strickler on August 31, 1946 in Baldwin, Kan. They enjoyed over 70 years of marriage and two daughters were born of this marriage, Jane (Rod) Carsten, and Melissa (Steve) Patterson Eshelman, his six grandchildren, Sarah Clark, Bryan (Amber) Carsten, and Jonathan Carsten, Amy and Larissa Patterson Eshelman, and Maddy Eshelman, plus two great-granddaughters, Aspen and Riley Clark. Wink was devoted to his family and loved spending time with them. He taught all his grandchildren how to drive a golf cart, he loved attending their sporting events and he was an encourager to them in whatever they were pursuing in life.

He was preceded in death by his wife, Louise Winkler, an infant brother, Wayne Lloyd Winkler, a brother, Francis Winkler, his sister, Evelyn Winkler, and a son-in-law, Larry Patterson.

Wink attended Paola elementary and high school, Baker University and Washburn Law School where he received his Juris Doctorate. He was in the Navy from 1943 – 1946 dur-
having World War II, where he was trained and served as a pilot. Wink had a strong work ethic and told stories of washing windows for 85 cents as he was putting himself through law school. He worked in the grocery store as a kid and never lost his enjoyment of reading the sale ads and finding a bargain. Wink was an attorney in Paola for 53 years, and also had an abstract and title company there. He was elected Miami County Attorney for 16 years, from 1953 – 1969, and served as president of the Kansas Attorney Association.

Wink was well known for helping others and volunteering long hours to improve his community and help school kids excel in sports. He was a member of the Paola United Methodist Church, American Legion, Kansas Historical Society, VFW, Washburn Law School Alumni, Paola Masonic Lodge, Abdallah Shrine, and the Paola Lions Club, during which he traveled to the International Conventions in Dallas, Mexico City, and Nice, France. He enjoyed traveling and took many portages to Canada, where he and friends would camp and travel by canoe through the rapids, remembering fondly when they capsized and lost all their food and gear. A few months ago, he enjoyed a trip to Aruba with his family. He had an easy-going personality and took life in stride, often being the voice of reason.

Wink enjoyed most sports all his life, whether playing them or officiating them. While in law school, he officiated 6-man JV and high school football games. He later officiated junior college, college, and BIG 8 Conference football. He officiated the NAIA district and national championships, NCAA II regional playoffs, several bowl games including the Sun Bowl, Sugar Bowl, Orange Bowl, and the 1971 “Game of the Century” between Nebraska and Oklahoma for the National Championship. Wink officiated 25 years on the field, and later observed officials for 25 years for the Big 8 and Big XII. He was inducted into the Baker University Hall of Fame, College Officials Hall of Fame, and Paola High School Wall of Fame. He made many good friends throughout his officiating career and told wonderful stories of his adventures through sports as he traveled by car, train or plane with officiating crews.

Wink is remembered by many as a loving, caring man who did not know a stranger, and always looked for the best in others. He leaves a legacy of integrity, plus outstanding devotion to family and friends. He was loved by many and will be deeply missed.

Family greeted friends during a visitation Friday, November 9th at the Stewart Funeral Home of Wamego. Private family burial was in the Paola City Cemetery. In lieu of flowers, memorials are suggested to the Winkler Scholarships at Baker University, Washburn Law School, or Paola High School, and may be left in care of the Stewart Funeral Home, PO Box 48, Wamego, KS 66547. Online condolences may also be left at www.stewartfuneralhomes.com
ATTORNEY DISCIPLINE

ORDER OF DISBARMENT
IN THE MATTER OF ROBERT E. ARNOLD, III
NO. 22,544—OCTOBER 3, 2018

FACTS: Robert E. Arnold voluntarily surrendered his license to practice law in Kansas. At the time of surrender, a complaint was being investigated by the Disciplinary Administrator. The conduct which prompted the investigation in Kansas served as the basis for Mr. Arnold’s disbarment in Missouri in June 2018.

HELD: The court accepted the surrender, and Mr. Arnold is disbarred.

ORDER OF DISBARMENT
IN THE MATTER OF JEAN MARIE BOBRINK
NO. 14,366—OCTOBER 3, 2018

FACTS: Jean Marie Bobrink, an attorney licensed to practice law in Kansas, voluntarily surrendered her license. At the time of surrender, there were two disciplinary complaints pending and she was operating under an active diversion agreement. Ms. Bobrink was disbarred in Missouri in January 2018.

HELD: The Court accepted the surrender and Ms. Bobrink is disbarred.

ORDER OF INDEFINITE SUSPENSION
IN THE MATTER OF JEFFERY A. MASON
NO. 119,012—SEPTEMBER 28, 2018

FACTS: Mason’s license to practice law in Kansas was suspended for six months in December 2016 for violating multiple Kansas Rules of Professional Conduct. In December 2017, the Disciplinary Administrator’s office filed a new complaint and a hearing panel determined that Mason violated KRPC 1.3 (diligence), 1.4(a) (client communication), and 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation). The misconduct arose after Mason failed to filed essential tax forms for an organization, which resulted in the revocation of its 501(c)(3) status.

HEARING PANEL: The hearing panel found that Mason failed to act with reasonable diligence when representing his client. There were several aggravating factors, and the panel also found mitigators including mental health issues and his willingness to cooperate with the disciplinary process. The disciplinary administrator recommended discipline of indefinite suspension, retroactive to the December 2016 date of Mason’s initial, six-month suspension. Mason suggested discipline of censure and that he be placed on probation. The hearing panel determined that probation was not appropriate in this case and recommended discipline of indefinite suspension.

HELD: Mason filed no exceptions to the hearing panel report. The court adopted the hearing panel’s findings and conclusions and concluded that indefinite suspension was the appropriate discipline. Before Mason can be reinstated, Mason must provide a written report from a licensed mental health provider and a plan for future practice. The indefinite suspension runs from the date of this order, a decision that was prompted by the serious nature of the violations and the misleading nature of Mason’s comments at the prior disciplinary proceeding.

ORDER OF DISBARMENT
NO. 19,846
IN RE MICHAEL P. PELOQUIN

FACTS: In a letter dated September 13, 2018, Michael P. Peloquin voluntarily surrendered his license to practice law. At the time of surrender, a formal complaint was pending alleging violations of: KRPC 1.3 (diligence); 1.4 (communication); 1.16 (termination of representation); 3.2 (expediting litigation); 5.5 (unauthorized practice of law); 7.3 (client solicitation); and 8.4 (professional misconduct). There were also allegations that Peloquin violated Supreme Court Rule 218. The court accepted the surrender of Peloquin’s license, and he is disbarred.
ORDER OF PUBLISHED CENSURE
IN RE MICHAEL J. STUDTMANN
NO. 118,992 – OCTOBER 12, 2018

FACTS: A hearing panel determined that Studtmann violated Kansas Rules of Professional Conduct 1.2(c) (scope of representation), 1.5 (fees), 1.7(a) (conflict of interest), 1.8(f) (accepting compensation for representation of client from someone other than the client), and 1.16(d) (termination of representation). The complaint arose after Studtmann agreed to represent two individuals who were involved in a fatality automobile accident. Studtmann represented both clients without discussing with them the potential for a conflict of interest. Studtmann also spoke with his client’s parents without obtaining her consent to release information to them. Both clients discharged Studtmann and obtained new counsel after a week of representation. Studtmann failed to promptly refund unearned fees to the client’s parents.

HEARING PANEL: Based on the record and on stipulations made by the parties, the hearing panel determined that the fees charged by Studtmann during his time on this case were unreasonable. The panel also found numerous conflicts with Studtmann’s joint representation and his dealings with his client’s parents. The hearing panel believed that some of Studtmann’s behavior was motivated by selfishness and it found that some of his answers at the hearing were misleading or deceptive. After noting several mitigating circumstances, the disciplinary administrator recommended discipline of a 90 day suspension. Studtmann made an initial request for probation before asking for an informal admonition. The hearing panel determined that Studtmann vio- lately recommended discipline of published censure. After noting that Studtmann had already refunded fees and agreed to an audit of his trust account, the disciplinary administrator recommended discipline of a 90 day suspension. Studtmann made an initial request for probation before asking for an informal admonition. The hearing panel believed that some of Studtmann’s behavior was motivated by selfishness and it found that some of his answers at the hearing were misleading or deceptive. After noting several mitigating circumstances, the disciplinary administrator recommended discipline of a 90 day suspension. Studtmann made an initial request for probation before asking for an informal admonition. The hearing panel determined that Studtmann violated Kansas Rules of Professional Conduct 1.2(c) (scope of representation), 1.5 (fees), 1.7(a) (conflict of interest), 1.8(f) (accepting compensation for representation of client from someone other than the client), and 1.16(d) (termination of representation). The complaint arose after Studtmann agreed to represent two individuals who were involved in a fatality automobile accident. Studtmann represented both clients without discussing with them the potential for a conflict of interest. Studtmann also spoke with his client’s parents without obtaining her consent to release information to them. Both clients discharged Studtmann and obtained new counsel after a week of representation. Studtmann failed to promptly refund unearned fees to the client’s parents.

HELD: There were no exceptions to the hearing panel’s final report. After noting that Studtmann had already refunded fees and agreed to an audit of his trust account, the disciplinary administrator recommended discipline of published censure. A majority of the court agreed. A minority of the court, troubled by the findings of Studtmann’s dishonest testimony, would impose the 90-day suspension initially requested by the disciplinary administrator.

ISSUE: (1) Reservation of rights and estoppel;

HELD: Both the district court and court of appeals erred by focusing on the “expansion of coverage” rule. The courts should have instead determined whether estoppel was appropriate under the reservation of rights rule. The Bar Plan could have satisfied its duty to defend while also preserving any defenses of non-coverage through a timely reservation of rights. In this case, there are genuine issues of material fact regarding whether Bar Plan timely reserved its rights. Accordingly, summary judgment was inappropriate and the case must be remanded for further findings of fact.

STATUTE: K.S.A. 60-256

BREACH OF TRUST—DAMAGES
ELLIS LIVING TRUST V. ELLIS LIVING TRUST
SEDGWICK DISTRICT COURT—COURT OF APPEALS IS REVERSED

DISTRICT COURT IS REVERSED—CASE REMANDED
NO. 113,097—SEPTEMBER 21, 2018

FACTS: Alain Ellis and her husband, Dr. Harvey Ellis, both executed living trusts. After Alain died, Harvey served as trustee of Alain’s trust. The terms of Alain’s trust provided that all income went to Harvey during his life. Upon his death, the trust was to be divided equally between the Ellises’ two sons, with each receiving income from the principal. While acting as trustee, Harvey improperly converted a substantial amount from Alain’s trust and placed the converted assets into his own trust. After Harvey died, the improper transfers were discovered and over $1 million was returned to Alain’s trust. Alain’s trust and the trust beneficiaries sought additional damages and filed suit against Harvey’s trust, Harvey’s estate, and individuals who advised Harvey while he was still living. Before trial, the district court ruled that Alain’s trust could not seek punitive damages from Harvey’s estate because Harvey was deceased. It also concluded that Alain’s trust was not entitled to recover double damages. Alain’s trust appealed these rulings to the court of appeals, which affirmed the dis-
district court’s rulings. Alain’s petition for review was granted on these two issues.

ISSUES: (1) Punitive damages from a deceased trustee; (2) double damages

HELD: The question of whether a plaintiff can recover punitive damages from the estate of a deceased tortfeasor is an issue of first impression. The Kansas statutes are silent on this issue. But the statutes do provide that an estate can stand in the shoes of a deceased tortfeasor, especially because an estate exists to pay the financial obligations of the deceased. And a threat of punitive damages may serve to discourage wrongdoing by trustees. For these reasons, a trust may seek punitive damages from the estate of a deceased trustee. Since that issue was not put to a jury in this case, the case must be remanded. This rationale also allows for a plaintiff to seek statutory double damages against a trustee’s estate because those damages are penal in nature and serve the same purpose as punitive damages.

STATUTE: K.S.A. 58a-1002, -1002(a), -1002(a)(3), -1002(c), 60-1801, -3702, -3702(a), -3702(c), -3702(d), -3703

ADDITION

The Journal of the Kansas Bar Association

ISSUE: (1) Sufficiency of the evidence to show support of the child

HELD: The facts established in the district court show that father made adequate efforts to support and meet his child. The putative adoptive parents made untrue allegations in their adoption petition, and the adoption petition prevented father from making efforts to support his child. This case must be remanded so that C.L. can begin to be integrated in to father’s home.

**CRIMINAL**

**CRIMINAL PROCEDURE—MOTIONS—SENTENCING—STATUTES**

**STATE V. ALFORD**

SEDGWICK DISTRICT COURT—AFFIRMED

NO. 117,270—OCTOBER 26, 2018

FACTS: Alford was convicted in 1993 of first-degree murder, aggravated kidnapping, and unlawful possession of a firearm. *State v. Alford*, 257 Kan. 830 (1995). In 2016 he filed pro se motions to correct an illegal sentence. He claimed trial court violated K.S.A. 1993 Supp. 21-4624(3) by permitting sentencing jury to consider murder victim's written statement regarding an earlier aggravated battery, which was improper hearsay testimony in violation of due process and right of confrontation. He also claimed jury was wrongly instructed it needed to reach a unanimous verdict on the hard 15 sentence in violation of K.S.A. 1993 Supp. 21-4524(5). District court summarily denied the motions. Alford appealed on both claims.

**ISSUE:** Motion to correct an illegal sentence

**HELD:** Neither of Alford's claims fits within the narrow definition of an illegal sentence, thus cannot be raised in a motion to correct an illegal sentence. Alford's hearsay argument relies on K.S.A. 1993 Supp. 21-4624(3)—a subsection devoted to establishing evidentiary rules—which does not qualify as the relevant statutory provision implicating an illegal sentence. And Alford's unanimity claim is defeated by *State v. Allison*, 306 Kan. 80 (2017).

**STATUTES:** K.S.A. 2017 Supp. 22-3631; K.S.A. 1993 Supp. 21-4624(3), -4624(5); K.S.A. 22-3414(3), -3504, -3504(1)

**CRIMINAL LAW—CRIMINAL PROCEDURE—EVIDENCE—JURY INSTRUCTIONS—PROSECUTORS**

**STATE V. LAMONE**

SEDGWICK DISTRICT COURT—JUDGMENT VACATED AND CASE REMANDED

COURT OF APPEALS—AFFIRMED

NO. 115,451—SEPTEMBER 28, 2018

FACTS: Lamone was convicted of driving under the influence (DUI). District court enhanced the sentence based on Lamone's two prior Wichita Municipal Court convictions. Court of appeals vacated the sentence and remanded case to district court for resentencing. 54 Kan. App. 2d 180 (2017). State's petition for review granted.

**ISSUE:** Prior convictions used to enhance sentence

**HELD:** This issue was addressed and resolved in *State v. Gensler*, 308 Kan. 674 (2018). A prior municipal court conviction for DUI under a Wichita ordinance prohibiting operation of a vehicle under certain circumstances, when the element of “vehicle” is defined more broadly that the “vehicle” element in the state DUI statute, cannot be used to elevate a later violation of the state statute to a felony. Lamone's sentence is vacated and case is remanded to district court for resentencing.
DISSENT (Stegall, J.): Dissents from the result and rationale in this case for same reasons stated in his dissent in Gensler.

STATUTES: K.S.A. 2017 Supp. 8-1567, -1567(i)(1); K.S.A. 2016 Supp. 8-1567

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—MOTIONS—SENTENCES—STATUTES
STATE V. LEHMAN
SEDGWICK DISTRICT COURT—REVERSED, MODIFIED SENTENCE VACATED, AND REMANDED
COURT OF APPEALS—REVERSED
NO. 112,500—SEPTEMBER 28, 2018

FACTS: Lehman was convicted in 2009 of sexual battery, and sentenced to 31 months in prison with 24 months post-release supervision. State filed 2013 motion to correct an illegal sentence, claiming K.S.A. 22-3717(d)(1)(G) required mandatory lifetime of post-release supervision. Motion was ultimately heard in June 2014, after KDOC had discharged Lehman from post-release supervision. District court ordered lifetime post-release supervision, finding Lehman’s discharge did not deprive the court of jurisdiction to correct an illegal sentence. Lehman appealed. Court of appeals affirmed in unpublished opinion. Lehman’s petition for review granted.

ISSUE: District court’s authority to modify a complete sentence

HELD: Invited error doctrine does not preclude State’s motion to correct an illegal sentence. Nor do contract principles prevent State from challenging the legality of a sentence it agreed to recommend in a plea agreement. Cases from other state and federal courts are reviewed. When Lehman completed his original sentence—even if illegal—without a court order that superseded the judgment of the sentencing judge, he was no longer subject to the jurisdiction of the criminal justice system. Any additional sentence imposed for the same offense after completing the original sentence constitutes a multiple punishment proscribed the double jeopardy provision of federal and Kansas constitutions. Argument that State’s notice of filing the motion to correct an illegal sentence negated any expectation of finality Lehman may have had upon completing his original sentence is unavailing.

CONCURRENCE (Rosen, J.): Agrees that under facts of this case, Lehman had a legitimate expectation in the finality of his sentence. Writes separately to emphasize the special circumstances of this case. If State had filed motion to correct and had obtained a judicial stay of finality before Lehman’s sentence had expired, that would have preserved the sentencing court’s jurisdiction. Instead, State did not obtain service on Lehman until after his sentence had expired.

CONCURRENCE (Stegall, J.): Concurs in the result but would not reach the double jeopardy question because precedent established in State v. Montgomery, 295 Kan. 837 (2012), would apply to foreclose the State’s claim.

STATUTORY: K.S.A. 21-4704(e)(2), 22-3504, -3504(1)-(2), -3717(d)(1)(G)

APPEALS—CONSTITUTIONAL LAW—CRIMINAL LAW—CRIMINAL PROCEDURE—EVIDENCE FOURTH AMENDMENT—PROSECUTORS
STATE V. LOWERY
SHAWNEE DISTRICT COURT—AFFIRMED
NO. 115,377—OCTOBER 5, 2018

FACTS: Related to a shooting between two vehicles on victims’ wedding night, Lowery was convicted of charges including premeditated first-degree murder of Davenport-Ray, attempted premeditated first-degree murder of Ray, and unlawful discharge of a firearm at an occupied building. On appeal, Lowery claimed: (1) prosecutorial error during trial and in closing argument; (2) he was denied his right to be present when district court held hearing on Lowery’s motion in limine and compelled a State witness to testify pursuant to grant of immunity; (3) district court erred by instructing jury on law of aiding and abetting without modifying the standard instruction; (4) his post-arrest statements to law enforcement officers were involuntary and should have been suppressed; (5) the partially redacted video recording of his interview with law enforcement officers contained inadmissible evidence; (6) prosecutor’s questions to witness went beyond the scope of defense counsel’s direct examination and elicited hearsay testimony; (7) insufficient evidence supported his convictions; and (8) cumulative error denied him a fair trial.

ISSUES: (1) Prosecutorial error, (2) right to be present at every critical trial stage, (3) aiding and abetting instruction, (4) voluntariness of a defendant’s statements to law enforcement, (5) failure to redact evidence from defendant’s video-recorded statement, (6) hearsay evidence beyond the scope of direct examination, (7) sufficiency of the evidence, (8) cumulative error

HELD: Defendant cannot circumvent contemporaneous objection requirements of K.S.A. 60-404 by characterizing an appellate issue as prosecutorial error rather than evidentiary error. No review of evidentiary claims that were not preserved for appeal. No abuse of district court’s discretion in denying Lowery’s motion for a new trial based on prosecutor’s comments and gestures. No error in prosecutor’s use of puzzle and picture analogies in this case which is factually distinguished from State v. Crawford, 300 Kan. 740 (2014), and State v. Sherman, 305 Kan. 88 (2016). Lowery’s claim of prosecutorial error for violating trial court’s orders in limine is unavailing. While a close call, prosecutor did not comment on witness credibility. Prosecutor improperly used “golden rule” argument in closing argument, and egregiously misstated the DNA evidence and testimony of the DNA analyst, but on facts in this case these were not reversible errors.

Kansas Supreme Court has not addressed whether an im-
munity hearing is a critical stage of the proceedings at which the defendant must be present, but other courts have found the defendant has no such right. However, district court violated Lowery’s statutory rights by conducting a hearing on Lowery’s motion in limine without Lowery or defense counsel present. Under facts in this case, the error was harmless.

Lowery’s instructional error claim is not reviewed because Lowery invited the error.

There is no express requirement in Miranda that a defendant be informed of the right to stop answering questions at any time and terminate the interview. Instead, this is part of the totality of the circumstances to be reviewed in the voluntariness calculus. Here, Lowery’s statements to law enforcement were freely and voluntarily made. District court’s Jackson v. Denno ruling is affirmed.

New allegations of material that should have been redacted were not preserved for appellate review. On claims properly before the court, the jury should not have heard officer comments on the possible sentence imposed if Lowery were to be found guilty, officer explanations on the law of felony murder, or statements implying that Lowery had a criminal history. But it is presumed the jury followed the instruction to not consider the ultimate disposition in this case.

Prosecutor’s questions were not outside the scope of direct examination. Officer’s testimony did not constitute inadmissible hearsay evidence, and no reasonable probability that evidence from this testimony affected the outcome of trial.

Evidence viewed in light most favorable to the State was sufficient to support Lowery’s convictions.

The three prosecutorial errors found in this case were harmless beyond a reasonable doubt, and the fairness of Lowery’s trial was not impacted by his absence at the motion hearing. Evidence against Lowery was not overwhelming, but circumstantially strong enough that cumulative effect of the errors did not deprive Lowery a fair trial.


ATTORNEYS—CRIMINAL LAW—CRIMINAL PROCEDURE—ETHICS—EVIDENCE—JUDGES—JURIES—JURY INSTRUCTIONS—PROSECUTORS—STATUTES—VENUE
STATE V. MILLER
DOUGLAS DISTRICT COURT—AFFIRMED
NO. 114,373 —OCTOBER 5, 2018
FACTS: Miller was convicted of premeditated first-degree murder of his wife. State v. Miller, 284 Kan. 682 (2007)(Miller I). In 2012 unpublished opinion, court of appeals granted Miller post-conviction relief and ordered a new trial. Kansas Supreme Court affirmed that decision. Miller v. State, 298 Kan. 921 (2014)(Miller II). On retrial, Miller again convicted of premeditated first-degree murder. Miller appealed. As structured by the court, Miller claims trial court erred by: (1) denying motion for change of venue given extensive publicity surrounding first trial and corresponding pretrial publicity on retrial; (2) denying Miller’s for-cause challenges to 10 prospective jurors who knew of Miller’s prior conviction and/or had a preconceived opinion he was guilty; (3) denying Miller’s motion to first have jury determine if victim’s death was homicide, and then have same jury determine the degree of homicide; (4) denying portion of proposed instruction that limited jury’s consideration of dating site evidence as evidence of homicide; (5) denying motion to disqualify the district attorney’s (DA’s) office based on conflict of interest with witness and because office in possession of information from Miller’s first trial that was protected by attorney-client privilege; and (6) three times advancing an interpretation of the evidence that was not supported by the record. Miller also claimed (7) that medical evidence from State’s forensic pathologist was insufficient to establish the victim had been killed by another. Miller further claimed the trial court erred by: (8) denying motions for mistrial after prosecutor mentioned pornography in violation of in limine order, and after State’s rebuttal witness testified outside the scope of permissible rebuttal; (9) admitting evidence Miller sought to exclude through motion in limine of Miller’s extramarital affair, Miller accessing dating websites, Miller being the beneficiary of wife’s life insurance policy, and graphic photographs; and (10) granting State’s motion on first day of retrial to admit Miller’s testimony in Miller I without giving timely notice of intent to introduce this prior testimony. Finally, Miller claimed cumulative error denied him a fair trial.

ISSUES: (1) Change of venue, (2) trial court’s denial of for-cause juror challenges, (3) Denial of bifurcation request, (4) denial of complete requested limiting instruction, (5) disqualification of district attorney’s office, (6) judicial misconduct, (7) state’s failure to prove a homicide, (8) denial of mistrial motions, (9) motions in limine and admissibility of evidence, (10) admission of defendant’s prior trial testimony, (11) cumulative error

HELD: Miller’s constitutional challenge to venue fails. Factors identified by United States and Kansas supreme courts are reviewed and applied, finding no presumed or actual prejudice from pretrial publicity in this case. Circumstances in State v. Carr, 300 Kan. 1 (2007), are compared.

Defense arguments regarding use of peremptory challenges, and trial court’s refusal to grant for-cause challenges, are examined. Even if district court erred in refusing to strike one prospective juror (A.S.) for cause, under facts in this case there was no showing of prejudice, and no violation of Miller’s constitutional or statutory rights.
Miller's bifurcation claim is evidentiary rather than constitutional. District court did not err in refusing to bifurcate trial by separate elements.

No showing of error in district court’s modification of the proposed limiting instruction.

Under facts in this case, which included defendant’s son living rent free with an Assistant District Attorney (ADA), and DA’s office acquiring but not disclosing possession of a day planner of Miller’s attorney in first trial, district court did not abuse its discretion in refusing to disqualify the DA’s office based on conflict of interest or DAs unprofessional handling of the planner. Kansas Rules of Professional Conduct discussed.

Judicial misconduct claim fails. Taken in context, trial judge’s response was not erroneous, much less misconduct.

Miller did not object to State forensic pathologist’s cause-of-death opinion until basis for that opinion had been thoroughly parsed and interminably repeated through multiple examinations by both parties. Failure to make timely contemporaneous objection defeats review of the merits of this evidentiary claim.

Prosecutor’s mention of pornography was error, but error was harmless in this case. Likewise, if any error in rebuttal witness testimony, the error was harmless.

In following precedent set in Miller I, district court did not err by admitting evidence of extramarital affair for purpose of motive. Under facts in this case, probative value of detective’s testimony about Miller accessing dating websites is tenuous but any error was harmless, and no error in admitting evidence of life insurance. District court’s admission of graphic photographs is affirmed based on law of the case established in Miller I.

Trial court’s decision to allow Miller’s retrial counsel to inspect Miller I testimony and respond with arguments was a reasonable remedy of the discovery violation. Under circumstances in this case, district court did not abuse its discretion in refusing to continue or suspend the retrial for a separate hearing on State’s motion to admit the Miller I testimony.

Viewed in context of the entire record, Miller was not so prejudiced by cumulative effect of errors declared in this case as to deny him a fair trial.

DISSENT (Johnson, J.): Notwithstanding practical and emotional costs of yet another retrial that likely again would result in a conviction, Constitutions require that result to maintain integrity of our criminal justice system. Cannot condone the conviction in this case because the retrial was fundamentally unfair. Unfairness starts with retrial’s venue, citing his dissent in Carr. Allowing juror A.S. to sit on retrial jury was fundamental error. Testimony about Miller accessing dating websites had no logical connection to a relevant fact that would make it more likely that Miller killed his wife.

Improvident to apply law of the case doctrine to uphold admission of graphic photographs. And testimony of State’s forensic pathologist should have been considered in assessing impact of cumulative error.

DISSENT (Wurtz, J., appointed to hear case vice Justice Stegall): Agrees that if an erroneous expert opinion on cause of death is added to the cumulative error analysis in this case, prejudice caused by cumulative effect of all errors denied Miller a fair trial. Also agrees that expert opinion on the cause of death was not based on medical evidence but rather on the doctor’s factual determination that Miller had lied about being in the room when his wife died. Would find Miller’s objection to expert opinion on the cause of death was sufficient to preserve the question for appellate review on the merits.


APPEALS—CRIMINAL PROCEDURE—JURISDICTION—STATUTES
STATE V. WEEKES
SALINE DISTRICT COURT—COURT OF APPEALS
DISMISSEL OF THE APPEAL IS REVERSED—CASE REMANDED
NO. 115,739—OCTOBER 5, 2018


ISSUE: Appellate jurisdiction

HELD: Review was limited to issue of appellate jurisdiction. Logical fallacies in Everett rationale are identified. Panel had jurisdiction to review whether the district court abused its discretion in denying Weeks’ motion for a post-probation-revocation sentence modification, pursuant to K.S.A. 2017 Supp. 22-3716(c)(1)(E), even if the denial results in the imposition of an original sentence that was a presumptive sentence for the crime of conviction. The panel’s dismissal for lack of jurisdiction is reversed. Appeal was reinstated and remanded to court of appeals for consideration on the merits.
STATUTES: K.S.A. 2017 Supp. 21-6803(q), 22-3716(c)(1)(E); K.S.A. 2016 Supp. 21-6820(c)(1)

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—EVIDENCE—JURIES—PROSECUTORS
STATE V. WILLIAMS
WYANDOTTE DISTRICT COURT—AFFIRMED
NO. 116,690—OCTOBER 26, 2018

FACTS: William was convicted of first-degree premeditated murder and criminal possession of a firearm. On appeal he claimed: (1) prosecutor’s closing remarks improperly called William’s testimony a fabrication; (2) State’s peremptory strikes of two jurors, and trial court’s overruling William’s claim of racial discrimination, violated Williams’ rights under Batson v. Kentucky, 476 U.S. 79 (1986); (3) trial court erred in allowing overly gruesome autopsy photographs during testimony of State forensic pathologist; and (4) cumulative error denied him a fair trial.

ISSUES: (1) Prosecutorial misconduct, (2) Batson challenge, (3) gruesome photographs, (4) cumulative error

HELD: Under facts in this case, prosecutor’s comments about Williams’ trustworthiness were within proper bounds. In context, prosecutor was advancing reasonable inferences based on physical evidence which supported the suggestion that Williams' testimony was unbelievable.

Second and third steps in Batson challenge are discussed. Under circumstances in this case, trial court did not abuse its discretion by concluding the prosecutor had a valid, race-neutral reason to strike each juror.

Autopsy photos in this case were graphically illustrative and unpleasant to view, but were not offered solely to inflame the jurors’ passions or prejudice.

Cumulative error claim is defeated by absence of any error.

STATUTES: K.S.A. 2017 Supp. 21-5402, -6304, 22-3601(b)(4); K.S.A. 60-2101(b)

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The appellee/cross-appellant’s brief is due 30 days after the appellant’s brief is served. 6.01(b)(2). The cross-appellee’s brief is due 21 days after the cross-appellant's brief is served. 6.01(b)(3). The appellee/cross-appellee's brief is due 21 days after the appellee/cross-appellant's brief is served. 6.01(b)(4). Any reply brief is due 14 days after service of the brief to which the reply is made. 6.01(b)(5). Whew. That’s a lot. Always a good time to stress that reading the appellate court rules is ESSENTIAL TO SUCCESSFUL APPELLATE PRACTICE.

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**PARENTAGE—STANDING—STATUTORY INTERPRETATION**

OSBORN V. ANDERSON

BOURBON DISTRICT COURT—REVERSED AND REMANDED

NO. 118,982—OCTOBER 19, 2018

FACTS: Although he was not the biological father, Osborn signed a voluntary acknowledgement of paternity for A.O. Osborn and is also listed as A.O.’s father on the birth certificate. Osborn married A.O.’s mother, but the relationship quickly soured and the marriage was annulled. Sadly, A.O. was later killed by Mother’s new boyfriend. Osborn filed a wrongful death petition against the boyfriend and DCF officials. Mother and DCF sought dismissal, claiming that Osborn lacked standing because he was not A.O.’s biological father. The district court agreed and summarily dismissed Osborn’s suit for lack of standing. Osborn appealed.

ISSUES: (1) Standing; (2) authority to challenge paternity

HELD: Osborn has standing to pursue a wrongful death action only if he is A.O.’s legal father. The annulment between Osborn and Mother did not revoke Osborn’s prior acknowledgement of parentage. In the absence of a timely, separate action to revoke the VAP, Osborn’s acknowledgement of parentage remains valid even after the annulment. There is no statutory authority that would allow DCF to challenge Osborn’s paternity.

STATUTE: K.S.A. 2017 Supp. 23-2204, -2204(b)(1), -2208(a), -2209(a), -2209(b), -2209(e), -2210(a); K.S.A. 60-1902

**CHILD IN NEED OF CARE—JURISDICTION**

IN RE K.L.B.

SEDGWICK DISTRICT COURT—AFFIRMED

NO. 118,563—OCTOBER 19, 2018

FACTS: Mother brought K.L.B. and another child to Kansas from Kentucky. After being in Kansas for a week, the children were taken into State custody. Mother did not contest the allegations in the child in need of care petition. After Kentucky declined jurisdiction over the children, Mother requested a hearing under the Uniform Child Custody Jurisdiction and Enforcement Act to find out why. Mother was eventually extradited back to Kentucky on criminal charges. Her parental rights were terminated, and Mother appealed.

ISSUES: (1) Jurisdiction under the UCCJEA; (2) sufficiency of the evidence

HELD: There is no evidence that Kentucky ever attempted to initiate child in need of care proceedings for these children. But even in the absence of prior proceedings, Kansas could not acquire initial child-custody jurisdiction under the UCCJEA because Kansas was not the children’s home state. However, the facts show that Kansas acquired jurisdiction on an emergency basis. Once Kentucky declined jurisdiction, Kansas was free to continue with this action. The district court’s decision to terminate Mother’s parental rights was supported by clear and convincing evidence and termination was in the children’s best interests.

STATUTE: K.S.A. 2017 Supp. 23-37,102(b), -37,102(l), -37,201, -37,204, -37,204(a), -37,204(b), -37,204(c), 38-2203(b), -2250, -2269(a), -2269(b), -2269(c), -2271

**CONSTITUTIONAL LAW—FEDERAL PREEMPTION—PUBLIC UTILITIES—STATUTES**

STATE V. BNSF RAILWAY COMPANY

CHASE DISTRICT COURT—REVERSED

NO. 118,095—NOVEMBER 2, 2018

FACTS: District court convicted Burlington Northern Santa Fe (BNSF) of violating K.S.A. 66-273 for blocking a roadway in Chase County for approximately four hours. The statute prohibits trains from standing on a public road in or near a city or town for more than 10 minutes. BNSF appealed on issues including whether the Kansas statute is preempted by the federal Interstate Commerce Commission Termination Act (ICCT) and the Federal Railroad Safety Act.

ISSUE: Federal preemption of state law

HELD: The ICCTA pre-empts K.S.A. 66-273. BNSF’s conviction is reversed as a matter of law. ICCT created the Surface Transportation Board (STB), giving it jurisdiction to regulate railroad transportation. While no court has addressed whether federal law preempts K.S.A. 66-273 or its predecessors, nearly all federal and state courts have concluded that state laws regulating how long a train can block a railroad crossing, and civil claims for alleged violations of state anti-blocking statutes, are preempted because they specifically target railroad operations. Likewise, K.S.A. 66-273 infringes upon the exclusive jurisdiction of the STB because the statute specifically targets railroad carriers and has more than a remote or incidental effect on railroad operations.

STATUTES: 49 U.S.C. §§ 1001 et seq. and 10501(a)-(b) (2016); K.S.A. 66-273, -274

**MUNICIPALITIES—PROPERTY**

JAYHAWK RACING PROPERTIES V. CITY OF TOPEKA

SHAWNEE DISTRICT COURT—REVERSED AND REMANDED

NO. 118,035—NOVEMBER 2, 2018

FACTS: In 2006, the City issued $10 million in Sales Tax and Revenue Bonds to finance improvements to Heartland Park racetrack. At the time the bonds were issued, the City
owned Heartland Park in fee simple for a term of years, subject to Jayhawk Racing’s reversionary interest. When the bonds failed to produce adequate revenue, the City indicated a desire to purchase Jayhawk Racing’s reversionary interest in the property so that the City owned the facility outright. It was anticipating that this purchase would also be financed by the issuance of STAR bonds. But after an election changed the composition of the Topeka City Council, the City decided not to pursue the STAR bond sale. Without STAR bonds, there was no funding for the purchase of Jayhawk Racing’s reversionary interest. Jayhawk Racing sued the City for breach of contract. The district court granted the City’s motion for summary judgment, finding that the City could not bind its successors to issue STAR bonds. Jayhawk Racing appealed.

ISSUES: (1) Nature of the contract; (2) enforceability of the contract; (3) cash-basis laws

HELD: Municipal corporations have both governmental and proprietary capacities. The contract to purchase Jayhawk Racing’s reversionary interest was a proprietary contract akin to a purchase agreement. Because the contract is proprietary, future City Councils were bound by the agreement. The district court erred when it focused only on the method of funding. The contractual provision which provided for the issuance of bonds is an exception to the Cash-Basis and Budget Laws.

STATUTES: K.S.A. 2017 Supp. 10-1116(a); K.S.A. 10-1112, -1119, 12-3013(e)(1), 79-2935

ADMINISTRATIVE LAW—DUI
PEARSON V. DEPARTMENT OF REVENUE
WYANDOTTE DISTRICT COURT—REVERSED AND DISMISSED
NO. 118,696—SEPTEMBER 21, 2018

FACTS: Pearson was arrested and his breath test showed alcohol levels above the legal limit. After being served with a suspension notice, Pearson timely requested an administrative hearing with the Department of Revenue. Pearson appeared for the scheduled hearing but the arresting officer did not, and the hearing officer dismissed the suspension order. A few days later, the hearing officer learned that the officer had attempted to notify officials that he was hospitalized and would not be able to attend the hearing. After receiving that information, the hearing officer withdrew the dismissal order and set a new hearing date to consider Pearson’s suspension. Pearson objected, but the hearing was held and a new hearing officer affirmed the suspension of Pearson’s driver’s license. After Pearson filed a petition for judicial review, the district court affirmed, finding that the hearing officer was a party to the proceedings and could withdraw the dismissal. Pearson appealed.

ISSUES: (1) Jurisdiction; (2) ability to withdraw an order

HELD: The order withdrawing the dismissal and setting the matter for a second hearing was not a final agency action. As such, Pearson could not have filed a petition for judicial review of that order. Pearson was allowed to appeal only at the conclusion of the second proceeding, where the new hearing officer affirmed the suspension of his driving privileges. There is no express or implicit statutory authority to allow a hearing officer to reconsider, grant a rehearing, or set aside an administrative suspension order after the order's effective date. The district court erred when it found that the hearing officer was a party to the action, giving her the authority to withdraw the order of dismissal. In the absence of a request for reconsideration, the hearing officer could not withdraw the order of dismissal and reinstate the proceedings against Pearson.

STATUTES: K.S.A. 2017 Supp. 8-259(a), -1002, -1002(a), -1002(f), -1020, -1020(d)(1), -1020(k), -1020(m), -1020(n), -1020(o), -1020(p), -1020(q), 77-621(a)(1); K.S.A. 77-607(a), -607(b)(1), -607(b)(2)

Paternity—Probate
IN RE ESTATE OF FECHNER
GEARY DISTRICT COURT—VACATED AND REMANDED
NO. 118,809—NOVEMBER 2, 2018

FACTS: Chad Fechner died in 2014, intestate and with only one living heir, his aunt, Rita Young. She opened a probate estate and was surprised when Gary Fechner filed a claim alleging that he was Chad’s half uncle. Rita questioned the accuracy of the birth certificate that Gary put forth as proof; there had been prior suggestions that Chad’s father was the product of an extramarital affair, which would mean he did not share DNA with Gary. Rita asked the district court to order Gary to undergo DNA testing to prove his biological relationship to Chad. Gary objected, claiming there was no authority to order DNA testing in a probate case. The district court agreed, disallowed the DNA testing, and relied on Gary’s evidence in proclaiming him an heir. Rita appealed.

ISSUE: (1) Ability to order DNA testing in a probate case

HELD: If Gary truly is the brother of Chad’s father, he would be an heir under the probate code. The probate code defines "children" as "biological children" or as children whose parentage has been determined under the Kansas Parentage Act. The Kansas Parentage Act allows for biology, adoption, or a determination under the Parentage Act. In this case, there is no way to initiate a Parentage Act case because Chad’s father died many years ago. The Code of Civil Procedure allows for DNA testing in a probate case. But the district court must make Parentage Act and Ross findings about whether such testing is warranted. The district court’s mistake of law about its ability to order testing was an abuse of discretion. That court should reconsider Rita’s request.


Divorce—Statutory Construction
IN RE MARRIAGE OF GERLEMAN
DOUGLAS DISTRICT COURT—REVERSED AND REMANDED
NO. 118,457—SEPTEMBER 14, 2018

www.ksbar.org | November/December 2018 85
FACTS: After a contentious divorce, the district court entered judgment against Robert Gerleman for back spousal maintenance owed to Jeannette, as well as judgment on Robert’s previous agreement to pay Jeannette a portion of his military retirement pay. In an effort to collect past-due amounts, the district court issued orders of garnishment to Robert’s employer. Robert’s father was diagnosed with brain cancer in 2017, and Robert took off more than two weeks from work in order to assist his father during surgery and treatment. Citing K.S.A. 60-2310(c), Robert asked that the garnishment be released because of the illness and his inability to work. The district court refused to issue the release, and Robert appealed.

ISSUE: (1) Interpretation of K.S.A. 60-2310(c)

HELD: K.S.A. 60-2310(c) allows for a release of garnishment if the debtor is prevented from working for more than two weeks because of illness of the debtor or any family member of the debtor. Under the plain meaning of the statute, Robert’s father is “any member” of Robert’s family. There is no requirement in the statute that the family member be an immediate family member residing with the debtor. The affidavit submitted by Robert was sufficient to prove that he missed work for more than two weeks while caring for his father. The district court’s decision is reversed, and the case is remanded for a factual determination about when the garnishment could resume.

STATUTE: K.S.A. 2017 Supp. 17-2205(a)(4)(A), 60-2310(c)

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JURISDICTION

ALLISON V. STATE

MONTGOMERY DISTRICT COURT—DISMISSED
NO. 114,607—NOVEMBER 2, 2018

FACTS: Allison was convicted of serious felonies, and his convictions were affirmed on direct appeal. He then filed a motion for K.S.A. 60-1507 habeas corpus relief, claiming that trial counsel was ineffective. The district court appointed counsel for Allison and held an evidentiary hearing. At the conclusion of that hearing, the district court denied Allison’s motion, finding that trial counsel was constitutionally sufficient. Allison docketed an appeal and then asked for a remand to the district court under State v. Van Cleave so that he could argue that his K.S.A. 60-1507 counsel was ineffective. After the hearing, the district court concluded that Allison was prejudiced by ineffective counsel at his K.S.A. 60-1507 hearing, and that the only remedy was to hold a new hearing on that motion. The State appealed that ruling.

ISSUE: (1) Jurisdiction

HELD: It is undisputed that ruling being appealed here is not a final decision. It did not dispose of the entire merits of the issue at hand—whether Allison’s trial counsel was ineffective. The hearing on the Van Cleave remand was only an intermediate step. Because the ruling is not final, the court lacks jurisdiction to hear the appeal at this time. The appeal is dismissed.

STATUTES: K.S.A. 2017 Supp. 60-1507(d), -2102(a)(4), -2102(c); K.S.A. 60-1507

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CRIMINAL

CONSTITUTIONAL LAW—CRIMINAL LAW—FOURTH AMENDMENT—SEARCH AND SEIZURE

STATE V. RITCHEY

SHAWNEE DISTRICT COURT—AFFIRMED
NO. 118,905—NOVEMBER 2, 2018

FACTS: Ritchey was arrested for an outstanding warrant while sitting as a front-seat passenger in a parked van. After Ritchey was out of the van and handcuffed, officer searched purse Ritchey left in the van and found drug residue. Ritchey was charged with possession of methamphetamine. She filed a motion to suppress, arguing the drug evidence was found during an illegal search of her purse. District court granted the motion, finding search of Ritchey’s purse was neither a search incident to arrest nor an inventory search. State filed interlocutory appeal, arguing the search was incident to the arrest, and even if illegal, the evidence would have been inevitably found during an inventory search at the jail. State also argued suppression did not advance purpose of the exclusionary rule.

ISSUE: Warrantless search of purse

HELD: District court properly suppressed evidence from the purse because State failed to show any exception for a war-
rantless search. Officers’ search of the purse was not a valid search incident to a lawful arrest where the purse was not on Ritchey’s person, there was no threat that Ritchey could use any weapons in her purse against the officers, and no possibility the purse contained evidence of her crime of arrest—an outstanding warrant. Next, applying rationale in State v. Baker, 306 Kan. 585 (2017), no showing that items within the closed purse would have inevitably been discovered where there was no evidence that police had policy to take items like the purse into possession for safekeeping, and no evidence the purse was sent along with Ritchey to the jail. Finally, State’s argument that suppression of the evidence in this case did not serve purpose of the exclusionary rule is rejected.

STATUTE: K.S.A. 2017 Supp. 22-3603

EVIDENCE—SEARCH AND SEIZURE
STATE V. SALAZAR
MONTGOMERY DISTRICT COURT—REVERSED AND REMANDED
NO. 119,070—OCTOBER 12, 2018

FACTS: A motorcyclist was killed after he was hit by a van driven by Salazar. After the accident, Salazar was upset but gave law enforcement permission to get her driver’s license out of her vehicle. While looking for the license, officers found Salazar’s cell phone on the floor. An officer picked it up and looked at it; when asked by another officer, he said that he was just trying to determine if Salazar was texting at the time of the accident. During her later interrogation, Salazar gave officers permission to search her phone. That investigation showed that Salazar sent a text at the exact time of the accident. Officers eventually requested and received a search warrant for Salazar’s phone. Salazar was charged with multiple counts, including one count of vehicular homicide. She filed a motion to suppress, claiming that the officer’s initial search of her cell phone was illegal, tainting any further evidence recovered from the phone. The district court granted the motion, finding that officers conducted an invalid warrantless search of the phone. The State appealed.

ISSUES: (1) Plain view exception; (2) attenuation doctrine; (3) exclusionary rule

HELD: A warrant is generally required before the search of a cell phone. The officer’s search of Salazar’s phone was unreasonable unless an exception to the warrant requirement applies. The district court made no findings about whether the officer pressed a button on Salazar’s phone in order to see the text messages, or whether they were immediately visible. But the district court’s implicit finding that the officer did manipulate the phone into showing messages is supported by substantial competent evidence. Because the officer pressed a button in order to activate the phone, the plain view exception does not apply. The district court did not make the findings necessary to determine whether Salazar’s consent to search her phone was voluntary and remote enough to allow for application of the attenuation doctrine. The attenuation doctrine can only apply if Salazar’s consent was voluntary, and further findings of fact are required before that can be determined.

STATUTES: No statutes cited.

CRIMINAL PROCEDURE—MOTIONS—SENTENCES—STATUTES
STATE V. SMITH
SEDGwick DISTRICT COURT—SENTENCE VACATED—CASE REMANDED
NO. 118,042—SEPTEMBER 14, 2018

FACTS: Smith convicted in 2006 of aggravated kidnapping. In 2014 he filed a K.S.A. 22-3504 motion to correct an illegal sentence, challenging the sentencing court’s criminal history scoring of a South Carolina burglary conviction as a personal felony in Smith’s criminal history. District court denied the motion and Smith appealed. In unpublished opinion the court of appeals vacated Smith’s sentence and remanded for resentencing. On remand, district court again found the South Carolina conviction to be a person felony, and denied Smith’s motion. Smith appealed. Issue before the panel centers on whether the holding in State v. Wetrich, 307 Kan. 552 (2018), was a change in the law that occurred after Smith was sentenced. State argued it was, and through retroactive application of the 2017 amendment to K.S.A. 22-3504, Smith’s sentence was not an illegal sentence.

ISSUE: Sentencing—classification of an out-of-state conviction

HELD: Kansas Supreme Court’s decision in Wetrich was not a change in the law within the meaning of the 2017 amendment to the definition of an illegal sentence in K.S.A. 2017 Supp. 22-3504(3). Instead, the decision reinterpreted the meaning of the term “comparable offenses” within the Kansas Sentencing Guidelines Act. No final decision on whether the 2017 amendment to K.S.A. 22-3504 can apply retroactively in Smith’s case, but panel rejects State’s claim that that 2017 amendment defining an illegal sentence is jurisdictional. Here, the South Carolina burglary statute that Smith was convicted under is not identical to or narrower than the Kansas burglary statute in effect when Smith committed his current crime of conviction, thus based on holding in Wetrich, Smith’s prior South Carolina burglary cannot be scored as person felony for criminal history purposes. Sentence is vacated and case is remanded for resentencing to classify the South Carolina burglary as a nonperson felony.

STATUTES: K.S.A. 2017 Supp. 21-6810(a), -6811(d), -6811(e), -6811(e)(3), 22-3504(1), -3504(3); K.S.A. 1993 Supp. 21-4711(e); K.S.A. 21-3110(7), -3715, -4711(e), 22-3504, 60-1507(f)
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