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The Journal Board of Editors is responsible for the selection and editing of all substantive legal articles that appear in The Journal of the Kansas Bar Association. The board reviews all article submissions during its quarterly meetings (January, April, July, and October). If an attorney would like to submit an article for consideration, please send a draft or outline to Patti Van Slyke, Journal Editor & Staff Liaison, pvanslyke@ksbar.org.

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The Journal of the Kansas Bar Association (ISSN 0022-8486) is published monthly with combined issues for July/August and November/December for a total of 10 issues a year. Periodical Postage Rates paid at Topeka, Kan., and at additional mailing offices. The Journal of the Kansas Bar Association is published by the Kansas Bar Association, 1200 SW Harrison St., Topeka, KS 66612-1806; Phone: (785) 234-5696; Fax: (785) 234-3813. Member subscription is $25 a year, which is included in annual dues. Nonmember subscription rate is $45 a year.

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Young lawyers can lead the way

by Shelby Lopez

This issue of “The Journal of the Kansas Bar Association” is unique in the history of the KBA. Nearly a year ago, the leaders of the Young Lawyer Section proposed that their section be allowed to provide content for one full issue of The Journal. Such a thing had never been proposed or done before. The request reverberated up and down the organizational chart, from the President of the Board of Governors to the Executive Director to the Director of Communications and Member Services, and it ultimately fell to the Board of Editors and our Journal Editor to hear out the YLS proposal and make the decision.

Ultimately, it was decided to give YLS the opportunity to do as they wanted—provide the substantive articles that define The Journal as well as a number of feature articles that would fill in or replace our usual columnists for one issue. Granted, The Journal has been proud to publish a great deal of content written by younger members of the KBA over the years, but it had never been packaged into one magazine, as a stand-alone YLS issue.

These young men and women who work diligently in your profession are accomplished and intelligent, well educated and experienced. They are in the trenches every day as prosecutors and defense attorneys, as association and government lawyers, as teachers and mentors. They are involved in their work, in their families and in their communities.

And these young lawyers are—unequivocally—the future of the Kansas Bar Association.

Give them your attention, your welcome, your time. Work with them to improve the profession now and in the future. While some may still be somewhat new to practice, don’t mistake their lack of courtroom experience for naiveté. They live in the same world, see the same issues and problems, but they see them with fresher eyes and with a worldlier perspective than many of us who grew up and went into practice before or at the dawn of the technical revolution.

We welcome their ideas, their passion, their knowledge and expertise. Without it, we are lost, as a profession and as an organization. These young lawyers are our leaders to be. Their ideals and decisions will define the legal profession and the judicial system for decades to come.

I congratulate the YLS team for coming up with the idea, sticking with it, making their case and ultimately bringing their own issue of The Journal to fruition. It’s a strong issue, standing on its own as a unique offering for the KBA, but reflecting the same standard of excellence we ask of all of our authors and contributors. Thank you!
Investing in the KBA’s Future

by Mira Mdivani

Young lawyers are KBA’s future. Members of the KBA Young Lawyers Section make a difference in the profession. They show exceptional leadership and give back to the bar and communities. They bring fresh ideas, push for positive change and are actively shaping the future of our profession. At the KBA, investing in young lawyers and encouraging their involvement is a top priority. When we invest in our young lawyers, we invest in the KBA and widen its impact on our community for years to come. We would like to celebrate their accomplishments and contributions by dedicating this issue of the Journal to young lawyers of the Kansas Bar Association. I am thrilled to introduce the first-ever Young Lawyer issue of the KBA Journal. In this groundbreaking issue, you will find articles written by and for young lawyers. I am confident that young and experienced lawyers alike will be encouraged, inspired and challenged by this issue. I am also encouraged that this issue will foster professional development and mentorship for our young lawyers and showcase their scholarship and leadership.

Rising Stars of the KBA

First, I would like to highlight a few rising stars, which is a very hard task, because we have many outstanding young lawyers among our colleagues. So we asked young lawyers who they think is extra-super cool, and we heard about KBA’s rising stars, including Christy Campbell, Lauren Byrne, Merideth Hogan, Jean Ménager and Danielle Atchison.

Christy Campbell is the Statewide Pro Bono Director for Kansas Legal Services. She has worked for Kansas Legal Services since graduating from Washburn University School of Law in 2008, originally as a staff attorney practicing family and elder law. Now she heads up the expungement projects across Kansas and is assisting with the KLS Harvard Expungement Study. Christy has been active in the Wichita Bar Association, serving as president of the Wichita Young Lawyers, Wichita Women Attorneys Association, and currently serving on the Board of Governors. She also chairs the WBA Pro Bono Committee. She’s a member of the Wesley E. Brown Inn of Court.
and was appointed to the Kansas Access to Justice Committee in 2018. While serving as Pro Bono Liaison for the KBA Young Lawyers in 2018, she started the process of updating the Kansas Disaster Guide and joined the Volunteer Organizations Assisting in Disaster committee as Secretary. She received the KBA Outstanding Young Lawyer Award in 2016, the Washburn Law Graduate of the Last Decade in 2018, and the WBA President’s Award in 2018. You’ve probably seen her at an expungement clinic somewhere in Kansas. Or you have heard from her asking you to volunteer on a cause close to her heart. If not (yet), you can catch Christy on stage in a community theater show, or at the Wichita Bar Show, which she is co-producing, to go live during the 2020 KBA Annual Meeting. She donates quilts for local nonprofit events and is an avid reader—when does she have time? Interested in pro bono or assisting in a disaster? CONTACT CHRISTY!

Danielle Atchison is a business immigration lawyer at Mdivani Corporate Immigration Law Firm (therefore, I personally know how insanely awesome she is). Danielle graduated from law school at the top of her class in 2014. Since then, she has developed excellent corporate immigration expertise, as well as deep expertise in the firm’s pro bono area of practice, helping immigrant women and children survivors of domestic violence with obtaining legal status and U.S. citizenship. Danielle chairs the Missouri Bar Immigration Law Committee, serves on the YLS Council, has chaired the Community Outreach Committee for the Earl O’Connor Inn of Court, where she produced lawyer-supported Special Proms for Wyandotte County high school students. As far as I know, she was the youngest Adjunct Professor of Law to be appointed to teach at the UMKC School of Law. She recently traveled to the U.S. border to do pro bono work representing women and children in asylum credible fear interviews. She has served as faculty training in-house counsel, business lawyers and HR professionals, across the United States. Danielle has received pro bono awards from the Kansas Bar Association and the Missouri Bar YLS, and the KC MBA Volunteer of the month recognition. She has traveled to Washington, DC, on behalf of the state bar to judge the national We the People Competition. In 2019, based on ratings by her peers, she earned the distinction of the Thomson Reuters Super-Lawyers Rising Star.

Lauren Byrne is a Senior Associate Editor with the Real Estate service for Thomson Reuters Practical Law. She and her husband recently moved to Prairie Village, Kansas where she works remotely from her home. Lauren was previously in private practice as an associate attorney at Barber Emerson, L.C. in Lawrence, Kansas, where she practiced in the areas of real estate, land use, and general business law. Lauren is actively involved in both state and national bar associations. She is a member of the Kansas Women Attorneys Association and recently served on the Entertainment Committee to host KWAA’s 30th Annual Conference in Lindsborg, Kansas. Lauren was also recently selected as a Real Property Fellow for the ABA Real Property, Trust and Estate Law Section where she will serve a two-year fellowship term and work closely with the Retail Leasing Committee. While in Lawrence, she previously served on the Board of Directors for United Way of Douglas County and was an active member of the Lawrence Rotary Club, serving as co-founder of Rotary Prime, a young professionals networking group. Lauren joined the KBA YLS Executive Board as the Continuing Legal Education Liaison. As the CLE Liaison, she is working to develop an ongoing series of CLEs, educating young lawyers on crucial skills at a low cost.

Jean Ménager joined Colantuono Bjerg Guinn in 2015 to practice business and employment law. He acts as outsourced in-house counsel /general transactional. His practice includes contract negotiations, commercial leasing, employee matters, business acquisitions, and employment and business litigation involving wrongful terminations, shareholder litigation, and general business disputes. Jean represented a seller in an acquisition where the consideration to the seller exceeded 20 million dollars; represented owners of a commercial tenant in the opening of a new store where the triple-net lease provided for annual rents in the 6-figures; served on a team that went to jury trial in 2019, and won a solo bench trial where he defended a shipper in a dispute brought by a shipping company that moved three 36 ton machines from China to Wisconsin. Jean is involved in the KBA, where he serves on the Diversity Committee, and he has recently been appointed the CLE Committee Co-Chair. He has served on the board of the Earl O’Connor Inn of Court, on the board of Directors for Lawyers Association of Kansas City, Johnson County Bar Association, including service as the YLS Section Chair and Mentorship Program Chair. His projects for the bar and community include: creating a new mentorship program for the Johnson County Bar Association, leading a committee that managed a charity drive collecting peanut butter, socks, and other needs for children served by Operation Breakthrough; organizing an annual charity Christmas party for homeless and other underprivileged children; and serving as a presiding judge for Missouri High School Mock trial where he heard several cases. He is the recipient of the 2018 Outstanding Lawyer of the Year award from the KBA.

Merideth Hogan is an Equal Justice Works Crime Victims Justice Corps Fellow. She is working on making sure the vulnerable in our communities have access to justice. She worked with Julie Larson and Erin Bartling of the Migrant Farmworkers Project unit and applied for a grant from EJW. Merideth worked on building relationships with organizations which support sex and labor trafficking victims, including up to 20 meetings every month to build relationships which translated in referral of many cases that needed her help. There are many
sex trafficking cases in Kansas City; and with an additional attorney, we could assist more sex- and labor-trafficked clients. We then hired Christine Ladner who is fantastic. Meredith is spearheading another grant application from the Office for Victims of Crime, and she hopes to fund two more attorneys and two more paralegals to help work on sex- and labor-trafficking cases.

KBA’s Young Lawyers in Their Own Words

Lauren Hughes and Sarah Stula, the publication co-chairs for the KBA Young Lawyer Section Board, pioneered the effort to produce this issue. In their own words:

Lauren Hughes: “Writing provides a unique opportunity for young lawyers to engage with the profession, showcase burgeoning knowledge in a particular field, and provide fresh perspectives. A young lawyer issue of the KBA Journal directly impacts the next generation of lawyers.”

Sarah Stula: “Young lawyers want to grow professionally and give back to the community, and a young lawyer issue of the KBA Journal presents the strategic opportunity to do both.”

KBA’s young lawyers have plenty of writing talent. They have been hard at work producing this issue of the KBA Journal. The Journal is proud to showcase excellent articles written by YLS section members and those within our bar who help and nurture young lawyers. In addition to YLS President Mitch Biebighauser’s President’s Column, Lauren Hughes wrote “REV. PROC.? DSUE? QTIP? Explaining Abbreviations that Every Lawyer Should Understand (What Every Lawyer Should Know About the Federal Estate Tax, Portability and the QTIP Election)”; Paul Mose wrote on impeachment evidence in civil cases; Joe Schremmer covered partnership compensation models; Sarah Stula interviewed Justice Luckert and Justice Stegall; and law student Kristen Egger shared a law student’s Perspective on KWAA’s 30th Year Anniversary. Be sure to read articles written by experienced lawyers on young lawyer issues, including by the KBF President Susan Saidian encouraging young lawyers to get involved in the Kansas Bar Foundation, and Clerk of the Appellate Court Douglas T. Shima sharing appellate tips for young lawyers. You are in for a treat!

About the KBA President

Mira Mdivani practices business immigration law in Overland Park. When she was a young lawyer, she was told to “get involved,” which turned to be excellent advice. She would like to thank young lawyers Mitch Biebighauser, Sarah Stula and Lauren Hughes for being amazing go-getters!
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Young lawyers, we need to communicate with you. Each year that you renew your KBA membership, the KBA endeavors to offer you services and products that it hopes you will find useful in your practice. The KBA offers opportunities to earn CLE credit, statewide functions to promote networking with your colleagues across the Flint Hills, and products that it hopes will enhance your practice. Put simply, do you care?

Let’s look at the numbers. There are 6306 members of the KBA. There are 836 members of the YLS. As a section, we comprise 13 percent of the entire KBA. Yet, its biggest networking functions don’t seem to draw your interest. The KBA’s Annual Meeting drew 129 attendees, only 6 of them—4.5 percent—were YLS members (that includes me and at least two other board members). That is not only low, it is disproportionately low; 13 percent of the membership was represented by 4.5 percent at the meeting. Stated another way, 2 percent of the total KBA membership attended annual meeting, but only 0.72 percent of YLS membership attended annual meeting. The numbers look the same for KBA CLE opportunities, the KBA’s largest CLE last year was the Family Law CLE; it drew 112 attendees, 5 of whom, 4.5 percent, were members of the YLS. I suspect the reason is not because the YLS has a disproportionately low family law practice.

This organization belongs to you—you pay the dues. Your voice should be heard. As your president, if I can accomplish
anything at all, it should be to communicate the value of the KBA to you. If I can accomplish anything meaningful, it would be to actually deliver you that value. If that means creating new ways to meet you where you practice, we can work on that. You are a diverse body, comprised of law students, “young” attorneys and newly admitted attorneys. Because of our diversity, there could be a number of different ways our membership could find YLS valuable. It’s time for you to speak up and tell us what that is. If you did not go to the KBA Annual Meeting, tell us why not. If you’re seeking other CLE opportunities, tell us how the KBA could measure up. Send me an email directly, mitch.biebighauser@fd.org; it can’t be any easier than that.

In 2017, the American Bar Association published an article, “What do young lawyers want from your bar association today?” I think we are fulfilling at least some of the recommendations made by the ABA. First, “traditional member benefits are often lost on young lawyers and law students.” Concerned with how they are going to get a job, make their student loan payments on time, and begin saving for the future, younger lawyers and law students join bar associations for the connections, the people. The best thing bar associations can do going forward to attract young lawyers and new members is to provide mentorship opportunities, constant networking chances, and writing opportunities.

We’re doing those things. Last year, we began what I hope will be an annual, with a perhaps growing frequency, mentorship kickoff event. In Topeka, Kansas City, and Wichita, we hosted breakfast events designed to connect volunteer mentors with YLS members. The events were free and came with coffee and pastries. I believe that the attendees, although few, found the program valuable, and I hope word spreads to additional YLS members and other young lawyers looking for an organization providing a robust mentorship opportunity. If you’re interested in writing, I know you won’t be turned down by Lauren Hughes and Sarah Stula, our publication chairs, who are constantly hunting for a good feature article. We can get you published in a very respected statewide legal journal—this one.

Second, “create a welcoming environment for new members.” I hope you feel welcome. The KBA counts among its ranks attorneys who want to see Kansas attorneys thrive. The Annual Meeting hosted an event dedicated to receiving YLS members and recognized, by brightly colored attendee badges, first time attendees. It was easy for leadership, sponsors and fellow members to reach out and bring young lawyers into the fold. I hope to hear your stories of that happening.

Third, “try a communication survey, because everyone is different.” We’re on it. By the end of this year, we will be sending out a survey to help us gather this information—please, hold your eye rolls. This is an important communication tool for us to gather what I hope will be frank feedback about what value you believe you are receiving as a YLS member and what value you expect to receive.

Fourth, “create opportunities now.” We can do that. Since my term began, I’ve elevated young lawyers into new committees of the KBA. They want your voice. We could also use you directly on the YLS board. If you’re looking for a fast track into YLS leadership, and you’ve made it this far into this article, let me know; we’ve got room on our board (space is limited, act now!) Maybe you’re not ready for leadership, but you do hope to see some take-away from this association. Let me know, and we’ll get on it. Looking to work on a universal skill? Sign up now for our November 4, 2019, CLE on writing, because I know I wasn’t alone in surfing the bottom of the curve in that course.

I look forward to communicating with you about the KBA’s value to you.

About the Author

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

mitch_biebighauser@fd.org

I remember being a young attorney....

by Susan Saidian

It was a few years ago—and I am not going to say exactly how many—but you can figure it out from my bar number. It was back when you faxed letters to opposing counsel who wouldn’t respond. Computers were big and used mainly for word processing as the legal profession was just starting to work out the legal and ethical kinks in using email for correspondence. I think the office where I worked had a hand cranked mimeograph, but it wasn’t used much anymore. This was back when you waited on the mail daily to see if the court had issued a ruling in your case, even coming in on Saturdays to check the mail. (I always read the last paragraph first.)

Some things today are likely the same as they were back then, the excitement of a new case, perfecting an opinion letter, keeping an eye on the billable hours. But of the things that have changed, one of the more significant areas is communication. It is practically instantaneous now. You can read the opinion rendered in your e-filed case from the comfort of your sofa while sipping a cup of hot chocolate.

Faster, more efficient communication can only improve the provision of legal services. For my generation and older, we adapted to new technology and the changes it brought to the office practice, to the court system and to our clients’ expectations. Most of the attorneys I practiced with mastered the necessary technical skills. The younger generations, some of whom were practically weaned on iPhones, needed no time to adapt. They hit the ground running and probably wonder why a few of us who are older do not understand paperless offices, or why we don’t know how scan and email from the copier.

Increased levels and methods of communication also mean that attorneys of all ages can be in touch with clients, colleagues and others so much faster, which can create opportunities beyond what was possible only a few short years ago. News about professional and charitable activities can be e-blasted in a second. The Kansas Bar Foundation uses “instant” communication all the time, and ironically, I am learning more today about how to use electronic communication from my younger Foundation Trustees than I did while I was in practice. As technology continues to evolve, future generations of attorneys will use it to advance the profession and the interests of their clients, just as have previous generations.

The attorneys I have worked with through the years who qualify as young attorneys are thoughtful, energetic and professional. They are not afraid to ask for help from those who are more experienced—and none of their elders should hesitate to give it. That is one thing that has not changed through the years. Sometimes it is a mentoring relationship between a senior partner and a young associate, or sometimes it is showing the newest attorney in the county where the judge’s chambers are. Younger attorneys bring fresh ideas and a new way of looking at things as well as prowess with technology. These types of interactions are the lifeblood of the legal profession.

So thank you, young attorneys for moving forward and continuing to improve the profession, as have the generations before you.

About the Author

Susan Saidian attended Millsaps College and Washburn University, obtaining her bachelor’s degree in 1982. She graduated from Washburn University School of Law in 1988. She spent most of her years in private practice in the area of bankruptcy, working for both consumer and business debtors, creditors and although she found all areas rewarding, she particularly enjoyed her work for consumer debtors. She is a member of the American Bar Association, Kansas Bar Association, Wichita Bar Association, Kansas Women Attorneys Association, and has served on the board of CASA of Sedgwick County. She has also served on the Kansas Bar Foundation’s IOLTA Committee. She is now in-house counsel at Line Medical, and lives in Wichita with her husband, David.
As T.S. Eliot once said: “I have measured out my life with coffee spoons.” The same could probably be said about my years in law school. But one of the best pieces of advice I got in law school was about coffee—set aside the books (especially the Blue Book), get out of the library and take a lawyer to coffee. And not just because you need the caffeine (though you certainly do), but because you need mentors. The same advice still rings true as a young lawyer.

One of my favorite shows on Netflix is “Comedians in Cars Getting Coffee,” hosted by Jerry Seinfeld. The premise is simple—Jerry takes a famous comedian, like Tina Fey or Steve Martin, out for a short coffee break in some snazzy car. Then the two chat about life, the grind of making a career out of comedy and lessons learned along the way. The show is, of course, hilarious. But it also reminds me of the “coffee break” culture that we, as busy young lawyers, have all too often lost. Yes, I’m saying it’s time to follow Jerry’s example and take a lawyer you admire to coffee. (Minus the snazzy car because we are, after all, young lawyers.)

So today, I invite you take a coffee break with me and two of the lawyers I admire most—Justice Caleb Stegall and Justice Marla Luckert. As a research attorney at the Kansas Supreme Court, I have had the privilege of taking coffee breaks with them for several years. I hope you will grab a cup of coffee, turn away from your screen, and join us for the conversation.

1. What was most challenging for you as a young lawyer?

**Justice Luckert:** I initially struggled to find my voice as a litigator. I observed attorneys whose style in the courtroom was effective and chose some to emulate. But those styles did not seem to fit a young, short, soft-spoken woman. I soon learned a valuable lesson: Just be yourself.

**Justice Stegall:** I think I hit the ground running pretty hard right out of the gate. As a result, getting used to the pace of practice was a challenge. I wasn’t initially very good at the “hurry up and wait” nature of the game, and it took some time to develop the necessary professional patience and intuitive sense of good timing that is crucial for any successful litigator.

2. What advice do you have for a young lawyer who wants to be on the bench someday?

**Justice Luckert:** I suggest everyone remember Socrates’ advice: “Regard your good name as the richest jewel you can possibly be possessed of—for credit is like fire; when once you have kindled it, you may easily preserve it, but if you once extinguish it, you will find it an arduous task to rekindle it again.”

**Justice Stegall:** Become the best lawyer you can be. Respect everyone. Be kind and professional. Don’t shy away from making your interest known at the right time and in the right
way. And then don’t sweat it. There are many brilliant and highly qualified lawyers who may have wanted to sit on the bench at one time or another, but for whatever reason—bad timing, bad luck, etc.—didn’t have the opportunity to do so. Becoming a judge should never be the measure of a successful legal career.

3. Who are your personal and professional role models?

Justice Luckert: My parents have been my constant personal role models. They exercised their strong faith; worked hard; and were (among many other wonderful things) honest, dependable, kind, giving, humble, determined, warm-hearted and loving. They always modeled a willingness to serve their God, church, family, and neighbors. My professional role models are too many to list by name. By category, they include exceptional professors at Washburn University School of Law; outstanding attorneys with whom I practiced law at Goodell, Stratton, Edmonds & Palmer; distinguished jurists who served on the bench before and with me; and many exceptional attorneys. I am very grateful for all they taught me as they modeled professionalism and effective lawyering skills.

Justice Stegall: I have been blessed almost beyond recounting with superb personal mentors, teachers, role models, and abiding friendships. In terms of historical figures, I have often written and spoken of my deep admiration for Theodore Roosevelt. In the judicial realm, I admire and have learned much from a variety of judges including Deaneell Tacha, Richard Posner, Henry Friendly, Mike Malone, Gary Nafziger and Neil Gorsuch—not to mention all of my colleagues on the Kansas Court of Appeals and the Kansas Supreme Court!

4. What do you love most about your job?

Justice Luckert: The Kansas judicial branch has wonderful judges and staff. I love working with them and am honored to do so as we collectively strive to provide Kansans with a fair, effective, and efficient judicial system.

Justice Stegall: I love serving my fellow Kansans. It is daunting to think about sometimes, but it is also a tremendous privilege.

5. So hypothetically, say you have a free afternoon and can’t work on anything related to the law. What would you do?

Justice Luckert: I would play with my grandchildren.

Justice Stegall: I could probably be found hanging out with my kids, playing basketball, tennis, chess or doing yard work.

6. Justice Luckert, you served as a district court judge before moving to the Kansas Supreme Court. How did that experience shape you as a Supreme Court justice?

Justice Luckert: Presiding over thousands of cases and countless courtroom proceedings has shaped me as an appellate justice in many ways. One, which impacts every appeal, arises from the collective body of those experiences: I understand that no two cases or courtroom experiences are ever the same and litigants, attorneys, and jurors react in many ways. Judges witness joy, sorrow, frustration, anger, remorse, indifference, despondency, defiance, hope and more—often with polar-opposite emotions playing out at the same time. These experiences keep the “cold” appellate record from ever being truly cold.

7. Speaking of district court, Justice Luckert, how can young lawyers best prepare for their courtroom debuts?

Justice Luckert: I recommend young attorneys take time to observe before you appear. Sit in the courtroom and watch several proceedings, heeding the protocol. If you are preparing for an appellate oral argument, you can watch archived arguments before the Kansas Supreme Court at www.kscourts.org. I also suggest you prepare, prepare, and prepare some more. Try to anticipate what will or could happen in the courtroom and think through what you will do. Do not tie yourself to a script that interferes with tracking the proceeding in real time. But do create outlines or checklists for every aspect of your appearance. Finally, be confident. After all, you are prepared!

8. Justice Stegall, you joined the ranks of tweeting judges. Why do you tweet?

Justice Stegall: To be honest, after my initial foray into the medium, I have scaled back my participation greatly. I have great respect for some of my friends like Georgia Court of Appeals Judge Stephen Dillard and our own Judge Steve Leben, who tweet regularly as a means of public outreach and education. But I have grown more and more skeptical of the medium as a fruitful conduit for communicating the values the judiciary is meant to embody—respect, fairness, thoughtfulness, deliberation and impartiality. So I may not be on Twitter for long I’m afraid.

9. Justice Stegall, as a young lawyer you decided to venture out into solo practice. What advice do you have for young lawyers interested in solo practice?

Justice Stegall: It’s certainly not for everyone. But for me, it was a great adventure, and I loved every minute of it. If a young lawyer were considering solo practice now, my first word of advice would be to find and cultivate strong mentors. “Solo” is never really solo.

About the Author

Sarah Stula serves as Publication Co-Chair on the KBA Young Lawyer Section Board. She graduated from Case Western Reserve University School of Law in Cleveland, Ohio, in 2016 and moved home to Kansas to start her legal career. For the last three years, she worked as a research attorney for Justice Caleb Stegall at the Kansas Supreme Court. This month, she joins Foulston Siefkin LLP as an associate attorney in Kansas City.
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A New Associate’s Field Guide to Partner Compensation

by Joseph A. Schremmer

There’s a certain topic of conversation shared among all lawyers, except, it seems, new ones. It’s a topic that, as a newly minted lawyer myself, I never asked about—partly from ignorance and partly intimidation. Now that I’m slightly more broken-in as a lawyer, it’s a topic I’m asked about frequently by new associates. The topic I speak of is law firm compensation for partners. This topic entails a deeper question of how firms allocate income and expenses among firm owners.

Despite its off-limits perception, profit allocation is an important issue to understand for lawyers new to a firm. Not only does it dictate how one would be compensated as a partner of the firm, but it can also reveal subtle details about the firm’s values and goals. This article attempts to provide a basic field guide to the most common forms of law firm profit allocation. It must be understood, however, that there are as many ways to allocate income and expenses among co-owners of a law firm as there are law firms. The summary set forth here is not, and could not be, exhaustive of this topic.

Those who took business associations in law school know the basics already. Law firms are usually organized as a partnership, limited liability company, limited partnership, limited liability partnership, or a professional version of one of these. In general, partnership income and expenses are allocated and distributed among partners in proportion to each partner’s pro rata share of the partnership. Limited liability companies, limited partnerships, and limited liability partnerships all permit this type of allocation but also permit deviations from the general rule as agreed among the owners of the entity. In other words, in most law firm settings, allocation of income and expense (and therefore partner compensation) is a matter of contract among the owners. There tends to be three broad models of income and expense allocation; we will call them the “true partnership model,” “the modified partnership model,” and the “eat-what-you-kill model.” Variation within each model is wide and significant. We will survey the basic characteristics of each below.

The True Partnership Model

Firms that utilize this model simply allocate items of income and expense to partners proportionally to the owner’s interest in the firm. Consider the hypothetical firm of Dewars
Walker & Ardbeg, LLC. The firm’s operating agreement authorizes 100 units of membership interest, which are owned by the three members of the firm as follows: 45 units to Dewars, 35 units to Walker, and 20 units to Ardbeg. The operating agreement provides for allocation of income and expenses among the limited liability company members on a unit basis. During April, Dewars brings in $45,000 in total fees, Walker $20,000, and Ardbeg $35,000. At the end of the month, the firm has netted $20,000 in profit and has $20,000 in free cash available for distribution to the members. Based on their membership interests, Dewars will receive a distribution (before tax) of $9,000 (being 45 percent of the total distribution), Walker $7,000 (being 35 percent of the total distribution), and Ardbeg $4,000 (being 20 percent of the total distribution). For purposes of allocating profit, it does not matter that Ardbeg collected more fees that Walker during the month.

Except in firms that pay partners a “salary” or guaranteed payments throughout the year, as described more below, partners in true partnership model firms generally do not enjoy perfect predictability in the timing or amount of distributions from the firm. The firm, and thus its partners, may be flush with cash some months and receive relatively little during others. The transition from being a salaried associate to a partner at one of these firms can feel abrupt.

True partnership model firms are probably the least common of the three models today. Most firms that follow this model are generally small, likely having fewer than 15 partners. The pros and cons of this model are obvious. On the one hand, partners are not compensated strictly based on their productivity or profitability, although these considerations (and others) usually bear on the determination of partnership percentages. It is not uncommon for such firms to cross-subsidize younger partners by awarding them a greater partnership percentage than would be justified by their annual receipts. On the other hand, partners are incentivized to share clients, refer matters internally, and handle cases together. True partnership model firms largely avoid intra-firm disputes over allocation of expenses (e.g., staff salaries, copier rentals, etc.), which can be sources of strife under other models.

The Modified Partnership Model

The modified partnership is probably the most common model. It is almost certainly the most common among larger firms. It is also susceptible to the greatest variation among firms that follow the model. The modified partnership model embellishes on the true partnership model with the goal, usually, of directly rewarding productivity, profitability or both. In these firms, ownership is often granted initially in a lock-step system that vests partners with set amounts of equity based on seniority. To incentivize junior partners—whose equity stake is often relatively small—to be productive, these firms devise ways to reward high achievers with various kinds of bonuses. Chief among these are the year-end bonus and the origination bonus.

Year-end bonuses are what they sound like—annual payments of additional compensation above a partner’s distributive share calculated under predetermined criteria. The usual criteria for year-end bonuses for partners are based on productivity or profitability of the individual lawyer. There are many ways to quantify things like “productivity,” and, therefore, there are many ways to calculate year-end bonuses. Productivity is often determined in large part by billable hours, actual receipts of fees (i.e., revenue), or a combination of the two. Origination bonuses are rewards for bringing a new client (or sometimes a new matter for an existing client) to the firm. “Origination,” as it is often shorthanded, can be determined in a number of ways. It is typically calculated as a set percentage of the total fee associated with the new client or matter. Origination bonuses can be significant and, as a result, firms often develop thorough and detailed rules for awarding them. Each firm will define “origination” differently—at some shops, for example, origination would include bringing back a former client, whereas other shops would not award origination on a client the firm represented in the past. At still other shops, the origination might be awarded to the lawyer who first brought in the client rather than the lawyer who brought the client back.

At many firms, partners accumulate origination credits that factor into the calculation of a lump sum bonus. Origination bonuses may be paid at the end of the fiscal year along with, or as part of, a year-end bonus. Partners who receive origination bonuses sometimes share a portion of the bonus with other junior partners or associates who contributed meaningfully in bringing in or working for a particular client.

Many, perhaps most, modified partnership model firms also pay partners a “salary” or guaranteed payments. Many firms pay partners a “salary” at regular intervals throughout the year such that each partner’s individual cash flow does not change significantly from when they were associates. But partners qua partners do not enjoy a “salary” within the term’s usual meaning. Instead, partner “salaries” or guaranteed payments are usually subject to repayment at the end of the fiscal year to the extent that the total received exceeds the share of profits to which the partner is entitled under the partnership agreement. If, on the other hand, a partner’s aggregate annual salary or guaranteed payments falls short of the partner’s share of profits, the partner will be entitled to an additional bonus to true-up compensation with percentage ownership.

What happens if a partner receives $300,000 in salary payments during 2018 but the partnership share at year end would entitle that person, under the partnership agreement, to only $275,000? In this case, the partner would owe the partnership the difference ($25,000). Likewise, if the partner’s proportion of firm profits at year end would total $400,000, the firm...
would owe the partner $100,000. This year-end true-up usually results in partners getting more from their distributive share than they received in guaranteed payments, in which case, they enjoy the bonus. But stories exist of partners paying the firm back for excessive guaranteed or salary payments.

The Eat-What-You-Kill Model

Some eat-what-you-kill firms may resemble office-sharing arrangements more so than law firms. Shops that follow this model allocate most income and expense items to the partners who earned the income or incurred the expense. Certain shared expenses such as office space rent, copier rentals, Westlaw or LexisNexis and library subscriptions, breakroom snacks (the list of expenses is long!) are allocated among partners based on their proportional use of the expense item. Eat-what-you-kill firms can and often do hire associates; and those associates’ salaries are generally allocated to the partners on the basis of each partners’ use of the associate’s time.

Let’s return to our hypothetical firm, Dewars Walker & Ardbeg, LLC, for an illustration. Assume Dewars Walker & Ardbeg’s operating agreement provides for items of income and expense to pass through to the member who earned the income or incurred the expense. Assuming the same facts as stated above about the month of April, Walker would be entitled to $35,000 in fees collected but would be responsible for the incurred share of firm expenses. Assume the monthly salary for Walker’s legal assistant is $4,500 and that 75 percent of the assistant’s working time is spent working for Walker and 25 percent for Ardbeg. Walker’s $35,000 in income would be reduced by 75 percent of the legal assistant’s salary, or $3,375. The same calculation would occur for all shared expenses the firm incurred during April. Certain expense items are passed through completely to Walker, like Walker’s membership dues for the Kansas Bar Association. At the end of the month Walker will receive the positive difference between income and expenses.

Like true partnership model firms, eat-what-you-kill firms are often small or medium sized. Junior partners may find it challenging to make ends meet at these firms. To ease the transition from associate to partner, these shops often allocate a relatively small portion of large expenses, like rent, to junior partners. The major advantage of an eat-what-you-kill system is that it clearly aligns partners’ efforts and success with their compensation. Partners who want to make more money can do so by finding more clients and generally working harder.

If you’ve read to this point but haven’t recognized any of these general descriptions as describing your firm, do not be surprised. There are myriad ways to allocate income and expenses. The key for young lawyers is to understand the fundamental differences among the broad compensation models, and to inquire about the specific method utilized by any firm the individual is considering joining.

About the Author

Joseph A. Schremmer has left his position as a partner at Depew Gillen Rathbun & McInteer, LC in Wichita, to accept an appointment to the faculty of the University of New Mexico School of Law. Joe holds a B.S., a B.A., and M.B.A. from the University of Kansas and received his J.D. from the University of Kansas School of Law. Joe served as the Editor in Chief of the Kansas Law Review. He currently serves on the executive committee of the KBA's Oil, Gas, and Minerals Section, and co-authors the Oil, Gas, and Mineral Law chapter of the KBA’s Annual Survey of Law. Joe previously taught oil and gas law at the University of Kansas School of Law.

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1. We will use “partner” throughout this article to refer generally to an owner of an equity interest in a law firm regardless of the firm’s form of organization.
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EXPLAINING ABBREVIATIONS THAT EVERY LAWYER SHOULD UNDERSTAND

(WHAT EVERY LAWYER SHOULD KNOW ABOUT
THE FEDERAL ESTATE TAX, PORTABILITY AND THE QTIP ELECTION)

by Lauren Hughes
INTRODUCTION

Among Kansas lawyers, members of large firms are in the minority. A glance through the Kansas Bar Association’s “Member Directory” shows a huge number of lawyers who are in solo practices or small firms. The directory identifies many of these lawyers as “general practitioners.”

Most Kansas general practitioners, whether young or more mature, will at least occasionally encounter the treacherous landscape of estate planning, probate, trusts, tax planning, etc. It is thus essential for general practitioners to be able to identify those clients that need tax planning for their estates. Therefore, in the author’s opinion, every general practitioner needs to know the basics of federal estate and gift tax law.

Imagine this scenario: A married couple (Spouse 1 and Spouse 2) comes to a general practitioner for estate planning. Perhaps this couple has a sizeable farm or a local business. Such a couple could easily have (say) $8 million in assets. For example, in many parts of Kansas, irrigated farm ground can be worth $5,500 per acre or more. Add a $500,000 combine and a few tractors, and it is easy to find “ordinary” people that own several million dollars’ worth of real and personal property.1 Let’s further assume, for the sake of simplicity, that this is a first marriage for both spouses, and that the couple has two children.

The couple’s wishes for their estate plan seem simple: everything outright to the surviving spouse, then to the kids. Simple will? Sure, no problem. But what happens when Spouse 1 dies?

Assume that Spouse 1 held his/her own separate property worth $4 million. The Federal Estate Tax Basic Exclusion Amount is currently $11.4 million. Therefore, if he or she were to pass away in 2019, Spouse 1’s gross estate will fall below his/her Basic Exclusion Amount and no federal estate tax return will be required.

Spouse 2 now has a total of $8 million in assets. Since the Basic Exclusion Amount exceeds this figure by $3.4 million, Spouse 2’s estate would also (under current law) fall below his/her Basic Exclusion Amount, and no federal estate tax return will be required.

When asked to assist with the administration of Spouse 1’s estate, the general practitioner may think that it is unnecessary to do much beyond helping Spouse 2 to retitle the assets in Spouse 2’s name.

But just carrying this “simple” estate plan into effect under the belief that no federal estate tax return needs to be filed, could subject to Spouse 2’s estate and/or the couple’s children to unanticipated and expensive estate tax. If this happens, the estate beneficiaries will ask, “Why didn’t the lawyer know this?”
This article seeks to provide basic answers for general practitioners to the following questions: (1) What are the basics of the Federal Estate and Gift Tax? (2) What is portability and how can it be used as an estate planning tool? (3) What is a QTIP election, and under what circumstances should it be made? and (4) If a federal estate tax return must or should be filed, what are the deadlines?

SECTION I: THE FEDERAL ESTATE TAX

The “Federal Estate Tax.” It seems to be a large part of our national conversation. Our two major political parties have strong opinions. Republicans view the Federal Estate and Gift Tax as an unfair/authoritarian/demonizing burden on small family farms and family businesses—on those who work hard and provide jobs to millions of Americans. Democrats view the tax as simply asking those who have “more than they need”—“the rich”—to “pay their fair share.”

Naturally, neither major political party is satisfied. Despite the Republicans’ best efforts, we do have a federal estate and gift tax. And, despite the Democrats’ persistence, only about .07 percent of decedents leave estates that have to pay such tax. It is thus rare (under present law) that any given Kansas lawyer will ever handle an estate that is required by law to file a federal estate tax return.

Yet it is crucial for every lawyer who is not involved in any way with estate planning or estate administration to know some basics of federal estate and gift tax law. Filing a federal estate tax return can be essential even if the estate is not required to file under current law. In the above scenario, when Spouse 1 dies, filing a return may be essential to protect the estate of Spouse 2 from becoming taxable. To be able to advise clients intelligently, the Kansas general practitioner needs to be able to spot such situations.

What is the Basic Exclusion Amount?

In 2017, President Trump signed into law the Tax Cuts and Jobs Act (the “TCJA”). The TCJA was the most significant federal tax reform since 1986. Under the TCJA, each individual can die with, and/or give away during life, a total of $11 million, free of any liability for federal estate or gift tax. This total (which is indexed for inflation) is known as the Basic Exclusion Amount. For 2019, inflation indexing has increased the Basic Exclusion Amount to $11.4 million.

In a married couple, each spouse possesses his or her own Basic Exclusion Amount. Therefore, if the only gifts during life have been non-taxable “freebie” gifts (that is, gifts covered by the annual exclusion from gift taxes), a married couple can (as of 2019) die with up to $22.8 million (in money and other property) without incurring any federal estate tax liability and without the requirement for their estates to file federal estate tax returns. (A “freebie” gift is an inter vivos gift that does not count against the donor’s Basic Exclusion Amount. It does not require a gift tax return to be filed. Any individual may make “freebie” inter vivos gifts each year of up to $15,000 per donee. For non-freebie gifts, the donor is required to file a gift tax return [Form 709]. Although no tax will be due when the gift tax return is filed, the amount of the non-freebie gift counts against the donor’s Basic Exclusion Amount.)

“Sunset” of some TCJA provisions at the end of 2025

Specific provisions of the TCJA are scheduled to “sunset” at the end of 2025. Specifically, absent Congressional action, the Basic Exclusion Amount will revert to $5 million per individual, indexed for inflation, for decedents dying in 2026 and after.

Small number of estates taxable under current law

Between 2013 and 2017, on average 11,100 estate tax returns were filed annually. For those who died in 2018 (following the passing of the TCJA) the Basic Exclusion Amount, after inflation indexing, was $11.18 million. The Urban-Brookings Tax Policy Center estimates that for those dying in 2018, only about 4,000 estate tax returns will be filed, of which only 1,900 will be for estates that owe tax. If the Basic Exclusion Amount does revert to $5 million following the sunset, this number could dramatically increase.

Most federal estate tax returns are filed for estates that are not taxable

These figures imply that a majority of estate tax returns are being filed, not because the gross estate’s size made the estate federally taxable, but for other reasons. These reasons may include: a) to make a portability election or b) to make a Qualified Terminable Interest Property (“QTIP”) election.
What is a federal estate tax return?

A federal estate tax return is filed by submitting Form 706 (and attachments) to the Internal Revenue Service. Returns are used to make certain elections, such as an alternative valuation date for assets, the Portability Election, or the QTIP Election.

Deadline for filing federal estate tax returns if one is required

Generally, the deadline to file an estate tax return is nine (9) months after the decedent’s death.12 A timely request for one six-month extension to file the return will automatically be granted. This will extend the return deadline to a total of fifteen (15) months after the decedent’s death.13 While further extensions are not impossible, applying for them is cumbersome, and whether to grant additional extensions is entirely discretionary with the IRS.

Valuation of assets

Valuing some estate assets (such as publicly traded securities) is simple. Other assets are harder to value. Typically, appraisals are required.14 The nine-month and even fifteen-month filing deadlines are often hardly sufficient to obtain proper appraisals of residential real estate, let alone appraisals of assets such as interests in businesses, specialized machinery or even farm ground. Many business appraisals take months. Often, complicated information must be assembled by lawyers, other professionals, business partners and/or family members before it is submitted to the qualified appraiser for valuation.15

For flexible estate plans, the fifteen-month deadline also provides little time to make informed, tax-efficient elections on the tax return. Complex decisions can include which assets should be distributed outright to a surviving spouse and which should be placed in a QTIP Trust or a non-QTIP Credit Shelter Trust (discussed below).

Conclusion: Bullet points for practitioners to know about the estate tax

- Each individual has a “Basic Exclusion Amount” of $11 million, indexed for inflation. The 2019 figure is $11.4 million.
- This exclusion amount can be used both for estate gifts and for inter vivos, or lifetime, gifts.
- For those dying in 2026 or later, the $11 million Basic Exclusion Amount is set to revert to $5 million per individual.
- Gifts of $15,000 per donor/donee/year (indexed for inflation) are “freebie” gifts that do not count against the donor’s Basic Exclusion Amount. Gifts larger than this require the filing of a gift tax return and count against the donor’s Basic Exclusion Amount.
- Filing a federal estate tax return is required when the total of a decedent’s lifetime gifts (excluding “freebie” gifts) plus the decedent’s gross estate is more than his or her Basic Exclusion Amount.
- The deadline to file an estate tax return when the decedent is required to file is nine months from a decedent’s date of death (automatically extendable to a total of fifteen months).
- The estate tax return requires detailed information on the decedent’s assets. Getting this information will likely require time-consuming appraisals.
- Even if the total of the decedent’s gross estate and taxable gifts is such that there is no requirement to file a return, there may be reasons (discussed below) to choose to file an estate tax return. Until recently, the nine/fifteen month deadline described above has also applied to such a return.

SECTION II: PORTABILITY

In almost all married couples, one spouse will, of course, die before the other.16 In most cases, the estate of the first spouse to die (the “Deceased Spouse”) will probably not reach the $11+ million Basic Exclusion Amount. This disparity between the Basic Exclusion Amount and the value of the gross estate will leave some portion of the Deceased Spouse’s Basic Exclusion Amount “unused.” This unused portion is the “Deceased Spousal Unused Exclusion” amount or “DSUE” amount.

The Internal Revenue Code (“IRC”) allows the DSUE amount to be transferred to the Deceased Spouse’s surviving spouse (the “Surviving Spouse”). This feature of the IRC is called “portability.”

Many surviving spouses’ estates that would not now be required to file nor are taxable (with the Basic Exclusion Amount at $11+ million) will be taxable if the Basic Exclu-
sion Amount reverts as scheduled to $5 million. But portability lets the Surviving Spouse have both his or her own Basic Exclusion Amount and any unused portion of the Deceased Spouse’s. Therefore, using portability may keep the Surviving Spouse’s estate from becoming taxable, even if the Basic Exclusion Amount drops.

History of Portability

On December 17, 2010, President Obama signed into law the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the “TRUIRJCA”). The TRUIRJCA introduced Portability to the law. Originally, portability was to be temporary, but on January 2, 2013, President Obama signed into law the American Taxpayer Relief Act (“ATRA”). ATRA made permanent the portability feature.

Basic Portability rules

The only method to elect portability and utilize the DSUE amount is to file a federal estate tax return for the Deceased Spouse’s estate.

Under the Code, the only DSUE amount that can be “ported over” to Surviving Spouse is that which comes from the “last deceased spouse of such surviving spouse.” IRC § 2010(c)(4)(B). Thus, if Surviving Spouse makes the portability election and later remarries another individual who then dies (“Deceased New Spouse”), Surviving Spouse loses any remaining DSUE of Deceased (First) Spouse. If Surviving Spouse wants to remarry, the law of portability thus gives Surviving Spouse an incentive to take advantage of the DSUE from Deceased (First) Spouse by making inter vivos gifts before remarrying.

Preservation of Portability

For a surviving spouse to receive a deceased spouse’s unused exclusion, the deceased spouse’s estate must file a federal estate tax return, and the return must be filed timely. Many lawyers—even those who do some probate and estate planning work—do not know this.

Portability is only a few years old. And because of its novelty, many executors (and their lawyers) have not understood the importance of using this unique planning tool. The thinking has simply been, “Since the deceased spouse’s estate is not taxable, filing a return is unnecessary.” Many lawyers learned of the Portability/DSUE return filing requirement only after the expiration of the nine/fifteen month deadline to file the decedent’s federal estate tax return.

Relief for late Portability Election if the filing deadline was missed

In order to save the DSUE amount by using portability for the surviving spouse, the tardy lawyer formerly had to file a costly application for a Private Letter Ruling (“PLR”) requesting permission for late filing under IRC § 301.9100-3 (“9100 Relief”). The number of such portability relief requests was huge, and the IRS found the processing burden overwhelming.

Therefore, on June 10, 2017, the IRS released Rev. Proc. 2017-34. Under this procedure, an estate tax return filed for the purpose of preserving portability may be filed within 24 months from the date of the decedent’s death. This revenue procedure contains no stated expiration date.

The procedure states:

This revenue procedure provides a simplified method to obtain an extension of time to elect portability that is available to the estates of decedents having no filing requirement under § 6018(a) for a period the last day of which is the later of January 2, 2018, or the second anniversary of the decedent’s date of death.

Several requirements must be satisfied in order for the extended filing deadline to apply. The most important are that the decedent: (1) must have been survived by a spouse; (2) must have died after December 31, 2010; (3) must have been a citizen of the United States at the time of death; and (4) must not have left an estate that was required to file an estate tax return under IRC § 6018(a) (that is, because of the estate’s size).

Thus, there is bad news and good news:

• In order to use portability to preserve the DSUE amount for the benefit of a surviving spouse, a federal estate tax return must be filed.
• But an estate tax return filed for the purpose of making the portability election may be filed within two (2) years after a decedent’s death.

Valuation of assets – simplified method

The complexities of preparing required estate tax returns are discussed above. Preparing a return for estates that are not required to file an estate tax return, but are filing for other
Example of using Portability

Assume that Dexter and Lizzie are married. Dexter passes away with $5 million of assets in his personal name. Also assume that Dexter made no adjusted taxable gifts during life. Thus, Dexter’s estate is not required to file an estate tax return.

Under Dexter’s estate plan, upon Dexter’s death, everything is to be distributed outright to Lizzie, if she is living. Assume that Lizzie indeed survives Dexter and that Dexter’s entire estate thus goes to Lizzie. Transfers between spouses—without regard to amount—are not subject to federal estate or gift tax. (See Section III below for explanation.) While Dexter’s gross estate is $5 million, he has used $0 of his Basic Exclusion Amount, as the transfer upon Dexter’s death to Lizzie qualified for the marital deduction. There remains $11.4 million of unused exclusion amount.

Assume that, prior to Dexter’s death, Lizzie had $5 million of assets in her own name. Therefore, Lizzie now has $10 million of assets.

In this example, Dexter (having transferred everything to his surviving spouse) has used $0 of his $11.4 million Basic Exclusion Amount. If a federal estate tax return is not timely filed to elect portability and thereby preserve the DSUE amount, Dexter’s unused exclusion amount will be irrevocably lost.

Effect of the TCJA 2025 sunset

As was mentioned previously, the Basic Exclusion Amount is scheduled to revert to $5 million per person in 2026.

We return to the Dexter/Lizzie example. Assume that Dexter’s unused exclusion amount is not preserved. If Lizzie dies after the Basic Exclusion Amount reverts to $5 million, a $10 million gross estate will exceed her $5 million Basic Exclusion Amount. Therefore, if Lizzie dies still owning the $10 million in assets, her estate will not only be required to file a federal estate tax return, but may be subject to federal estate tax. Therefore, Lizzie’s estate will be required to pay federal estate tax at 40 percent for a total tax of $2 million.

But, if Dexter’s DSUE amount is preserved through portability, the result is different. Assume that Dexter dies in 2019 and that the portability election is correctly made. Also assume that, for 2026 and later years, the Basic Exclusion Amount reverts as projected to $5 million. If Lizzie passes away in 2026, Lizzie will have her own $5 million Basic Exclusion Amount plus Dexter’s $11.4 million Basic Exclusion Amount, for a total Basic Exclusion Amount of $16.4 million. Lizzie’s assets of $10 million are less than her $16.4 million Basic Exclusion Amount; therefore, Lizzie’s estate will not be required to file a federal estate tax return and will not have to pay federal estate tax. This is a tax savings of $2 million.

As is apparent, electing portability could yield huge tax savings. Not electing portability could cause huge tax costs.

Conclusion: Bullet points for practitioners to know about Portability

- “Portability” allows a surviving spouse to “port over” the unused exclusion amount of his or her deceased spouse to the surviving spouse. The unused portion of the deceased spouse’s federal estate tax exemption amount is known as the Deceased Spousal Unused Exclusion amount (the “DSUE” or “DSUE amount”).
- In order to preserve the DSUE amount for a surviving spouse, an estate tax return must be filed.
- Rev. Proc. 2017-34 extended the time to file “portability-only” estate tax returns to two (2) years following the death of the decedent.
- A simplified Form 706 may be used for a “portability-only” return.

SECTION III: THE QTIP ELECTION

When the amount of tax on a decedent’s gross estate is being calculated, the gross estate amount is reduced by subtracting allowable expenses and deductions to arrive at the “taxable estate.” Allowable expenses include such items as administration expenses, funeral expenses, medical claims against the estate, and obligations such as mortgage debt and promissory notes. Allowable deductions include the marital deduction and the charitable deduction. In other words, in determining the taxable estate of a deceased spouse (as opposed to simply calculating a decedent’s gross estate), the marital deduction becomes an integral part of reducing federal estate tax. Generally, transfers from one spouse to another, whether during life or at death, are free of federal estate and gift tax. This non-taxability of spousal-transfers is called the “marital deduction.” Naturally, using the marital deduction is a basic tool of estate planning.

But problems arise when we move beyond the “traditional” family model and begin planning for subsequent marriages, blended families and possible tax law changes. In today’s volatile political climate, it is impossible to predict what the estate...
tax laws may be when a surviving spouse dies. It is, therefore, critical to provide for flexibility in any estate plan—especially for potentially taxable estates.

**What is Terminable Interest Property?**

As was noted above, the general rule is that property transfers from one spouse to the other are free of federal estate/gift tax. But under IRC § 2056(b)(1), there is an exception to this rule for spousal transfers of “terminable interests.” An interest is “terminable” if a) it will terminate or fail on the lapse of time, on the occurrence of an event or contingency or on the failure of an event or contingency to occur, and b) on the termination, an interest in the property will pass to someone other than the surviving spouse.39

**What is a Credit Shelter Trust?**

A Credit Shelter Trust is typically funded by property valued at the decedent’s entire Basic Exclusion Amount. This amount is held in trust for the lifetime of the surviving spouse. Such a trust is called a “Credit Shelter Trust” because it “shelters” the Deceased Spouse’s Basic Exclusion Amount from the estate tax. Property placed in a Credit Shelter Trust does not qualify for the marital deduction. It is “sheltered” from estate tax, not by the marital deduction, but by the decedent’s Basic Exclusion Amount.

Commonly, Credit Shelter Trusts provide that the surviving spouse is entitled to regular distributions of all net trust income. Trust principal may (or may not) be distributable to the surviving spouse; provisions vary widely. Ordinarily, Credit Shelter Trusts require or allow distributions of principal as necessary for the surviving spouse’s health, education, maintenance and support.

A Credit Shelter Trust need not benefit the surviving spouse alone, however. A Credit Shelter Trust may also include, for example, a decedent’s children as beneficiaries.

When the surviving spouse dies, the assets remaining in a Credit Shelter Trust are excluded from the surviving spouse’s gross estate and thus escape federal estate tax. This is because the surviving spouse never had control over those assets. But as is detailed below, any assets remaining in the Credit Shelter Trust at a surviving spouse’s death do not receive a step-up (or even a step-down) in basis.

**How Can Terminable Interest Property Become “Qualified” (QTIP)?**

Qualified Terminable Interest Property (“QTIP”) is property that qualifies for the marital deduction even though what the surviving spouse receives is only a “terminable interest.” QTIP falls outside the general rules on terminable interest property. QTIP qualifies for the marital deduction. Any QTIP remaining in the surviving spouse’s estate is included in the gross estate to determine if an estate tax return is required.

Under IRC § 2056(b)(7)(B)(i), QTIP is property a) that passes from the deceased spouse, b) in which the surviving spouse has a qualifying income interest for life, and c) as to which a QTIP election is made by the filing of an appropriate federal estate tax return. Under the Code, QTIP is treated as passing to the surviving spouse and no one else; therefore the marital deduction is allowed for the transfer.30 Since QTIP is sheltered from tax by the marital deduction, which is unlimited in amount, transfers of QTIP (such as into a QTIP Trust) may exceed the Basic Exclusion Amount without estate tax.

A QTIP election can nonetheless “have estate, gift, and generation-skipping transfer (GST) tax consequences for the surviving spouse.”31 It is not a panacea.

**What is a Qualified Terminable Interest Property (“QTIP”) Trust?**

In a QTIP Trust, the deceased spouse gives a life interest in property to the surviving spouse without incurring federal estate/gift tax. The surviving spouse may (but need not) have the right to invade the trust principal for certain purposes. But, for terminable interest property to qualify as QTIP, it is essential that the surviving spouse have no power of appointment over whatever remains of the principal when surviving spouse dies.

At the surviving spouse’s death, any assets that remain in the QTIP Trust are included in his or her gross estate for estate tax purposes.

In order to “qualify” terminable interest property for the marital deduction, a QTIP Trust must satisfy specific requirements.

First, as was noted, the QTIP Trust must come from the deceased spouse.

Second, the surviving spouse must have a qualifying income interest for life. In order for this interest to be “qualifying,” the surviving spouse must be entitled to all of the income from the property, payable at least annually, or must have a “usufruct interest”32 for life in the property; and no one can have a power to appoint any part of the property to any person (other than to the surviving spouse).

Third, an election must be made on a timely filed federal estate tax return to treat terminable interest property as “qualified” and thereby to receive the marital deduction for the property. IRC § 2056(b)(7)(B)(v).

Other technical rules, largely set out in IRC Regulations, will not be discussed here.

**When is a QTIP Trust used?**

Setting up a QTIP Trust may be considered in several family circumstances. The most common is the subsequent marriage/blended family.
Taxation of a QTIP Trust upon death of surviving spouse

Because QTIP qualifies for the marital deduction, there is no limit on the value of property that may be placed in a QTIP Trust, but QTIP Trusts are taxed differently when the surviving spouse dies.

Any assets remaining in the Credit Shelter Trust when the surviving spouse dies are not included in the surviving spouse’s gross estate, but any assets remaining in the QTIP Trust when the surviving spouse dies are included in the estate of the surviving spouse.

Because the assets held in a QTIP Trust are included in the surviving spouse’s gross estate, they receive a “step-up” in tax basis (discussed below). In contrast, the assets that remain in a Credit Shelter Trust at the surviving spouse’s death receive no stepped-up basis.

QTIP Trust vs. Credit Shelter Trust

Credit Shelter Trusts and QTIP Trusts have important differences.

First, the surviving spouse may or may not be the only beneficiary of a Credit Shelter Trust.

Second, the Credit Shelter Trust may or may not require all of the income to go to the surviving spouse. For example, the Trustee may have the power to “sprinkle” income among several different beneficiaries, such as the deceased spouse’s children or grandchildren.

Third, under a Credit Shelter Trust, the surviving spouse is not required to have the right to force the Trustee to make unproductive property productive. (This is a power that the surviving spouse must have if Trust property is to qualify for QTIP treatment).

Additionally, the surviving spouse may hold a limited power of appointment over the assets in the Credit Shelter Trust, such as the power to appoint property among individuals and/or institutions specified by the deceased spouse. This is in contrast to a QTIP Trust, in which the surviving spouse cannot hold any powers of appointment over the Trust assets.

Finally, as was noted above, the assets held in a Credit Shelter Trust do not receive the “step-up” in basis that the assets held in a QTIP Trust do.

“Simple” A/B trust planning—consequences

In a typical A/B Trust, the “A” portion is called the “Marital” trust (which may or may not be a QTIP trust) and the “B” portion is a Credit Shelter Trust.

Actual trust terms can be extremely specialized and complicated. But to illustrate principles, it will nonetheless be helpful to continue with the Dexter/Lizzie example scenario used above.

When Dexter died, he had $5 million of assets in his name. Under Dexter’s estate plan, his estate was to be distributed outright to Lizzie if she survived him (which she did). Lizzie, with her own $5 million, now has $10 million of assets.

Lizzie, as representative for Dexter’s estate, timely filed a simplified estate tax return to preserve Dexter’s $11.4 million DSUE amount.

Lizzie later gets remarried (to Buzz). Lizzie and Buzz both have children from prior marriages. In their separate estate plans, they both provide for trusts to be set up.

Buzz’s estate plan uses the archetypal A/B Trusts. In this plan, the “B” portion (the Credit Shelter Trust) is funded with assets having a value of up to Buzz’s entire Basic Exclusion Amount. If anything remains in Buzz’s estate after the Credit Shelter Trust is funded, that remainder goes to the “A” portion (the Marital Trust).

Buzz dies in 2019 with a gross estate of $11.4 million. This happens to equal Buzz’s Basic Exclusion Amount, so the entire estate goes to fund the Credit Shelter Trust, and the Marital Trust never comes into existence.

Because Lizzie remarried Buzz, who has now died, she has lost the $11.4 million of DSUE from Dexter (her first husband). Portability is only available to preserve the DSUE amount from the last deceased spouse. And because Buzz used his entire exclusion amount to fund the Credit Shelter Trust, there is $0 of DSUE to port over from Buzz to Lizzie. Further, the assets placed in the Credit Shelter Trust will not receive a step-up in tax basis at Lizzie’s death.

Such an estate plan arguably squanders the benefits of portability; it does nothing to prevent possible estate tax from falling later upon Lizzie and other beneficiaries.

QTIP Trust planning as an alternative.

Buzz’s estate plan could instead have provided for a QTIP
Trust. (1) The assets would remain in trust for Lizzie (with or without the right to invade principal); (2) Buzz’s estate plan would determine the ultimate beneficiaries of the QTIP Trust; (3) the QTIP Trust would receive the full marital deduction and, when Buzz died, none of his Basic Exclusion Amount would be used up; and (4) Lizzie would be able to “port over” Buzz’s Basic Exclusion Amount to add to her own exemption.

While there are more sophisticated trusts in existence (e.g., the “Clayton QTIP”), those will not be detailed in this article.

Considerations prior to making the QTIP Election

a. Surviving Spouse’s Right to Make Unproductive Property Productive

The QTIP Trust may be more suitable in the above example. But what is imperative is that lawyers understand the main differences between a “QTIP Trust” and “Non-QTIP” Trust. For example, placing assets in a QTIP Trust could be undesirable because, in a QTIP Trust, the surviving spouse must have the right to compel unproductive property to be made productive. In portfolios with a high concentration of one kind of fluctuating-value asset (such as oil and gas operations), giving the surviving spouse this power could harm the family business and undo the benefits of tax planning.

b. Inclusion of QTIP Trust Assets in Surviving Spouse’s Estate

Additionally, although the property placed in a QTIP Trust will qualify for the marital deduction and will reduce the taxable estate of a deceased spouse, any trust property remaining when the surviving spouse dies will be included in the estate of the surviving spouse. IRC §§ 2044(a) and (b). Hence, preserving the DSUE amount of the deceased spouse will become ever-important in these instances – now and if the estate tax exemption amount reverts to $5 million.

c. Step-Up in Basis

One great benefit of putting property into a QTIP Trust is getting a “step-up” in the tax basis of the property. A step-up in basis (provided for under in IRC § 1015) occurs when an asset owned by the decedent at death receives an increase (“step-up”) in its tax basis to the asset’s fair market value as of the date of death. By contrast, if property was gifted during the donor’s life, the donee has a tax basis equal to what the original owner’s tax basis was.

“[A] step-up in basis reduces capital gains tax liability on property passed to an heir by excluding from taxation any appreciation in the property’s value that occurred during the decedent’s lifetime.” While there are many policy arguments for and against the step-up in basis, this tax provision encourages individuals with highly appreciated (or appreciating) assets to keep those assets until death. The step-up in basis is an important consideration in deciding whether to use a QTIP Trust and, if it is used, what assets to transfer into it.

Deadline for filing an estate tax return which elects QTIP treatment of property

As was noted, the general deadline to file an estate tax return is nine or 15-month months after the death. If a return is filed because of the size of the decedent’s gross estate, the QTIP election can be made on the timely filed return. It is also clear that, if the decedent’s estate was not required to file an estate tax return because the gross estate did not exceed his/her Basic Exclusion Amount, Rev. Proc. 2017-34 has extended to the second anniversary of the decedent’s death the time to file an estate tax return for the purpose of preserving portability.

What remains unclear is this: for an estate that is not required to file an estate tax return, what is the deadline to file a return that elects both portability and QTIP? That is, does Rev. Proc. 2017-34 extend the “due date of the return” for those filing both for portability and to make a QTIP election? Though the question has surfaced, the procedure does not answer it, and the IRS has not, to the author’s knowledge, provided any public clarification. The difference between 15 months (the time to file [with an extension]) and 24 months (the available time under Rev. Proc. 2017-34 for filing portability returns) is nine months, which may seem insignificant. But this nine month difference is important not only for the
technical aspects of preparing the return, but a two-year time frame provides the time necessary to review the landscape. Perhaps a QTIP election in conjunction with portability will provide the most tax efficient method of asset transfers to children or grandchildren. In the alternative, it may be appropriate to sell an asset or gift it over time to the next generation.

Having enough time to make such crucial decisions intelligently is a tremendous benefit to a surviving spouse (and, of course, to the practitioner).

Conclusion: Bullet points for practitioners to know about QTIP Trusts and the QTIP Election

- QTIP Trusts can be an incredibly beneficial estate planning tool — especially in second (third, fourth, etc.) marriages and blended families.
- In order to qualify certain terminable interest property for the marital deduction, if the QTIP is in a trust, the trust document itself needs to grant certain specific rights to the surviving spouse.
- QTIP Trusts have many beneficial aspects, but need careful thought and planning.
- Assets placed in a QTIP Trust that remain when the Surviving Spouse dies are included in the gross estate of the Surviving Spouse.
- Because the assets in a QTIP Trust are included in the Surviving Spouse’s gross estate, those assets receive a step-up (or down) in tax basis.
- A QTIP election can be made only by filing an estate tax return.
- The filing deadline is uncertain for an estate tax return that is not required due to the gross estate size, but instead is made to elect portability and QTIP—by the ordinary nine or 15-month deadline, or by the two-year deadline under Rev. Proc. 2017-34?

SECTION IV: FINAL BULLET POINTS

- **Err on the side of caution**
The two year deadline for portability-only returns provided by Rev. Proc. 2017-34 may also cover returns that also make a QTIP election. But, in order to safeguard portability, it would be safer to file such a return within the nine or 15-month deadline.

- **Valuation of assets takes time**
Begin preparation of an estate tax return sooner rather than later. If you are obtaining appraisals, those may take several months. If you are working with various other professionals, they also need time to perform their respective tasks. If you are working with an accountant during tax season, be prepared for slower responses. Additionally, remember that you are interacting with the Surviving Spouse in the most delicate time of that person’s life; be sensitive and tactful.

- **Be aware of developments**
Many events, whether personal, financial or political, may affect estate administration strategy. The Surviving Spouse may pass away during preparations for the filing of an estate tax return. The value of certain assets may plummet, which may factor into choosing between distributions to a QTIP Trust or Credit Shelter Trust, or even into deciding to disclaim assets.

- **Political changes can lead to legal changes**
There has been radical political change in the past five years, and more could be imminent. Although the Basic Exclusion Amount is not set to revert to $5 million until 2026, federal estate and gift tax law could drastically change before then. Under a different administration, Congress could decrease the individual’s Basic Exclusion Amount to (say) $3 million. The volatility of U.S. tax laws is one reason that estate plans must be flexible.

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**About the Author**

Lauren Hughes is an attorney at Wise & Reber, L.C., McPherson, Kan. Her practice concentrates on estate and trust planning, administration of estates and trusts, business succession planning, and other wealth management areas. She received her JD from the University of Kansas School of Law. Lauren is involved with several organizations within the KBA, and is currently serving a second term as co-editor of the YLS forum. In her free time, Lauren enjoys spending time with her husband and their two shih tzus, Bella and Dexter.

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2. This author expresses no opinion as to the validity of an estate tax or the views expressed by either major political party.


   To put the number of estate tax returns filed in perspective, the Population Division of the Bureau of the Census projects that 2.7 million people will die in 2018. Thus, an estate tax return will be filed for only about 0.15 percent of decedents, and only about 0.07 percent will pay any estate tax.


5. Smith & Howard, Certified Public Accountants and Advisors, 2018 Tax Cuts & Jobs Act Overview, https://www.smith-howard.com/2018-tax-cuts-jobs-act-overview/ (2018). “On December 22, 2017, the most sweeping tax legislation since the Tax Reform Act of 1986 was signed into law. The Tax Cuts and Jobs Act of 2017 (TCJA) makes small reductions to income tax rates for most individual tax brackets and significantly reduces the income tax rate for corporations. It also provides a large new tax deduction for owners of pass-through entities and significantly increases individual alternative minimum tax (AMT) and estate tax exemptions. And it makes major changes related to the taxation of foreign income.”


7. 26 CFR § 2503(b).


10. Id.

11. Id.


14. There is an exception to the requirement of appraisals in the “Simplified 706” preparation method discussed later in this article.


16. While intuitively one might think “Isn’t it always the case that one spouse dies before another?”, there is the case of simultaneous death, which, although rare, can happen.


18. Id.

19. “The Service has issued numerous letter rulings under § 301.9100-3 granting an extension of time to elect portability under § 20.2010-2(a)(5)(A) in situations in which the decedent’s estate was not required by § 6018(a) to file an estate tax return. Many of these ruling requests have involved estates of decedents that discovered the failure to elect portability not long after the due date set forth in § 20.2010-2(a)(1) for filing an estate tax return to elect portability.” See Rev. Proc. 2017-34, Section 2, .02(4).

“Treasury and the Service have determined that the considerable number of ruling requests for an extension of time to elect portability received... indicates a need for continuing relief for the estates of decedents having no filing requirement under § 6018(a). Further, the considerable number of ruling requests received has placed a significant burden on the Service.” See Id. at Section 2, .02(5).


21. “Making the simplified method of this revenue procedure available after January 2, 2018, to estates during the two-year period immediately following the decedent’s date of death should not unduly compromise the ability of the taxpayer or the Service to compute and verify the DSUE amount because the necessary records are likely to be available during that period.” Id. at Section 2, .02(7).

22. Id. (at Section 2, .02(6)).

23. Id.


26. IRC § 2056 provides that transfers between spouses are free of tax and use none of the exclusion amount. In essence, this is a dollar for dollar credit against the overall exclusion.

27. IRC § 20.2010-2.

28. The trans reliee spouse must be a US citizen. Additionally, an estate tax return may need to be filed for a decedent who was a nonresident and not a US citizen if the decedent had US-situated assets. 26 CFR 2523(i) (unlimited marital deduction for gifts during life only applies to US citizens); 26 CFR 2056(d) (unlimited marital deduction for bequests at death only applies to US citizens).

29. IRC § 2056(b)(1).

30. IRC § 2056(b)(7).


32. The right to enjoy the use and advantages of another’s property short of the destruction or waste of its substance.

33. Section 20.2056(b)(5f)(4).

34. IRC § 1014. This step-up in basis is generally reported on the beneficiary’s tax return when the property is sold or depreciated. The accountant will provide the adjusted cost basis for the asset. For securities, the financial advisor will adjust the cost-basis for the mutual fund or security directly without formal reporting. If the security is sold, gains are assessed on the adjusted basis.

35. IRC §1015.


37. Id.

38. Under the IRS Regulations, the QTIP Election may be made on the last timely filed return, or on the first late-filed return for estates that are required to file. 26 CFR § 20.2056(b)-7(b)(4).


40. A qualified disclaimer is an irrevocable and unqualified refusal by a person to accept an interest in property. If a beneficiary makes a qualified disclaimer, the property interest in property is, for tax purposes, treated as though the beneficiary never received the property. IRC § 2518(a), (b).
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For over a century, the word “impeachment” has had various meanings in legal and political contexts. Most of the time, impeachment involves allegations that “cast doubt” on a person’s qualifications, testimony, or character. For example, as early as 1872, Congress initiated impeachment proceedings against Judge Mark Delahay of the U.S. District Court for the District of Kansas. Judge Delahay, appointed by President Lincoln himself, ultimately resigned before formal impeachment proceedings after several witnesses (including a future U.S. Senator for the State of Kansas) testified to the congressional panel that the Judge was regularly “intoxicated on the bench.”

While formal and political impeachment proceedings are rare, issues relating to impeachment evidence are common. Attempts to “impeach” a witness with evidence relating to credibility, character, and contradictory statements have frequently arisen in both civil and criminal cases since the beginning of the common law. Despite serving as long-standing evidentiary issues, the meaning, scope, and application of state and federal impeachment rules have evolved multiple times.

The modern impeachment rules focus on evidence of credibility or truthfulness. This approach limits the admission of general character evidence, funnels the pool of potential evidence into a core category of truthfulness, and includes additional limitations on the timing and form of admissible impeachment evidence. State and federal courts are largely aligned in applying this impeachment approach in civil cases. Of course, impeachment rules in criminal cases have a few different requirements and unique rules in both state and federal courts. Nevertheless, in civil cases, the modern view is that impeachment evidence is focused on truthfulness.

Of course, impeachment is just one piece of the evidentiary puzzle. Foundation requirements, hearsay rules, relevancy tests, and judicial discretion are often intermixed with a court’s decision to admit or exclude impeachment evidence.
In fact, sometimes, evidence may be relevant to both a material legal issue and witness credibility, thereby permitting admission of evidence for both substantive and impeachment purposes. There is indeed nothing one-dimensional about an issue involving potential impeachment evidence.

The sections below will provide specific examples of key impeachment issues and rules under the modern approach. Because evidentiary rulings are subject to an abuse of discretion standard on appeal, trial courts can justifiably reach opposite conclusions applying the same rule. Therefore, this article focuses on several of the principles that guide such decisions.

I. TRUTHFULNESS DEFINES THE GENERAL SCOPE OF IMPEACHMENT EVIDENCE

Under the current rules, impeachment evidence typically relates to a witness’s character for truth or veracity. Evidence about a witness’s “general” character and extrinsic proof of prior conduct that do not relate to truthfulness or the merits in a case are frequently inadmissible under the modern impeachment rules.

Whether the same evidence is admissible for a different purpose, such as impeaching a witness with an inconsistent prior statement or proving an element of a claim or defense, is a separate question. This can be a tricky issue to navigate because “evidence of [character] traits...other than honesty or veracity [are] inadmissible,” and evidence of specific instances of conduct to “prove a trait of...character” are also inadmissible.

Evidence of a witness’s truthfulness or veracity may be admitted through opinion or reputation evidence. The key restrictions apply when a party attempts to prove a witness is a dishonest person based on specific examples of past conduct. It may be true—even admitted—that a witness lied several times during a political debate. But evidence of those lies is likely inadmissible in a negligence lawsuit because dishonest character “may not be proven by specific instances” of a witness’s prior conduct.

But there may be evidence of past conduct that disproves testimony of a witness that could be admissible in a negligence action. For example, evidence that a party is an alcoholic who often drives when intoxicated may be excluded as impermissible character evidence for impeachment, as being an alcoholic does not establish dishonesty. However, evidence about a specific lie relating to having an open container in a vehicle while driving was admissible in a negligence case where the Defendant testified that he or she never held a beer can while driving and there was contradictory testimony from an ex-girlfriend that the Defendant had done that exact thing on several previous occasions. In that specific case, the testimony of the ex-girlfriend did involve specific instances of prior conduct, but the evidence was not introduced just to show that the Defendant was an alcoholic; rather, the evidence was used to impeach the Defendant’s testimony that he had “never held a beer can in his hand while driving.” So, while there are general prohibitions on the admission of evidence to establish a general character trait, other than honesty, or prior bad acts of a witness, the evidence may still be admissible for a different purpose.

II. THE WHO, WHAT, AND WHY OF IMPEACHMENT EVIDENCE

The three most important issues for impeachment issues are who, what, and why. All three issues are connected by a general rule, in both Kansas state and federal district courts, “that any party may challenge a witness’s credibility.”

With some exceptions, then, the general rule is that anyone in front of the bar can impeach anyone on the witness stand.

“Why” a party seeks to introduce impeachment evidence must, as a threshold rule, be to impair or support a witness’s credibility. Limiting the “why” to character for truthfulness reduces the danger of prejudice by narrowing the scope of admissible impeachment evidence to a singular trait. But, as noted above, evidence may be inadmissible to impeach the general character of a witness yet still admissible for a different purpose. In some situations, a jury may even be instructed to consider evidence for a substantive purpose; but, it is difficult to imagine how substantive evidence showing the party lied to someone about the case events could not also impair the credibility of a witness. The bottom line is that the modern approach limits impeachment evidence to prove a witness’s veracity or truthfulness, so long as relevant.

The question of “What” constitutes admissible impeachment evidence remains a central issue in many cases. There are three common situations where the “What” issue commonly arises in modern civil cases: 1) when evidence is admitted for dual purposes of impeachment and a substantive issue; 2) when character is placed at issue or otherwise introduced; and 3) when asking about prior acts versus proving those.
A. Evidence for Both Impeachment and Substantive Purposes—or Just One of the Two Purposes

Some evidence is admissible for both impeachment and substantive purposes. Prior testimony about the value of specific property could fit this category when there is a later case that involves the issue of the value of the same property. For example, in a 2007 eminent domain case in Wyandotte County, Kan., the owner of a business park and mall claimed the property was worth $30–$35 million.18 The government’s appraisal expert set the value at approximately $4 million, and the jury awarded the owner $7.5 million.19 At trial, the government introduced evidence from a 2005 tax appeal where the owner claimed the value of the property was approximately $2.7 million—a far cry from the range claimed at trial. The Court admitted the owner’s prior statement about the property value both for impeachment purposes and as substantive evidence regarding the actual value of the property. As the Court explained, the owner made a prior inconsistent statement to reduce his ultimate tax bill by underestimating the property’s value, which impacted his credibility for impeachment, and the owner was in the best position to estimate the value of property he owned, which went to the substantive issue of its market value.

There are also grey areas where the court’s discretion controls close calls, which often involve questions about whether evidence of prior conduct or events shares a close enough relation to issues in a current case for evidence to become admissible. In a premises liability case, a plaintiff sued a bowling alley after slipping on a lane and suffering a back injury.20 The bowling alley discovered the plaintiff had a prior fainting spell before falling on a lane and sought to introduce the evidence to impeach the plaintiff’s testimony about the extent of her injuries and on the substantive issue of damages.21 The Court found that the defense expert failed to connect the fainting spell to the injuries from the plaintiff’s fall, making the evidence irrelevant to the particular claims and damages in the case and, therefore, inadmissible for any purposes under the relevancy test in K.S.A. 60-401(b).22

It is also important to remember that a party will generally not be allowed to impeach a witness using extrinsic evidence dealing with a collateral matter. For example, when a plaintiff attempted to admit a prior inconsistent statement against a defendant’s expert for impeachment and substantive purposes, the court ruled that relevancy was lacking.23 Plaintiff obtained pleadings from a prior medical malpractice action involving the expert and a hospital where the expert effectively claimed any fault was attributable solely to the hospital—which the jury verdict confirmed by attributing all fault to the hospital.24 Plaintiff asked if the expert had claimed the hospital was in fault in that case, and the expert said no.25 Plaintiff sought to use this inconsistent statement, but the Court ruled that the testimony related to an “unconnected case [that] was not material or relevant to” the case at hand.26 The rules did give the Court discretion to admit the evidence, because prior inconsistent statements are often admissible for impeachment purposes when relevant to a later case, but the Court found relevancy lacking and sustained the Defendant’s objection.27

Or consider a medical malpractice case involving a birth injury in which there is evidence that the mother was a habitual drug user while pregnant. For the same reasons, such evidence is typically inadmissible for impeachment purposes. However, when the witness is testifying for her daughter, a child who suffered brain damage before birth, in a medical malpractice case, the evidence may be admissible on the issue of causation.28 This would raise the concern addressed earlier involving a limiting instruction to the jury, but the effectiveness of that instruction is unclear.

Ultimately, parties have a higher chance of admitting inconsistent testimony when the Court views that testimony as closely connected to an issue in the current case. A contradictory statement on a collateral matter unconnected to the case may be inadmissible on relevancy grounds.29

B. Character At Issue or Introduced

Parties face narrow limitations when it comes to impeaching a witness with character attacks. Unless the witness’s character is directly at issue in the case—such as a plaintiff claiming libel or slander—impeaching a witness with evidence of his or her bad character is generally inadmissible. As the introductory section of this article outlined, the rules generally restrict impeachment evidence to truthfulness and prohibit evidence that a witness is, for example, a careless, rude, or otherwise bad person. That said, sometimes a party raises a claim or defense that places a witness’s character at issue by necessity. Other times, a party improperly introduces character evidence and, thereby, opens the door for contrary evidence.

One example where character is “at issue,” and therefore tweaks the normal impeachment rules, is when claims relate to honesty or truth. For example, claims for defamation, libel, slander, or misrepresentation often put a party’s character
“in issue by the very nature of the claims asserted and damages sought.”30 While limitations on character evidence still exist, the applicable rules have a much wider scope in these types of cases and even permit admission of “evidence of specific instances of [a] person's conduct.”31 This expansive scope is still limited by relevancy requirements and the Court's discretion, but character evidence is more likely to be admissible when a claim requires proof of character for a party to prevail.

In addition to character being injected into a case by the nature of a claim, there is also a broader evidentiary scope after a party improperly introduces character evidence at trial. When a party disregards a court order or otherwise sneaks in character evidence for some advantage, the opposing party "may reply with similar evidence whenever it is needed for removing an unfair prejudice" that could follow from the improperly introduced evidence.32 This is not a statutory rule, but rather an evidentiary doctrine that allows a party to even the playing field once a party breaks the rules and 'opens the door' to character evidence first.33 That said, while the rule does allow admission of some irrelevant and prejudicial evidence, the scope is limited to what is necessary to cure prejudice and contradict the initial evidence introduced to the jury.

Every party should be careful not to accidentally violate an evidentiary order or introduce evidence to the jury that, though helpful, constitutes impermissible character evidence. Once the door is open, the opposing party will likely obtain a greater benefit by admitting contrary evidence with a prejudicial effect.

C. Asking About Prior Acts Versus Proof the Acts Occurred

Some impeachment evidence can only be introduced if the witness is given an opportunity to address it. For example, under K.S.A. 60-422(c), it is generally a requirement to ask a witness about potential impeachment evidence. This issue is especially important for prior testimony and criminal convictions for crimes involving dishonesty. There are also limitations on asking about previous conduct or testimony and proving that prior conduct actually occurred.

The prohibition on going beyond “asking” and attempting to prove conduct actually occurred is a long-standing principle and was applied in Kansas as far back as 1921, when the Kansas Supreme Court upheld a trial court’s exclusion of evidence that a doctor advertised medical services in violation of a local medical association’s rules.34 The opposing party cross-examined the doctor about the advertising practices, which the doctor admitted to doing. The opposing party then sought to introduce evidence of the advertising practices, but the trial court excluded the evidence because cross-examination already brought out those facts, and further admission of specific instances of the doctor’s conduct was prohibited. The Court’s central point was that impeachment was limited to cross-examination, and once the doctor admitted to the conduct, the opposing party could not pile on additional direct evidence to cement the point. Impeachment was limited to “asking” on cross-examination, not “showing” the jury that the conduct actually occurred afterward.35

However, evidence received under an exception to the hearsay rule may be impeached by evidence of a prior inconsistent statement without giving the declarant an opportunity to address the inconsistency. In a medical malpractice action involving a prior inconsistent statement, a party sought to admit contradictory testimony from five prior depositions of an expert witness.36 While the rules permit a party to impeach a testifying witness with prior inconsistent testimony after learning about and explaining the inconsistency, the expert witness did not testify in the case and could therefore not be impeached under that rule.37 However, the expert’s deposition testimony was admitted, which permitted use of “any part or all of a deposition . . . as though the witness were then present . . . against any party” when a deposed witness gave contradictory testimony.38

Crimes involving dishonesty are also a hot topic in the “ask versus prove” arena. The Kansas and federal rules permit admission of a witness's prior convictions for crimes of dishonesty for impeachment purposes.39 The words “conviction” and “crime” are firm requirements; most courts will not extend the rule to professional discipline or false statements on documents that result in non-criminal consequences. Courts are also hesitant to allow extrinsic evidence of prior bad acts indicating dishonesty, even if cross-examination about the bad acts is permitted for impeachment purposes.40

If a witness has been convicted of a crime involving “some element of deceit, untruthfulness, or falsification,” the conviction may, in the Court's discretion, be introduced for impeachment.41 These convictions “clearly reflect[] upon [the] ability to testify truthfully,” and thus embody the core purpose of the modern impeachment approach and scope.42 However, even in this circumstance, impeachment may be limited to cross-examination because of the limitation on extrinsic proof of prior dishonest actions.43 In other words, a party may be able to ask a witness about a prior conviction, but proving that conviction with documentary or other extrinsic evidence
may be off limits. Nevertheless, depending on the substantive issues involved and the type of evidence a party seeks to use to prove a conviction, the evidence may still “be admitted for other reasons,” as discussed earlier.44

III. ALL IMPEACHMENT EVIDENCE MUST PASS THE RELEVANCY TEST, WHICH IS REVIEWED FOR ABUSE OF DISCRETION

The specific rules relating to admissible impeachment evidence provide a general threshold in the larger evidentiary framework. There is also a balancing test that court’s may use in any case to ensure evidence is relevant and protect against prejudice. The court is afforded significant discretion on this issue.45

At times, the court may not even find that the evidence has probative value to meet the core relevancy requirement. A plaintiff may have fallen down or fainted sometime in the past, but that does not make evidence of the prior fall admissible as either impeachment or substantive evidence when there is a new injury and damages involved in a later case.46 But a plaintiff bringing a second lawsuit for an injury, who gave contradictory testimony about his health in a deposition in the first lawsuit, may have a problem keeping out evidence for both impeachment and substantive purposes in the second case.47

The key takeaway is this: Do not plan on winning your case by appealing an evidentiary ruling by the trial court. When it comes to impeachment rules, courts have not created or followed “nice, hard and fast rules governing [a] trial judge’s action.”48 Every case and set of evidence and circumstances is different, which provides the trial court with “considerable discretion to control the admission” of impeachment and character evidence.49 The standard for review relating to admission or exclusion of impeachment evidence is “abuse of discretion,” thereby providing further leniency that favors the trial court.50

Because a party appealing a judgment and requesting a new trial based on an evidentiary ruling must meet the high bar of proving that the ruling was “inconsistent with substantial justice,” and considering the inherent discretion given on admissibility issues, the best approach is to frame and win impeachment issues at the trial level.51 A party can certainly prevail on appeal, but a well-developed record at the trial-court level is essential (and often overlooked on impeachment issues). Without an iron-clad record, an appellate court may find that evidence was improperly admitted, but that the trial court simply made a “harmless error” that did “not prejudice the substantial rights of a party.”52 Though still an error, a harmless error does not provide a “basis for a reversal of a judgment and must be disregarded.”53

CONCLUSION

Impeachment is a complex evidentiary issue involving overlapping rules and considerations, but the guiding principle is that evidence relating to truthfulness and credibility of a witness are central to admissibility. Courts have wide discretion on impeachment rulings, and the most important place to focus a credibility attack is at the trial level. Although rules, cases, and circumstances affecting the role and admission of evidence change case by case, being familiar with the common impeachment issues above will help to guide the impeachment analysis in any case.

About the Author

Pablo Mose is a bilingual attorney with years of experience handling catastrophic personal injury law. Mr. Mose began his career at a national defense firm, handling complex personal injury, class action and insurance cases. Mr. Mose graduated from the University of Kansas Law School where he was a member of the KU Law Review and the top recipient of the Trial Advocacy award. He is licensed to practice law in Kansas and Missouri.

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impeachment evidence in civil cases


3. Id.

4. In fact, only two Presidents have undergone impeachment proceedings, and both were acquitted. Did You Know?, Merriam-Webster (Online Ed., 2018, at https://www.merriam-webster.com/dictionary/impeach).

5. K.S.A. 60-420, -422.

6. See PIK 102.30 (providing a specific jury instruction for evidence that may be admissible for both purposes or just one, along with a comment section discussing applicable law.)


8. K.S.A. 60-422(c)-(d).


10. See Hagedorn v. Stormont-Vail Reg. Med. Center, 715 P.2d 2, 10 (Kan. 1986) (involving admission of deposition testimony by Plaintiff’s expert confirming lies in political debate, which the Court found to be a Harmless Error).

11. Shirley, 933 P.2d at 660 (citing State v. Smallwood, 574 P.2d 1361 (Kan. 1978)).


16. K.S.A. 60-406 (“When relevant evidence is admissible as to one party or for one purpose and is inadmissible as to other parties or for another purpose, the judge upon request shall restrict the evidence to its proper scope and instruct the jury accordingly.”); PIK 102.30 (providing a template instruction when evidence is only admissible for a single purpose). Whether a jury can actually consider the evidence for just one purpose is unclear, but the statute and rules provide for this approach.

17. K.S.A. 60-406 (“That cannot be done”).


19. Id.


21. Id.

22. Id.


24. Id. at 258-59.

25. Id. at 258.

26. Id.

27. KSA 60-422(b).


29. There may also be procedural requirements unique to a motion in limine ruling or evidentiary order from the court in a particular case. Violation of those procedural requirements can create a threshold barrier to admitting even otherwise valid impeachment evidence. See *Stephens v. Whitney Management Corp.*, 2005 WL 1429862, at *4 (Kan. Ct. App.) (emphasizing that the issue relating to potential impeachment evidence was really “whether [the party] complied with the district court’s order that a bench conference with an evidentiary proffer must precede any reference to specific bad acts.”), *Dewey v. Funk*, 505 P.2d 722, 725 (Kan. 1973) (requiring creation of record of excluded evidence to preserve argument about admissible impeachment evidence for appeal).


31. KSA 60-446.

32. Dewey, 505 P.2d at 724.

33. Id. at 724-25.


35. Id. (“That cannot be done.”)


37. Id. (discussing KSA 60-422(b)).

38. Id. (KSA 60-232).

39. See K.S.A. 60-421, Fed. R. Evid. 609. These rules have differences, but share the same core principles.

40. See Harusahaan v. Sugale, 2014 WL 6675149 at *1-2 (D. Kan. Nov. 25, 2014) (permitting questions about Doctor’s license revocation in one state that was not reported on an application to another state, but limiting impeachment to cross-examination and prohibiting references to consequences of acts or extrinsic evidence on the issue).


42. Id.

43. Id. at 1292.

44. Id.

45. KSA 60-445. See also Shirley v. Smith, 933 P.2d 651, 660 (Kan. 1997) (“This does not end our inquiry. Relevant evidence may be inadmissible under more specific provisions.”), Fed. R. Evid. 403.


51. Id. at 605-606.


53. Id. See also State v. Watson, 2014 WL 1542325 at *3 (Kan. Ct. App. 2004) (finding error in admitting evidence at trial, but refusing to reverse judgment because of “harmless error” based on record).
Gone Glamping – A Law Student Perspective on KWAA’s 30th Annual Conference

by Kristen Egger

When I began my first week of law school, the school administrators stressed how special our class was to have a female-to-male ratio of nearly 50-50. Upon hearing this, the class clapped and many of us women cheered and nodded towards each other in approval. However, this statistic was one of many announcements during first week, and it soon got lost in a whirlwind of readings, cold-calls, and “it depends.” It was nearly a year later when attending the Kansas Women Attorneys Association’s 30th Annual Conference that I was reminded of that moment from my first week.

After spending three days with over 200 women legal professionals, the statistic took on a new significance.

I was given the opportunity to attend the KWAA conference on July 18 – 20, 2019, with attorneys from my summer clerkship. This conference, as they told me on my first day, was one of the essential items to put on my summer calendar. We arrived Thursday afternoon to a crowded Bethany College, and I was immediately cognizant of the energy in the atmosphere. The theme of the 30th anniversary was summer camp, and all I could think was how appropriately the theme fit as I saw people of all ages greeting and hugging their friends. With a sash and some merit badges, I set off as a first-time attendee.

What I found during my days at camp was sophisticated programming, incredible networking opportunities and a group of impressive professionals with common goals.

My first takeaway was the diverse conference programming. Sessions such as Mira Mdivani and Danielle Atchison’s discussion of their work with asylum seekers and Judge Arnold-Burger’s implicit bias presentation brought national issues to light. These issues are consistently discussed in the classroom, and it was refreshing to see the conversations extend into the professional sphere, where they grow from conversa-
tion to action. Then, the importance of attorney well-being and self-awareness was stressed in Gretchen Rubin’s keynote address and Whitney Casement’s mindful lawyering lesson. I am constantly warned as a student that I will need to be ready to navigate this stressful profession. These sessions introduced me to simple tactics that will aid me in that navigation. Finally, the last session of the conference, which featured women of the judiciary reminiscing on their individual journeys, brought with it history and perspective. This panel was a reminder of the work that women have done—and continue to do—within the legal sphere. It was a lovely send-off from a conference with the motto “Celebrating our Past: Embracing our Future.”

The valuable networking opportunities also captured my attention. Networking can make a law student wary, but KWAA was different. When not in sessions, we were at social events, from alumni receptions to meals to banquets. I was introduced to the beloved bar the Öl Stuga, which the conference descended upon like a flock of birds, surprising the Lindsborg locals. We also browsed the beautiful Sandzén Gallery where artwork incited more personal conversations. The networking highlight, however, was the Friday night banquet. Here, the summer camp theme emerged in full force—with yard games, fishing and a photo booth canoe! When the attendees finally took their seats for the meal, we listened as various awards were handed out to inspiring and deserving attorneys. It was a real goal-setting experience to listen to some of the accomplishments of the women in that banquet room. We ended the night with a jovial talent show, where I found out in addition to being excellent practitioners, my fellow attendees could rap and give lessons in ventriloquism.

It was through these sessions and socials where I met everyone from justices and judges to past and present bar association presidents to even other law students. I went from having conversations about western Kansas to talking about my personal goals with young attorneys who were just getting into the heat of practice. I spent three days being enveloped by this wonderful community of differing experiences but shared learning and betterment goals. All of these introductions and conversations opened up my ideas about the professional world and made me excited to practice in a few years. Above all else, I was able to turn this mind’s eye image of practicing attorneys into relatable people. Now when I review a Kansas Supreme Court opinion, or skim a bar journal article, I recognize members of this community instead of merely reading names on a page.

As the conference ended and I headed out of Lindsborg, the 50-50 statistic came to mind. At 23 years old, I am able to cheer this statistic due in part to the work of the women who paved the way for me. The Kansas Women Attorneys Association conference gave me the opportunity not only to appreciate, but to meet and learn from some of these very individuals. For that, I am grateful. This special introduction to such a wonderful community will stick with me as I move forward through school and into practice—I truly was a happy camper.

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About the Author

**Kristen Egger** is a second-year law student at Washburn University School of Law. She is a staff writer for the Washburn Law Journal and President of the Rural Practice Organization. Kristen holds a Bachelor of Science in Journalism and Mass Communications from Kansas State University. She is also a student member of the Kansas Bar Association. Over the summer of 2019, Kristen clerked for Wise and Reber, L.C. in McPherson, Kansas.

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Kansas Legal Services helps 1,400 survivors of domestic abuse and their families in six months.

Kansas Legal Services, in a project funded by IOLTA and the Victims of Crime Act (VOCA), has helped 1,401 crime victims, survivors and their families escape the trauma of domestic abuse, sexual violence and stalking, in the period of January through June, 2019. The families included 1,977 children and 1,244 women. KLS helped these Kansans in all parts of the state through its eleven field offices. KLS attorneys spent 6,715 hours in legal assistance through representation and advice, as well as providing education and referrals to help survivors access needed services such as health and medical care, transportation, housing and resolution of legal barriers to security.

One survivor stated in an evaluation of the services she received, “I had never been in this type of domestic violence situation before. The level of clarity, directness, and efficiency was outstanding regarding what was taking place. The non-judgmental, straightforward attitudes were reassuring and offered dignity in what felt like a very shameful place.”

Kansas Legal Services staff see a wide range of crisis situations when helping victims, such as the case of “Joy.” KLS - Hutchinson assisted Joy, who was being stalked and harassed by her abusive husband, “David.” David was trying to coerce Joy into settling a divorce and dismissing the PFS case to keep him from potential criminal convictions. David electronically stalked Joy, putting a tracking device on her vehicle. KLS was successful in settling the divorce so Joy did not have to appear in court. KLS worked with the Victim’s Advocate in the DA’s office to ensure Joy’s safety.

Even though they see survivors through desperate times and trauma at its most heartbreaking, KLS staff find hope and the rewards of seeing a family gain its footing again to become safe and secure. Another survivor said about KLS, “I have suffered 8 years of abuse. This one year PFA will give me a solid chance to heal & get away from the defendant.”

October is National Domestic Violence Awareness Month. This project is partially funded by a Kansas Bar Foundation IOLTA grant.
Members in the News

New Positions

Jared Brown has joined Baty, Holm, Numrich & Otto as an associate attorney. Brown previously worked for Brown & James in St. Louis. He earned his law degree from the University of Missouri, Columbia. Brown will work in the firm’s practice areas, which include complex personal injury, construction defect, transportation, product liability, governmental, education, employment, commercial, retail, business disputes, insurance coverage, estate planning and general corporate law.

Ed Collazo, Topeka lawyer and former Topeka City Councilman, has accepted the newly created position of “independent police auditor.” Collazo has been a public defender, a prosecutor and a police officer, which uniquely qualified him to serve in the position. Collazo, a graduate of Kansas State University and of Washburn University School of Law, has been in private practice. Collazo will be part of the process of evaluating reports of police misconduct, particularly in instances during which officers use force.

Nathan Day has joined Baty, Holm, Numrich & Otto as an associate attorney. Day previously served as an Assistant Prosecuting Attorney in Cass County; he earned his law degree from the University of Missouri, Columbia. Day will work in the firm’s practice areas, which include complex personal injury, construction defect, transportation, product liability, governmental, education, employment, commercial, retail, business disputes, insurance coverage, estate planning and general corporate law.

Tomas Ellis has accepted a position with the Calihan Law Firm in Garden City, Kan. He brings a background in prosecution along with an emphasis in agricultural law, water law, oil and gas law, and real estate law. Ellis was raised in Scott County, and he is accepting matters involving family law, real estate and agri-business.

Thomas Fiegener has accepted a position with Baty, Holm, Numrich & Otto to be an associate attorney. He recently earned his law degree from the University of Missouri-Kansas City. Fiegener will work in the firm’s practice areas, which include complex personal injury, construction defect, transportation, product liability, governmental, education, employment, commercial, retail, business disputes, insurance coverage, estate planning and general corporate law.

Larry A. Pittman II brings over 15 years of experience in business and consumer bankruptcy, secured transactions, debtor-creditor rights, and consumer and mortgage-related disputes to his new position at Mann Conroy Law Firm. He works with clients to navigate all chapters of the Bankruptcy Code, sell and acquire assets, and resolve and litigate claims in federal and state courts. In addition to his bankruptcy and debtor-creditor related work, Larry’s practice includes counseling businesses on complying with consumer protection statutes, structuring secured transactions, lending relationships, as well as defending businesses against consumer claims.
Before joining Mann Conroy, Larry served four years as law clerk to a United States Bankruptcy Judge. Larry received his J.D. and B.A., with Distinction, from the University of Missouri—Kansas City.

Chris Randle has been hired as a Senior Litigation Attorney by Cordell and Cordell, the nation’s largest domestic litigation firm focusing on representing men in family law cases. Randle will work out of the Wichita office. He earned his J.D. and his B.A. from the University of Kansas. Before this position, Randle practiced criminal, civil-structure settlements and military law. He deployed to Iraq with the Army in 2006 and served as an Assistant Staff Judge Advocate for Multi-National Corps-Iraq in Baghdad.

Robert C. Reynolds has served the Kansas City metro area as a business and intellectual property attorney for several years and works with entrepreneurs, authors, and artists to plan and protect their business assets, and he has recently joined the Mann Conroy Law Firm. He has provided general counsel services to companies in diverse fields, from cybersecurity to pharmaceutical ancillaries. Bob focuses his practice on obtaining, licensing, and protecting intellectual property rights and helping clients understand how to best develop and protect their IP portfolio in a way that promotes the objectives of their business. Bob received his J.D. from the University of Missouri – Kansas City, and his undergraduate degree from Drury University.

Joe Schremmer, formerly of Wichita, has been appointed an Assistant Professor and the endowed Leon Kareltiz Oil & Gas Law Professor at the University of New Mexico School of Law. Joe teaches oil and gas law, property, and secured transactions. His writing focuses on oil and gas law. His current projects include both resources for practicing lawyers and judges as well as law journal scholarship. Before teaching, Joe practiced with the Wichita firms of Depew Gillen Rathbun & McInteer, LC and Withers, Gough, Pike, Pfaff & Peterson, LLC. Joe is a past president of the KBA’s Oil, Gas, and Mineral Law Section.

Larry Schwartz has accepted a position with the City of Arkansas City to serve as the temporary city attorney. The 90-day contact will include duties as the municipal court prosecutor and other civil legal work. Schwartz already serves as county attorney, leading a team of criminal prosecutors. The city attorney position came open as a result of the resignation of Tamara Niles after 14 years of service.

Evan Shodowski has joined Baty, Holm Numrich & Otto as an associate attorney. Shodowski previously worked at Lewis Brisbois in Kansas City, Missouri. Prior to joining private practice, Shodowski clerked for Judge Kathryn Gardner at the Kansas Court of Appeals. He earned his law degree from Washburn University. Shodowski will work in the firm’s practice areas, which include complex personal injury, construction defect, transportation, product liability, governmental, education, employment, commercial, retail, business disputes, insurance coverage, estate planning and general corporate law.

Morgan Simpson has joined Baty, Holm, Numrich & Otto as an associate attorney. Simpson previously worked at Lewis Brisbois in Kansas City, Missouri. Prior to joining private practice, Simpson clerked for Judge Patrick D. McAnany at the Kansas Court of Appeals. He earned his law degree from Washburn University. Simpson will work in the firm’s practice areas, which include complex personal injury, construction defect, transportation, product liability, governmental, education, employment, commercial, retail, business disputes, insurance coverage, estate planning and general corporate law.

Isaac M. Wright has joined the Larned law firm of Smith, Burnett & Hagerman, LLC. Mr. Wright graduated from Washburn Law School this spring with honors. Smith, Burnett & Hagerman, LLC is a general practice law firm with emphasis on probate, real estate, trust matters, mental health, municipal law, elder law and general business matters.

**NOTABLES**

Whitney Casement senior associate with the Law firm of Goodell, Straton, Edmonds & Palmer LLP has been awarded as one of Topeka’s Top “20 Under 40” Honorees. Only a select few are chosen each year for this honor among more than 200 nominations and 100 applications. Casement was chosen for her commitment and contributions to her profession and to her community.

Foulston Siefkin has announced that four of its lawyers were named to 2020’s The Best Lawyers in America in the following practice areas: Jeremy L. Graber - Corporate Law; Charles R. (Dick) Hay - Health Care Law; James P. Rankin - Employee Benefits (ERISA) Law, Government Relations Practices, Litigation (ERISA); Thomas L. Theis - Health Care Law, Mediation, Medical Malpractice Law - Defendants, Personal Injury Litigation (Defendants)

Eloy Gallegos (of Gallegos Law) and Lucille Douglass (of Calihan Law Firm) led a public seminar in Garden City to try to answer questions and concerns of area residents who might be stopped by police and have their citizenship questioned. The lawyers explained to those in attendance about different kinds of police stops, emphasizing that those who are stopped should comply with officers to avoid criminal charges, but that compliance does not mean answering every question. The forum was live-streamed on Facebook, and a translator was on hand to assist those who spoke Spanish as their first language.

The lawyers also underscored the importance to the community of the immigrants who live there. More public forums are planned in the future, hopefully at churches and other faith-based locations in and around Finney County.

Jess W. Hoeme of the Joseph, Hollander & Craft law firm (Wichita) was honored by Best Lawyers in the area of Crimi-
nald Defense: General Practice and DUI/DWI Defense. His practice is focused in criminal litigation across the State of Kansas, and he has represented clients in 80 percent of Kansas counties. Hoeme represents Kansas Law Enforcement Officers and Agencies in matters of professional affairs and investigations. Hoeme is a graduate of Washburn University and received his J.D. from Creighton University School of Law. A past chairman of the criminal committee of the Wichita Bar Association, he is a member of the Wichita, Kansas and American Bar Associations, the Kansas and National Associations of Criminal Defense Lawyers, and the National College of DUI Defense Lawyers. He serves as general counsel to the Kansas Bail Agents Association.

Ross A. Hollander of the Joseph, Hollander & Craft law firm was named Wichita Lawyer of the Year in the Employment Law Management Section. He was further recognized for his expertise in Employment Law—Management, Labor Law—Management, and Litigation—Labor and Employment. Hollander is co-chair of the firm’s Civil Litigation and Employment Law Division and has practiced employment, labor, and commercial law for more than 40 years. A graduate of Wichita State University, Hollander received his J.D. from the University of Kansas School of Law. He is a member of the Wichita, Kansas and American Bar Associations, Kansas Association of Defense Counsel, Defense Research Institute, and National Arbitration and Mediation (NAM).

John H. Hutton, the managing partner of the Topeka law firm Henson, Hutton, Mudrick, Gragson, & Vogelsberg, LLP, was honored by being selected by his peers for inclusion in the 26th edition of The Best Lawyers in America© 2020 in Real Estate Law, Commercial Litigation, and Construction Law. Hutton earned his undergraduate and Juris Doctor degrees from the University of Kansas.

Sal Intagliata earned his fifth consecutive listing in Best Lawyers in three individual practice areas: Criminal Defense: General Practice; Criminal Defense: White-Collar; and DUI/DWI Defense. His career includes 18 years as a distinguished criminal defense attorney in private practice, as well as four years as a Sedgwick Co. ADA, where he prosecuted cases in the Gangs/Violent Crimes Division. A shareholder in Monnat & Spurrier, Intagliata’s practice focuses on criminal, white-collar criminal and appeals in federal and state courts throughout Kansas. He currently serves on the Kansas Judicial Council Criminal Law Subcommittee and on the Ad Hoc Pretrial Justice Task Force, created by the Kansas Supreme Court. He previously served as Vice President of the Wichita Bar Association and as a member of its Board of Governors; and on two separate occasions has served as Chair of the Association’s Criminal Practice Committee. Intagliata also served two terms on the Board of Governors of the Kansas Association of Criminal Defense Lawyers. Intagliata earned his bachelor’s degree from KU, and his J.D. from the University of Kansas School of Law in May 1995. Intagliata is also a graduate of the National Criminal Defense College.

Christopher M. Joseph of the Joseph, Hollander & Craft law firm (Topeka) was named Topeka Lawyer of the Year for Criminal Defense: General Practice. He was also honored in the Criminal Defense: General Practice. He leads the firm’s criminal and civil asset forfeiture practice groups. A graduate of Wichita State University and the University of Kansas School of Law, Joseph has earned Martindale-Hubbell Law Directory’s highest “AV” rating for lawyers. He is a Fellow in the Litigation Counsel of America, and is designated as one of the top five percent of Kansas lawyers in Super Lawyers® by Thomson Reuters. He has served on the KBA’s criminal law committee and chaired the Topeka Bar Association legislative committee. He often presents to other attorneys at continuing legal education seminars throughout the state.

Joslyn M. Kusiak of the Independence, Kan., law firm of Kelly & Kusiak Law Office LLC attended the ABA House of Delegates meeting held in San Francisco on Aug. 12-13. Kusiak serves as the KBA Young Lawyer Delegate. Kusiak’s practice includes estate planning and administration, business formation and providing ongoing business consulting and advice and civil litigation. The ABA House of Delegates is the policy-making body of the ABA.

Kristine Lawless of the Joseph, Hollander & Craft law firm (Topeka) was honored by Best Lawyers in America in the sector of Criminal Defense: General Practice and Criminal Defense: White-Collar. Lawless has extensive experience in complex federal and state criminal cases, including appeals. Her primary practice now focuses on family law, and the Kansas Supreme Court has certified her as a mediator in domestic cases. Lawless was formerly Chief of the Northeast Kansas Conflicts Office and served as an Assistant Appellate Defender and Public Defender in Shawnee County. A graduate of Wichita State University, Lawless earned her J.D. at Washburn University School of Law. She has been an adjunct professor for the law school and has served as Judge Pro Tem in Shawnee County District Court. Lawless is designated as one of the top five percent of Kansas lawyers in Super Lawyers® by Thomson Reuters.

On September 20, 2019, McDonald Tinker PA (Wichita, Kansas) was recognized as a company whose accomplishments have demonstrated respect or inclusive treatment for others, advocacy for underrepresented groups and a commitment to the advancement of cultural diversity in our business community. This award was presented at the fifth annual Wichita Business Journal 2019 Diversity and Inclusion Awards Luncheon at the Hyatt Regency in Wichita, Kansas.

Casey Y. Meek of the Joseph, Hollander & Craft law firm (Lawrence) earned recognition by Best Lawyers in the area of Criminal Defense: General Practice. Meek represents indi-
members in the news

Royalty and Working interests.

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viduals during the investigation and prosecution of felony and misdemeanor charges, including: drug & alcohol offenses; DUI & other traffic offenses; property crimes; person crimes; and probation violations. Meek also assists clients with expungements of criminal investigations and convictions. Meek is a member of the Kansas Bar Association, the Douglas County Bar Association and other professional organizations. He earned his bachelor's degree from the University of Kansas and his JD from the University of Kansas School of Law. He has been named a “Rising Star” by the Missouri & Kansas Super Lawyers*.

Dan Monnat of Monnat & Spurrier, honored by Best Lawyers in America for 32 consecutive years, was named to the Best Lawyers list in four areas: Criminal Defense-General Practice; Criminal Defense-White Collar; Bet-the-Company Litigation; and Appellate Practice. A nationally recognized trial lawyer, lecturer and author, Monnat is on the Kansas Trial Lawyers’ Association’s Board of Editors and is the Criminal Law Chair. He is a Fellow of the American College of Trial Lawyers, the International Academy of Trial Lawyers, the American Board of Criminal Lawyers, the American Bar Association and the KBA. Monnat has practiced in Wichita for more than 40 years. A graduate of California State University, he holds a J.D. from Creighton University School of Law and is a graduate of Gerry Spence's Trial Lawyer's College.

Dave Mudrick, who is Of Counsel in the Topeka law firm Henson, Hutton, Mudrick, Gragson & Vogelsberg, LLP, was selected for the 2020 edition of The Best Lawyers in America© for his work in Employment Law-Management, Labor Law-Management, and Litigation-Labor and Employment. Also, the Best Lawyers organization announced that Mudrick was recognized by his peers as 2020 Topeka Employment Law-Management of the Year. Mudrick was President of the Employment Law section of the Kansas Bar Association from 2016-18. He has been approved by the State as a Civil Mediator and a Teacher Due Process Hearing Officer. Also, he plans to serve as an arbitrator. He earned his B.S. degree from Kansas State University. He attended law school at Duke University where he served on the Duke Law Journal and the University of Kansas, and earned his J.D. from the University of Kansas, where he was selected for Order of the Coif.

Trevor Riddle earned his third consecutive listing in Best Lawyers in the area of Criminal Defense: General Practice. A shareholder at Monnat & Spurrier who has practiced for nearly 15 years, Riddle specializes in handling scientific witnesses such as forensic laboratory technicians, doctors, biomechanical engineers and other experts. Riddle’s practice focuses on the defense of those accused of white collar crimes, violent crimes, drug offenses and sex offenses. A graduate of Oklahoma State University, he earned his J.D. from the University of Kansas School of Law. Riddle is a member of the National Association of Criminal Defense Lawyers (NACDL) and is a graduate of the NACDL White Collar Criminal Defense College sponsored by Stetson University College of Law. He also is a member of the Kansas Association of Criminal Defense Lawyers, the American Bar Association, the Kansas Bar Association, the Wesley E. Brown Inn of Court and the Wichita Bar Association.

Stinson LLP is ranked among the top law firms in the 2019 “Best of the Best” rankings issued by Midwest Real Estate News. This year, the firm ranked third out of all law firms in the Midwest region. Midwest Real Estate News annually ranks the top law firms from 14 Midwestern states based on the number of real estate transactions in the past year that occurred within those states. Stinson completed 2,177 transactions in 2018. Stinson’s real estate attorneys provide services for all types of real estate matters, including acquisitions and dispositions, commercial leasing, construction, development, environmental, transactional, tax structuring, tax credit and workout and foreclosures. The firm also has an experienced real estate-related litigation team that handles commercial real estate, banking and lending, land use and litigation, housing and public finance disputes.

Thomas L. Theis of the Foulston Siefkin Topeka office was named to 2020 Lawyer of the Year in Topeka in the area of Health Care Law.

Michelle Wade of Jetstream Aviation Law had an article published in the Summer 2019 issue of Family Office Magazine titled “Are You Paying the Right Price for the Family Jet” which discusses what to watch for in an aircraft transaction.

Sandra Wunderlich, partner in the Tucker Ellis LLP St. Louis office, has been selected by her peers for inclusion in The Best Lawyers in America® for 2020 in the area of Litigation – Intellectual Property. An experienced trial lawyer, Wunderlich has been lead trial counsel in a dozen jury and bench trials. Over the past 25 years, she has litigated patent, trademark, copyright, and domain name matters from the cease-and-desist stage through appeal. A member of the Federal Circuit, she has successfully handled appeals in that court.
Obituaries

H. Scott Beims (5/25/1939 - 8/30/2019)

Harold Scott Beims, 80, of Atwood, Kan., died Friday morning, August 30, 2019 in Colby, Kan. He was born on May 25, 1939 to Harold “Pete” and Genevieve (Scott) Beims. Scott grew up on his family farm where he gained a strong work ethic. As a youngster, he enjoyed fishing at Crystal Springs, playing baseball, and getting into trouble with his brothers. He graduated from Atwood Community High School in 1957. Following high school, he attended the University of Kansas, graduating with a degree in Education in 1962, and served one year in the Navy. He taught math in Denver for one year, then moved back home to teach in Atwood.

He met Donna Harter, a young teacher in Colby, on a blind date and they were married shortly after on May 29, 1964. Scott then decided to attend law school at Washburn University, where he then graduated in 1968 with honors, finishing second in his class. He returned to Atwood once again to practice law, following in the footsteps of his grandpa Charley Scott and great grandfather Dempster Scott. In 1970, he joined the firm Lewis, Lewis, and Beims with his best friend Bob Lewis, Jr. and his father Bob Lewis, Sr. Scott thoroughly loved practicing law and served his clients with honesty and dedication.

He and Donna were proud parents and he always enjoyed attending all of his children’s events: football, cross country, musical events and wrestling matches. No matter what, he was always there cheering them on. Scott placed a high value on the many traditions he shared with his family. Scott’s love for the community of Atwood was evident in the countless committees and boards he served on throughout his life. He dedicated his life to the public and community where he lived. Scott served the public as Rawlins County Attorney for over 25 years, Atwood School Board for nearly 40 years, Atwood City Attorney, Rawlins County Hospital Attorney, Atwood City Council and an original trustee of the F.D. Obert Trust. He served his community as a member of Rotary for over 50 years, Kansas Bar Association, Masonic Lodge, United Methodist Church, Atwood Chamber of Commerce, Boy Scout leader and little league baseball coach. In his spare time he enjoyed attending various high school and community events, following KU sports, farming, hunting and traveling.

He was preceded in death by his beloved wife Donna; his parents; infant sister, Cheryl; and in-laws Peach Beims, Carl and Kay Harter and Jim Harter. Scott is survived by his children, Bobi Jo and Juan Robles of Atwood and Mitch and Carrie Beims of Wichita; two grandchildren, Braden and Berkley; three step-grandchildren, Tanner, Mia and Paige, all of Wichita, Kan.; siblings, Ron Beims of Herndon, Kan., Terry (Joyce) of Little River and Sherry Beims of Atwood; brothers-in-law, Eugene (Sally) Harter, Don (Val) Harter and Jerry (Barb) Harter; sisters-in-law, Rosie Hespenhide, Jane Anne (Rich) Farris and Dorine Harter; and many nieces and nephews. A memorial visitation was held on Monday, Sept. 2, 2019 at Baalmann Mortuary, Atwood. A Memorial service was held Sept. 3 at the United Methodist Church in Atwood. Memorials are suggested to RCHS Athletics, in care of Baalmann Mortuary, PO Box 391, Colby, KS 67701.
Kenneth Edward Peery (10/18/1925 - 8/10/2019)

Kenneth Edward Peery Kenneth E. “Ken” Peery, age 93, passed into the care of his Eternal Father on Saturday, August 10, 2019 at University of Kansas Health System St. Francis Campus in Topeka, KS.

Ken was born October 18, 1925 in Newton, KS to E.J. and Mabel (Pierson) Peery and raised in Emporia, KS. Ken graduated from Emporia High School in 1943 and began college at Emporia State. When WWII interrupted, he enlisted in the US Navy through an officer training program and was called to active service in November 1943. He was commissioned an Ensign in August 1945. He served aboard the carrier escort USS Savo Island in the Pacific and aboard LSM 470 on the Yangzte River in China. Ken continued his service in the Naval Reserves retiring as a lieutenant in the 1970s.

After the war, Ken completed his bachelor’s degree at Emporia State and earned his LLB from the University of Kansas School of Law in 1950 and a Master of Law from George Washington University in 1957. He practiced law first in Emporia, then as an attorney for the US Department of Agriculture in Washington DC (1955-62), before settling into a solo practice in Concordia, KS from 1962-1982 where Ken served as Cloud County Attorney and Municipal Judge.

Ken married Doris Jean Wagner of Emporia on June 7, 1953. Doris was a faithful, loving and spirit-filled companion throughout his journey on this earth. The local church was always at the center of their lives. Ken was deeply involved in the life of the church as a servant-leader, including as deacon at Emporia and Concordia First Baptist Churches and lay leader at Colonial Presbyterian Church in Kansas City, Immanuel Baptist Church in Rogers, AR and First Baptist Church in Topeka, KS.

Ken was active in the Christian Legal Society, an affiliation that fueled his calling to combine the ideals of his faith with the best ideals of the legal profession. In 1982, he ended his practice in Concordia and relocated to Kansas City where he founded the Heart of America Christian Justice Center which provided alternative dispute resolution and reconciliation services. He continued this work after his retirement, helping to found a similar service in Northwest Arkansas.

Ken had a lifelong interest in politics and civic engagement. A proud Republican, he was an energetic campaigner, on his own behalf in North Central Kansas, and for various candidates in Kansas and Arkansas, including Governor Mike Huckabee. Ken served as GOP precinct chairman up to the time of his passing.

Ken was proud of his affiliation with the Boy Scouts of America, earning his Eagle Scout rank in 1942 and serving as Scoutmaster for Troop 39 in Concordia. A diehard Jayhawk fan, Ken never missed a broadcast of any KU football or basketball game. While living in Topeka, Ken enjoyed his Tuesday morning bible studies with the Topeka Fellowship Group, where he also served on the board.

An avid outdoorsman (though not a hunter or fisherman), Ken loved to take his family on camping and hiking trips, almost always with a canoe strapped on top of the car. He became a proficient sailor and loved to be on the water. Upon retirement, Ken and Doris lived for several years on Beaver Lake, Ark., before resettling in Topeka, Kan., to be near their grandchildren. Ken’s final years were devoted to caring for Doris as she progressed through the stages of Alzheimer’s disease.
Ken is survived by his wife of 66 years, Doris Jean, who resides in the memory care unit at Brewster Place in Topeka; sons, Patrick (Cheri) Peery, Lawrence, KS and John (Marianne) Peery, Jessup, MD; grandchildren Jessica Humphreys and Sarah Michael, Topeka, Sam Peery, Overland Park, Anna Peery, Menlo Park, CA, Andrew Peery, Key West, FL, and Lydia Peery, Jessup, MD, and nine great grandchildren. He is also survived by his sister Virginia Clay, Dallas, TX with whom he was very close.

A Celebration of Life was conducted at The First Baptist Church of Topeka, KS on September 7, 2019 at 11:00am. A light luncheon was served at the church following services. The family suggests that contributions be made to the Alzheimer's Association and sent in care of Davidson Funeral Home, Topeka.

**John S. Seeber (2/24/1930 - 8/20/2019)**

The beautiful soul of John S. Seeber, beloved husband, father, grandfather, and great-grandfather went back into the heavens on August 20, 2019. He was born on February 24, 1930 and raised on the family farm in Albert, Kansas. John loved the farm, family, classical music, KU basketball, and the profession of law. He was an avid exerciser, quick with a joke, and never met a stranger. John married his childhood sweetheart Barbara in 1950, enjoying 68 years of marriage for a total of 74 years with her. He crossed the finish line at age 89 having a sharp mind and stubborn resistance to cancer and heart issues. They had three girls, Karen Seeber (Wichita, KS), Mary Krohn (John of Des Moines, IA), and Jean Nemechek (Patrick of Buckeye, Arizona), granddaughter Dianna O’Neill (Mike of Des Moines, IA), grandson David Deardorff (Katherine of Ann Arbor, Michigan) and great-granddaughters Estella, Camila, and Kalea. He was preceded in death by stillborn granddaughter Rebecca. John graduated from Great Bend High School and the University of Kansas where he combined his last year of undergraduate with his first year of law school. After graduation he served as a 1st Lieutenant as an Army JAG Corp attorney from 1953 to 1957 and in the Reserves until 1961. In the Army earned a National Defense Service Medal. John joined Adams, Jones, Robinson, & Malone Law Firm where he spent his career. He served on the state ethics committee investigating unethical attorneys. He would get a twinkle in his eye when recounting cases and he loved the letter of the law. John was an active attorney for 49 years and 13 days but he refused a retirement party as he never truly retired. John said the key to a happy marriage was patience, and a long life was to “Live Well”. He was funny and adopted the Southeast High “honk” as his signature. The honk and a wave were always given when leaving on a trip and performed when driving by friend’s houses. It was always fun to hear “I heard your dad drive by last night.” When finishing a phone call his phrase was not goodbye but the old ham radio “over and out” meaning that the communication was complete. Now, as our Earthly ability to look him in the eye and tell him how much we love him has now passed, we do not say goodbye instead we say over and out as only one type of communication has ended. We will continue to show him our love by living the rest of our days according to his example, his ethical guidance, and by being silly when the situation is right. John’s final resting place will be in the wind and the soil of his treasured Seeber farm, going back to the land he loved so much. John’s memorial service was held on Saturday, August 24, 2019 at Calvary United Methodist Church, 2525 N. Rock Road, Wichita, Kansas. Memorial donations made in his memory should be sent to Calvary United Methodist Church. Downing & Lahey Mortuary - East Chapel. Share tributes online at: www.dlwichita.com.

[https://klsprobono.org/](https://klsprobono.org/)

**PRO BONO LEGAL SERVICES**

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

ORDER OF DISBARMENT
IN RE LARRY DEAN TOOMEY
NO. 11,959—AUGUST 29, 2019

FACTS: In a letter dated August 13, 2019, Larry Dean Toomey voluntarily surrendered his license to practice law in Kansas. At the time of surrender, a disciplinary complaint was pending. Toomey was convicted of two counts of felony theft; the victim was his client.

HELD: The Court accepted the surrender, and Toomey is disbarred.

ORDER OF REINSTATEMENT
IN RE DAVID E. HERRON, II
NO. 119,726—SEPTEMBER 11, 2019

FACTS: In May 2019, Herron’s license to practice law in Kansas was suspended for 60 days. After that time elapsed, Herron filed a petition for reinstatement. The office of the Disciplinary Administrator had no objection to reinstatement.

HELD: Seeing no objection, the court considered and granted Herron’s petition for reinstatement.

ORDER OF REINSTATEMENT
IN RE HARRY LOUIS NAJIM
NO. 116,943—SEPTEMBER 11, 2019

FACTS: Najim’s license to practice law in Kansas was indefinitely suspended in December 2017. Najim petitioned for reinstatement in November 2018. After an investigation, Najim appeared at a hearing and the panel recommended that Najim’s license be reinstated.

HELD: After a thorough review of the hearing panel’s report, the court accepts the findings and finds that Najim’s license should be reinstated.

Civil

DRIVERS LICENSE—DUE PROCESS
CREECY V. KANSAS DEPARTMENT OF REVENUE
JOHNSON DISTRICT COURT—AFFIRMED IN PART
AND REVERSED IN PART
COURT OF APPEALS—AFFIRMED IN PART AND
REVERSED IN PART
NO. 117,035—AUGUST 23, 2019

FACTS: It is undisputed that law enforcement had probable cause to arrest Creecy for DUI. Creecy showed signs of a medical emergency, and EMS was called, but he momentarily recovered. Law enforcement gave Creecy the implied consent advisories, both orally and using the DC-70 written form. Creecy attempted to give a breath sample but was unable to produce enough air to register a sample. After the second failure, the officer told Creecy that his inability to provide a sample constituted a failure. The officer completed the notice of suspension form—the DC-27—and Creecy was arrested. Creecy requested an administrative hearing, paying the statutorily-required $50 fee. The ALJ affirmed the suspension, and Creecy petitioned for review. The district court affirmed the ALJ and Creecy appealed, claiming that his failure to complete the test was caused by a medical condition, that both the implied consent advisory and the notice of suspension were statutorily insufficient, and that the required $50 is facially unconstitutional. The court of appeals affirmed the district court. Creecy’s petition for review was granted.

ISSUES: (1) Constitutionality of mandatory fee; (2) adequacy of service; (3) whether failure equaled refusal; (4) adequacy of implied consent advisory

HELD: There is no statutory provision for a waiver of the $50 fee that must be paid in advance of an administrative hearing. A driver’s license is an interest which entitles the holder to procedural due process protections before revocation or suspension. Where fundamental rights are implicated, allowances should be made for indigent litigants. The lack of such allowances here creates a barrier to due process. Accordingly, the $50 fee is unconstitutional on its face. Evidence
shows that Creecy was given the DC-27 form before being transported to the hospital. That is adequate to show that Creecy received adequate service. Creecy had the burden to show that his test failure was due to a medical condition. He did not introduce any evidence to show the cause of his failure to produce a sample. In the absence of this evidence, the district court is affirmed. The DC-70 advisory given by law enforcement substantially complied with the statute.

CONCURRENCE: Stegall, J. concurs in the result

STATUTES: K.S.A. 2014 Supp. 8-1001(a), -1001(b)(1)(A), -1001(k), -1001(q), -1002, -1002(c), -1012(d), -1013(i), -1020(a)(1), -1020(d)(2), -1020(o), -1020(p); K.S.A. 77-611

DRIVERS LICENSE—DUE PROCESS
MEATS V. KANSAS DEPARTMENT OF REVENUE
JOHNSON DISTRICT COURT—AFFIRMED
NO. 116,469—AUGUST 23, 2019

FACTS: Meats was arrested for DUI. He refused to perform a post-arrest evidentiary breath test. An officer gave Meats the implied consent advisory both orally and in writing. After being released, Meats requested an administrative hearing to challenge the administrative suspension of his driver’s license. The suspension was affirmed by an ALJ, and Meats appealed to district court where he argued, among other things, that the $50 fee that is statutorily required before an administrative hearing is held is unconstitutional. The district court affirmed the license suspension but agreed with Meats that the fee is unconstitutional because it lacks reasonable accommodations for indigent drivers. The issue was moot with respect to Meats, who had already paid the fee. The Department of Revenue appealed the ruling on the fee, and Meats cross-appealed the suspension of his license. Under K.S.A. 60-2101(b), the appeal was heard directly by the Supreme Court.

ISSUES: (1) Constitutionality of mandatory fee; (2) adequacy of implied consent advisory

HELD: The $50 fee imposed by K.S.A. 2014 Supp. 8-1020(d)(2) is unconstitutional on its face because it requires payment of a fee, without provision for indigency, before a motorist can obtain procedural due process during the license suspension process. The DC-70 form given to Meats substantially complies with relevant statutes. The evidence before the court shows that law enforcement complied with the statute when serving Meats with the DC-27.

CONCURRENCE: Stegall, J. concurs in the result

STATUTES: K.S.A. 2014 Supp. 8-1001(k)(4)(A), -1002(c), -1013(i), -1020(a)(1), -1020(d)(2); K.S.A. 60-2101(b)

DRIVERS LICENSE—DUE PROCESS
ROSENDAHL V. KANSAS DEPARTMENT OF REVENUE
MIAMI DISTRICT COURT—AFFIRMED IN PART AND REVERSED IN PART
NO. 117,862—AUGUST 23, 2019

FACTS: After responding to the scene of a car accident, law enforcement asked Rosendahl to perform field sobriety tests. After she failed the preliminary breath test, Rosendahl was arrested. The Intoxilyzer test showed she was well over the legal driving limit. Rosendahl requested an administrative hearing and paid the statutorily-required $50 fee. The ALJ affirmed the suspension, finding that the officer had reasonable grounds to believe that Rosendahl was operating a vehicle under the influence. Rosendahl petitioned for review, arguing before the district court that her intoxication was due to alcohol consumption after the accident but before law enforcement arrived. After hearing evidence, the district court reversed the ALJ finding that the breath test was due to Rosendahl’s post-accident alcohol consumption. The district court also agreed with Rosendahl that the $50 filing fee was unconstitutional, but found the issue moot since Rosendahl paid the fee. The Department of Revenue appealed, and under K.S.A. 2015 Supp. 8-1020(d)(2) the case was heard directly by the Supreme Court.

ISSUES: (1) Reasonable grounds to request a breath test; (2) constitutionality of mandatory fee

HELD: Rosendahl failed to raise the issue of post-accident alcohol consumption before the ALJ. Based on the totality of the circumstances, law enforcement had no duty to inquire about whether Rosendahl was drinking after the accident, especially since Rosendahl did not raise the issue herself. The district court erred by giving controlling weight to testimony concerning intervening alcohol consumption. As held in other decisions issued this day, the nonrefundable $50 fee required by K.S.A. 2015 Supp. 8-1020(d)(2) is unconstitutional on its face.

CONCURRENCE AND DISSENT: (Stegall, J., joined by Rosen and Johnson, JJ.) The majority correctly found that the officer had reasonable grounds to request a breath test and that the administrative hearing fee is unconstitutional. But the district court should be affirmed as being right for the wrong reason. It is clear that Rosendahl was not driving under the influence.


AMANUENSIS—ESTATES
IN RE ESTATE OF MOORE
COWLEY DISTRICT COURT—AFFIRMED
COURT OF APPEALS—AFFIRMED
NO. 115,628—SEPTEMBER 6, 2019

FACTS: Roxie Moore owned close to 900 acres of land throughout the state. Over the years, she used portions of that land as security to help her son, Harvey. Not only did Roxie use land as collateral for Harvey, but Harvey took over $100,000 from Roxie through the years. Roxie’s health began to decline, and she named Maureen—Harvey’s ex-wife—as her durable power of attorney. Around this time, Roxie hired counsel to protect the rest of her property from Harvey. She wanted a transfer-on-death deed that would assign the land to Harvey’s children through Maureen. After the deed was prepared and Roxie read it, she asked Maureen to sign the
deed for her, with a note that she was the power of attorney. Roxie died in 2009, and Maureen executed a warranty deed transferring property to Harvey’s sons, as Roxie wished. Harvey opened a probate proceeding seeking a determination of descent of the real estate. The sons responded that certain real estate had passed to them under the transfer-on-death deed. The district court granted summary judgment to the sons, finding that Maureen acted as amanuensis in signing the new deed for Roxie. The court of appeals affirmed, and the Supreme Court granted Harvey’s petition for review.

ISSUES: (1) Signature by amanuensis; (2) undue influence

HELD: There is no statutory prohibition against signing a deed via an amanuensis. The amanuensis signs with the same authority and legal effect as if the signature were physically provided by the principal directing the signature. The district court properly found, by a preponderance of the evidence, that Maureen fulfilled Roxie’s request to sign the deed on her behalf. That is a valid exercise of an amanuensis. When signing the deed, Maureen directed the property to herself and then on to her sons. A self-interested amanuensis presents a danger. But in this case, clear and convincing evidence rebutted any presumption of undue influence, and there was no evidence that Roxie was not competent to execute the deed.

CONCURRENCE: (Stegall, J.) Kansas law clearly allows an amanuensis to sign a deed. But the majority improperly conflates amanuensis with an owner’s agent. The use of an agent would not be a binding signature.

DISSENT: (Johnson, J.) It is impermissible to skip the formalities associated with creating a property deed.


NATURAL GAS
NORTHERN NATURAL GAS V. ONEOK
PRATT DISTRICT COURT—REVERSED AND REMANDED
NO. 118,239—SEPTEMBER 6, 2019

FACTS: Northern Natural Gas maintains an underground natural gas storage facility. It holds certifications which allow it to inject and store previously extracted natural gas, which allows Northern to sell it when there are favorable market conditions. In 2008, Northern filed suit against two producers, claiming they artificially created conditions which caused Northern’s storage gas to migrate beyond the storage field’s certified boundaries. That suit ultimately ended up with FERC issuing a certificate on June 2, 2010, authorizing Northern to expand its field boundaries, extending its buffer zone to protect migrating gas from capture. Back in district court, Northern’s motion for reconsideration, which asked for different treatment for post-FERC decision gas capture, was denied. Northern appealed and the case was transferred to the Kansas Supreme Court after docketing.

ISSUE: (1) Right to capture storage gas after June 2, 2019

HELD: Northern became exempt from common-law rule of capture after June 2, 2010, when it received the FERC certificate authorizing additional condemnation. The district court erred when it ruled that K.S.A. 55-1210 superseded case law to the contrary. This caselaw is not an unconstitutional taking of property. The rule of capture does not vest title, it simple recognizes an ability to produce.

DISSENT: (Johnson, J., joined by Stegall, J.) Neither a court nor a federal agency can take a property interest from a Kansas landowner.

DISSENT: (Stegall, J.) In addition to agreeing with Justice Johnson, the prior caselaw relied on by the majority is wrong and should be reversed.

STATUTE: K.S.A. 55-1201, -1202, -1204, -1205, -1210, -1210(a), -1210(c)

APPELLATE PROCEDURE—RES JUDICATA
IN RE CARE AND TREATMENT OF SIGLER
BARTON DISTRICT COURT—AFFIRMED
COURT OF APPEALS—AFFIRMED
NO. 118,914—SEPTEMBER 6, 2019

FACTS: Sigler was convicted of aggravated criminal sodomy and indecent solicitation of a child. Before he was released from prison, the State petitioned that he be committed as a sexually violent predator. That case went to trial in 2015, but after a hearing the district court determined that Sigler did not meet all of the criteria to be indefinitely committed. Sigler was released, but was returned to prison shortly thereafter for violating the terms of his parole. As it did before, the State filed a petition before Sigler’s release asking that he be committed as a sexually violent predator. Sigler asked that the petition be denied on grounds of res judicata or collateral estoppel. The motion was denied and a jury determined that Sigler was a sexually violent predator. Sigler appealed and the court of appeals affirmed the jury’s finding. Sigler’s petition for review was granted.

ISSUES: (1) Existence of a material change in circumstance; (2) denial of motion for mistrial

HELD: Sigler failed to preserve for appeal any argument involving collateral estoppel. Under a res judicata analysis, the State presented evidence of a material change inSigler’s mental state and risk assessment. Specifically, the State proved that Sigler has serious difficulty controlling his dangerous behavior. Statements made about Sigler at trial were unquestionably wrong. But any prejudice which arose from those statements was cured, and the district court did not err by denying a motion for mistrial.

DISSENT: (Johnson, J.) The Sexually Violent Predator Act should be interpreted to permit the State only one opportunity to seek involuntary civil commitment. In addition, viewing pornography or sexually explicit websites cannot be grounds for commitment.

STATUTE: K.S.A. 59-29a03, -29a03(a)(1)
HILL V. STATE  
SHAWNEE DISTRICT COURT—AFFIRMED IN PART AND REVERSED IN PART, CASE REMANDED  
COURT OF APPEALS—AFFIRMED IN PART AND REVERSED IN PART  
NO. 114,403—SEPTEMBER 6, 2019

FACTS: Hill was hired by the Kansas Highway Patrol as a trooper. He was assigned to Troop H in southeastern Kansas. Hill was fired in November 2011 after he was involved in a dispute with a supervisor who was investigating a civilian complaint against Hill. The Kansas Civil Service Board reversed the termination but found that Hill deserved discipline and sanctioned him with a one-year suspension without pay. KHP abided by the decision and treated Hill as a new hire who could be assigned wherever staffing needs were greatest. At that time, Finney County in southwestern Kansas had the greatest need for troopers. KHP admitted that it was unusual to involuntarily reassign a trooper to a different geographic area. Hill asked the KCSB to prevent the transfer but the Board denied his request. Hill then asked KHP for a hardship assignment so that he could care for his mother, who had serious health problems. Hill reported to Finney County but quickly asked for reassignment back to his former duty station. Hill sued both KHP and his supervisor in district court, claiming that the transfer was retaliatory and in violation of public policy. In the time since the suit was filed, Hill received a transfer and a promotion. The district court granted the defendants’ motion for summary judgment, finding that Hill did not establish prima facie proof of retaliation. The court of appeals affirmed that decision. The Kansas Supreme Court granted Hill’s petition for review.

ISSUES: (1) Jurisdiction; (2) sovereign immunity; (3) summary judgment

HELD: Torts committed by a state agency fall outside of the Kansas Judicial Review Act and the Civil Service Act does not provide administrative review for wrongful transfers or job assignments. This gives the court jurisdiction to hear Hill’s case. There are exceptions to Kansas’s employment-at-will doctrine. Specifically, there is an anti-retaliation public policy. Some employee retaliations which fall short of termination or demotion may give rise to an actionable tort, as long as those retaliations are sufficiently coercive to undermine public policy. The Kansas Tort Claims Act does not immunize the defendants from liability for such a retaliation claim. Hill presented a prima facie case of job retaliation, which should have prompted the district court to ask KHP to provide a nondiscriminatory reason for the transfer.

DISSENT: (Stegall, J., joined by Luckert, J.) The majority read the KTCA too broadly. The KTCA provides immunity to KHP.

STATUTES: K.S.A. 2018 Supp. 75-2929d(a)(1), -2949(g), -6103(a), -6104, -6104(h), -6104(n), -6104(s); K.S.A. 75-2947(a), -2957

HABEAS CORPUS
LITTLEJOHN V. STATE
SEDGWICK DISTRICT COURT—CASE REMANDED  
COURT OF APPEALS—REVERSED  
NO. 115,904—AUGUST 23, 2019

FACTS: Littlejohn confessed to killing someone during a botched robbery attempt. Before trial, counsel filed a motion to determine competency and a motion to suppress. A report pronounced Littlejohn competent but cautioned that IQ testing was warranted. At trial, counsel did not mount a mental defect defense and did not request any jury instructions relating to Littlejohn’s low IQ. He was convicted as charged, and those convictions were affirmed on appeal. Littlejohn filed one K.S.A. 60-1507 motion which was denied. His second 60-1507 motion is the subject of this appeal. In that motion, Littlejohn argued that trial counsel was ineffective for failing to raise a mental defect defense. The motion was denied as successive and an abuse of remedy. Littlejohn appealed, and the court of appeals reversed the district court finding that trial counsel should have investigated Littlejohn’s mental defect defense. The Supreme Court accepted the State’s petition for review.

ISSUE: (1) Standard for determining exceptional circumstances

HELD: K.S.A. 60-1507 specifically bars second or successive motions for similar relief on behalf of the same prisoner. Over the years, case law has allowed exceptions if the movant can prove exceptional circumstances. The test is whether Littlejohn presented exceptional circumstances to justify reaching the merits of a successive motion, factoring in whether justice would be served by doing so. Because the court of appeals used the wrong test, the case is remanded to the court of appeals.

CONCURRENCE: Nuss, C.J., Biles and Stegall, JJ, concur in the result

STATUTE: K.S.A. 60-1507

NOYCE V. STATE
SEDGWICK DISTRICT COURT—AFFIRMED  
COURT OF APPEALS—REVERSED  
NO. 114,971—AUGUST 23, 2019

FACTS: Noyce was convicted of capital murder but pled guilty to avoid a death sentence. He received two consecutive hard 40 sentences, to be served consecutive to an aggravated arson sentence. Noyce did not appeal this sentence. Noyce did appeal the denial of a motion to correct illegal sentence, but his sentences were affirmed. Shortly thereafter, Noyce filed an untimely K.S.A. 60-1507 motion in which he claimed ineffective assistance of counsel and multiple instances of collusion between his counsel, the district attorney and the district court. The district court summarily denied the motion as untimely and Noyce appealed. The court of appeals reversed the district court, finding that two of Noyce’s claims of ineffective assistance at the plea stage raised issues that could constitute manifest injustice. The Kansas Supreme Court accepted the
State’s petition for review.

ISSUE: (1) Existence of manifest injustice

HELD: It was Noyce’s burden to produce a record on appeal which showed error. Noyce did waive appellate rights by pleading guilty, and he also waived any claims about multiplicity. Trial counsel’s advice that Noyce’s sentence was not appealable was not manifestly unjust, especially in light of the fact that Noyce was potentially facing a death sentence. Withdrawing Noyce’s guilty pleas would potentially open him to an eventual death sentence. The district court’s summary denial of Noyce’s motion is affirmed.

STATUTE: K.S.A. 22-3504, 60-1507

CRIMINAL

APPELLATE PROCEDURE—CRIMINAL PROCEDURE—EVIDENCE—PROSECUTORS—SENTENCES—STATUTES—WITNESSES

STATE V. NOYCE

MIAMI DISTRICT COURT—AFFIRMED IN PART AND VACATED IN PART

COURT OF APPEALS—AFFIRMED

NO. 116,252 - SEPTEMBER 6, 2019

FACTS: Noyce was convicted in Miami County of 18 counts of larceny. Noyce appealed his convictions claiming double jeopardy barred conviction on two counts and four other convictions were not supported by competent evidence. Noyce also claimed trial counsel was ineffective because he did not object to expert psychological testimony. Court of appeals held that Noyce was not entitled to an independent psychological evaluation and that trial court’s instruction permitting expert testimony was not clearly erroneous.

ISSUES: (1) Existence of manifest injustice, (2) statute of limitations, (3) ineffective assistance of counsel, (4) cumulative error, (5) sentencing error

HELD: No need to reach the legal arguments about the meaning of “on or about” in this case because no factual support for prosecutor’s suggestion that the charged crimes occurred during four-and-a-half months prior to the alleged date of the crime. Any time discrepancy in time frame related to the possibility the crimes occurred after the date alleged. Prosecutor’s argument outside the evidence was error, but State meets its Chapman burden of establishing no reasonable possibility this error contributed to the verdict.

K.S.A. 2018 Supp. 60-456(b) does not apply to the child’s interview, and district court did not err in admitting the interview. Expert testimony is not necessarily required as a foundation to introducing a child witness’ interview into evidence and no specific formula or protocol need be followed when conducting an interview. Here, examiner never offered an opinion or otherwise testified to anything based on her scientific, technical, or other specialized knowledge. She simply relayed the factual circumstances under which the statement was taken, and did not offer an opinion about the reliability of the child’s statement or whether she found the statement believable or truthful. Ballou failed to preserve his argument about the need for a taint hearing.

Ballou failed to preserve his pretrial motion for an independent psychological examination of the child victim. District court applied the appropriate factors in State v. Gregg, 226 Kan. 481 (1979), for determining whether a criminal defendant is entitled to an independent psychological evaluation of a witness.

The single, nonreversible prosecutorial error found in this case does not establish reversible cumulative error.

Off-grid lifetime sentences are to be followed by parole, not lifetime postrelease supervision as ordered in this case. That portion of the district court’s judgment is vacated.


CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—JUDGES—JURIES—JURY INSTRUCTIONS

STATE V. BOOTHBY

STEVENS DISTRICT COURT—AFFIRMED

COURT OF APPEALS—AFFIRMED

NO. 116,505—SEPTEMBER 6, 2019

FACTS: Jury convicted Boothby of aggravated assault and criminal threat for pointing a gun at victim and threatening to come back when victim was alone. On appeal, Boothby claimed reversible judicial misconduct during voir dire by district court judge’s suggestion to one venire panel that Boothby was charged with aggravated battery in a former case. Citing State v. Smith-Parker, 301 Kan. 132 (2014), as recognizing a right to jury nullification, Boothby also claimed district court erred when it instructed jury that its verdict “must be founded entirely upon the evidence admitted and the law as given in these instructions.” Court of appeals affirmed in unpublished opinion, finding Boothby—as the party alleging judicial misconduct—failed to meet his burden of showing prejudice. Panel also found the challenged jury instruction was legally correct, and in the alternative, the instruction was not clearly
erroneous. Boothby’s petition for review granted.

ISSUES: (1) Judicial comment error, (2) jury instruction—verdict

HELD: From now on, an erroneous judicial comment made in front of the jury that is not a jury instruction or legal ruling will be reviewed as “judicial comment error” under the constitutional harmlessness test in Chapman v. California, 386 U.S. 18 (1967). Existing precedent concerning structural error or other kinds of error traditionally labeled “judicial misconduct” remains undisturbed. State’s invitation to adopt the federal plain error standard is declined. Judicial comment error will be analyzed in two steps: error and prejudice, with the prejudice step reviewed under the Chapman constitutional harmlessness test. Thus, judicial comment error is reversible unless the State, as the party benefiting from judicial comment error, proves beyond a reasonable doubt that the error did not affect the outcome of trial in light of the entire record. Judicial comment error is reviewable on appeal despite the lack of a contemporaneous objection at trial. Here, State met its burden to prove the judicial comment error was harmless.

Instruction challenged in this case is legally correct, and a district court does not err when it tells a jury to follow the law. Smith-Parker did not establish a “right” to jury nullification, and the Court declines to recognize such a right in this case. Also, the reasonable doubt instruction in Smith-Parker is distinguishable from the instruction Boothby challenges.

STATUTES: K.S.A. 2018 Supp. 22-3414(3); K.S.A. 22-3403(3), 60-455

CRIMINAL LAW—EVIDENCE—JURY INSTRUCTIONS—STATUTES

STATE V. CHAVEZ

WYANDOTTE DISTRICT COURT—AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART

COURT OF APPEALS—AFFIRMED

NO. 115,602—AUGUST 23, 2019

FACTS: Jury convicted Chavez of aggravated burglary, stalking and criminal threat. He appealed claiming: (1) insufficient evidence supported the stalking conviction which required the State to prove legally impossible mental states; (2) district court should have instructed jury and allowed Chavez to argue that victim had waived her right to enforce the protection from abuse (PFA) order; (3) district court failed to give jury a limiting instruction concerning the PFA because it constituted evidence of prior crimes or civil wrongs; and (3) cumulative error denied him a fair trial. In an unpublished opinion, the court of appeals reversed the aggravated burglary conviction but affirmed the stalking and criminal threat convictions. Panel found in part that Chavez was not entitled to a K.S.A. 60-455 limiting instruction regrading the PFA because the existence of the PFA was an element of the stalking charge, and did not address the implied waiver claim. Chavez' petition for review granted.

ISSUES: (1) Stalking, (2) implied waiver of PFA, (3) limiting instruction, (4) cumulative error

HELD: Kansas stalking statute, K.S.A. 2018 Supp. 21-5427 is reviewed to understand the culpable mental states at issue. Chavez' reliance on State v. O'Rear, 293 Kan. 892 (2012), for his legal impossibility argument is undermined by the 2011 recodification of the Kansas criminal code to include a new culpable mental state paradigm. Here, sufficient evidence supported Chavez' stalking conviction. He knowingly confronted the victim after being served with a court order not to do so, which satisfied the reckless element of the charged crime.

The protected person under a PFA order does not have the authority to unilaterally modify the court order by waiving its restraints or consenting to its violation. Chavez was not entitled to a jury instruction on principles of implied waiver of a PFA, and such an instruction was not legally appropriate.

Similar to approach taken in State v. Sims, 308 Kan. 1488 (2018), petition for cert. filed April 29, 2019, court will assume the PFA falls within ambit of the 60-455 requirement for a limiting instruction, but no showing the failure to give a limiting instruction in this case was clearly erroneous.

Error that led to the reversal of Chavez' aggravated burglary conviction, combined with assumed limiting instruction error, did not create substantial prejudice that denied Chavez a fair trial.

STATUTES: K.S.A. 2018 Supp. 21-5202, -5202(c), -5242, -5427(a)(3), -5427(b)(1)-(3) -5427(c), -5427(f)(1), -5427(f)(1)(B), -5924, 22-3414(3), 60-455, 3107(f); K.S.A. 21-3201, -3201(b), 60-3101(b)

CRIMINAL PROCEDURE—SENTENCES—STATUTES

STATE V. HAMBRIGHT

SEDGWICK DISTRICT COURT—REVERSED AND REMANDED

COURT OF APPEALS—REVERSED ON ISSUE SUBJECT TO REVIEW

NO. 115,259—AUGUST 23, 2019

FACTS: Hambright entered a guilty plea to felony criminal damage to property and misdemeanor theft. Presumed probation period for Hambright’s severity level 7 felony was 24 months, but the district court imposed a 36-month probation term with $60,000 in restitution. Hambright appealed, arguing in part his sentence was illegal because the district court used K.S.A. 2018 Supp. 21-6608(c)(5) for severity level 8-10 crimes to increase the probation term. In an unpublished opinion, the court of appeals in part agreed that 21-6608(c)(5) did not apply to Hambright’s conviction, but found the increased probation term was within the district court’s discretion under K.S.A. 2018 Supp. 21-6608(c), and the departure sentencing procedures in State v. Whitesell, 270 Kan. 259, 13 P.3d 887 (2000), for increased probation terms no longer applied. Hambright’s petition for review granted.

ISSUE: (1) Departure sentence—increased term of probation

HELD: Panel’s analysis of Whitesell is criticized and re-
versed. District court's imposition of an extended term of probation beyond the presumptive 24 months for Hambright's conviction constitutes a departure that must be supported on the record by substantial and compelling reasons. Matter is remanded to district court for resentencing on the duration of probation under the correct legal standard.

STATUTES: K.S.A. 2018 Supp. 21-6801 et seq., -6803(f), -6803(i), -6803(o), -6803(q), -6608, -6608(c), -6608(c)(1)(B), -6608(c)(2), -6608(c)(5), -6608(c)(6), -6608(c)(7), -6608(c)(8), -6815(a), -6815(b), -6817(a)(3); K.S.A. 2000 Supp. 21-4611; K.S.A. 1999 Supp. 21-4611(c)(1)(B), -4716; -6608(c)(8), -6803(i), -6803(o), -6803(q), -6608, -6608(c), -6608(c)

CRIMINAL PROCEDURE—EVIDENCE
STATE V. HOWLING
PRATT DISTRICT COURT—AFFIRMED
COURT OF APPEALS—AFFIRMED
NO. 116,524—SEPTEMBER 6, 2019

FACTS: Howling was convicted of aggravated criminal sodomy. On appeal, he claimed district court erred in admitting a videotape of the forensic interview of the child victim, arguing this should have been treated as expert testimony. He also challenged sufficiency of the evidence supporting his conviction, citing the victim's inconsistent statements and caregivers' failure to observe any injury for more than 24 hours while the child was in their care. Court of Appeals affirmed in unpublished opinion, finding a video of a forensic interview is not expert testimony, and the evidence was relevant and admissible. It further found sufficient evidence supported the aggravated criminal sodomy conviction. Howling's petition for review on both issues granted.

ISSUES: (1) Evidence—forensic interview of child; (2) sufficiency of the evidence

HELD: Trial court did not err in admitting the interview. As explained in State v. Ballou, 310 Kan. __ (decided this same day), a forensic interview standing alone is not expert testimony. K.S.A. 2018 Supp. 60-456(b) does not provide a basis for excluding a forensic interview of an alleged child sexual abuse victim that does not include opinions or other testimony based on scientific, technical, or other specialized knowledge. Whether to adopt a taint hearing process in Kansas is not considered. No separate taint hearing was required in this case where district court performed its gatekeeping function to consider the reliability of the child's statements resulting from the forensic interview.

Under facts in this case, sufficient evidence supported Howling's aggravated criminal sodomy conviction.

STATE: K.S.A. 2018 Supp. 60-456, -456(b)

CONSTITUTIONAL LAW—CRIMINAL LAW—CRIMINAL PROCEDURE—JURY INSTRUCTIONS—SENTENCES
STATE V. PEREZ-MEDINA
FORD DISTRICT COURT—AFFIRMED
COURT OF APPEALS—AFFIRMED
NO. 114,589—SEPTEMBER 6, 2019

FACTS: A jury convicted Perez-Median as charged of aggravated battery for knowingly causing great bodily harm or disfigurement by using a knife to cut victim's face. District court refused to give any recklessness-based lesser included crime instructions because evidence justified knowing rather than reckless actions. Sentence included registration under Kansas Offender Registration Act (KORA) based on sentencing court's finding that a deadly weapon was used. Perez-Median appealed, claiming in part the jury should have been instructed on reckless aggravated battery. He also claimed the sentencing court's finding of a deadly weapon to impose KORA registration violated Apprendi. Court of appeals affirmed in unpublished opinion, finding no clear error was shown by omission of instructions on lesser included crimes where such instructions were legally but not factually appropriate. Review granted on jury instruction challenge, and on challenge to KORA registration.

ISSUES: (1) Jury instructions; (2) KORA registration

HELD: Clear error standard does not apply because Perez-Median adequately preserved this issue for appellate review. Even assuming district court erred in refusing to instruct on reckless aggravated battery offenses, the error is not reversible because no evidence supported a reckless act by the defendant.

Perez-Median must register as a violent offender. He provided no evidence or argument to establish the punitive effects of registration under KORA. Under State v. Petersen-Beard, 304 Kan 192, cert. denied 138 S.Ct. 2673 (2018), the registration requirement is upheld by an equally-divided court of six justices.

CONCURRENCE AND DISSENT (Johnson, J.)(joined by Beier and Rosen, JJ.): Agrees with majority's handling of the lesser included offenses, but would vacate the registration requirement. He continues his vigorous dissent on majority's holding that KORA registration is not punishment.


APPEALS—APPELLATE PROCEDURE—ATTORNEY AND CLIENT—CRIMINAL LAW—CRIMINAL PROCEDURE—JURY INSTRUCTIONS—SENTENCES—STATUTES
STATE V. TOOTHMAN
SALINE DISTRICT COURT—AFFIRMED;
COURT OF APPEALS—AFFIRMED IN PART AND REVERSED IN PART
NO. 114,944—SEPTEMBER 6, 2019

FACTS: A jury convicted Toothman of seven sex crimes for
rape and sodomy of the victim over a two year period. District
court imposed sentences for primary offenses of aggravated
criminal sodomy and rape, and set aside convictions on alter-
native charges of criminal sodomy, aggravated indecent liber-
ties with a child, and aggravated incest. Toothman appealed
claiming district court: (1) committed clear error by failing to
instruct jury that criminal sodomy is a lesser included crime
of aggravated criminal sodomy; (2) abused its discretion by
failing to adequately inquire about a potential conflict be-
tween Toothman and his trial counsel before sentencing; and
(3) committed clear error by instructing jury that its verdict
“must be founded entirely upon the evidence admitted and
the law as given in these instructions.” In unpublished opin-
ion on summary calendar, court of appeals sua sponte reversed
two convictions and remanded with directions to resentence
Toothman for aggravated incest as the more specific crime be-
cause Toothman had a familial relationship with the victim.
Review granted on Toothman’s petition and on State’s cross-
petition from panel’s reversal of the two convictions with re-
instatement of lesser alternative counts of aggravated incest in
their place.

ISSUES: (1) Panel’s sua sponte reversal of convictions; (2)
jury instructions—criminal sodomy; (3) defendant’s dissatis-
faction with attorney; (4) jury instruction—verdict

HELD: Court of appeals panel ignored cautionary direc-
tive that when an appellate court raises an issue sua sponte,
counsel for all parties should be afforded a fair opportunity
to brief the new issue to present their positions to the ap-
pellate court before the issue is finally decided. Here, panel
erred when it sua sponte reversed Toothman’s convictions for
aggravated criminal sodomy and rape by relying on caselaw
and statute at issue prior to Legislature’s 1993 change of ag-
gravated incest statute to effectively overrule State v. Williams,
250 Kan. 730 (1992). Aggravated incest, as now defined, is
not a more specific crime than aggravated criminal sodomy or
rape. Panel is reversed on this ground. Toothman’s convictions
for aggravated criminal sodomy and rape are affirmed.

District court did not err in listing criminal sodomy as an
alternative offense to aggravated criminal sodomy, rather than
as a lesser included offense as Toothman requested.

No dispute that the letter Toothman submitted the day of
sentencing triggered the district court’s duty to inquire, but
under facts in this case, district court adequately inquired into
Toothman’s dissatisfaction with his attorney.

Jury instruction challenged in this case is identical to that
challenged in State v. Boothby, 310 Kan. ___ (decided this same
day). Following Boothby, the instruction is legally correct, and a
district court does not err when it tells a jury to follow the law.

STATUTES: K.S.A. 2018 Supp. 21-5109(b), -5604(b)(2)
(A), 22-3414(3); K.S.A. 2011 Supp. 21-5503(a)(1)(A), -5504(a)
Supp. 21-3501(4), -3503; K.S.A. 21-3107(2), -3107(2)(b);
K.S.A. 21-3603, -3603(2)(a) (Ensley 1988); K.S.A. 21-3603(1)
(Ensley 1981); K.S.A. 21-3603(1) (Weeks 1974); K.S.
NAME CHANGES
IN RE PETITION OF CLARK
NORTON DISTRICT COURT—REVERSED
AND REMANDED
NO. 121,034—SEPTEMBER 6, 2019

FACTS: While serving a sentence at the Norton Correctional Facility, Clark filed a petition to change his last name. He wanted to re-take the name of his biological father to carry on that legacy. After a phone conference, the district court denied Clark’s petition, finding that the name change was precluded due to Clark’s status as an inmate. Clark appealed.

ISSUE: (1) Ability to change name while incarcerated

HELD: Name changes are governed by statute. Petitioners need not provide a compelling reason for the change, as long as the judge is satisfied as to the truth of the allegations made in the petition. There is no regulation or statute which would bar an inmate from obtaining a name change. Regulations do require that the inmate continue to respond to the name that was used at the time of conviction, and records will continue to reflect the original name. But nothing precludes the actual name change. Further, there is no requirement that a petitioning inmate show a compelling reason for the name change.

STATUTES: K.S.A. 2018 Supp. 22-4903, -4905(i), 23-2506, -2716; K.S.A. 60-1401, -1402(a), -1402(b), -1402(c), 77-425

APPEALS—CRIMINAL PROCEDURE—SENTENCES—STATUTES
STATE V. CHARDON
DOUGLAS DISTRICT COURT—REVERSED
NO. 119,464—AUGUST 23, 2019

FACTS: Chardon stipulated to violating terms of his probation, and was held in jail for 65 days awaiting disposition hearing. District court imposed 60-day jail sanction and extended probation for 12 months. District court refused Chardon’s request to credit the 65 days awaiting disposition toward the 60-day sanction, and instead ordered the sanction to begin from date of disposition with the 65 days credited toward the underlying sentence. Chardon appealed.
ISSUES: (1) Mootness; (2) jail sanction for probation violation

HELD: Chardon’s sentencing claim is moot because he had already served the 60-day sanction, but issue is considered because the question is capable of repetition and is of public interest.

Rule of lenity applies. Following State v. Petz, 27 Kan. App. 2d 805 (2007), and considering how the Kansas Legislature created the 60-day sanction, Chardon should have received credit for the 65 days served awaiting disposition of a probation violation.


CRIMINAL LAW—EVIDENCE—MOTIONS—STATUTES

STATE V. JUSTICE-PUETT
RILEY COUNTY DISTRICT COURT—REVERSED AND SENTENCE VACATED
NO. 119,697—SEPTEMBER 13, 2019

FACTS: Justice-Puett appealed her jury conviction for possession of a theft detection device remover. Citing the lack of evidence identifying what she had used to cut a security detection device from two phones, she argued in part that K.S.A. 2018 Supp. 21-5805(c) only prohibits possession of either a tool or device specifically designed to remove or defeat theft detection devices on merchandise.

ISSUE: K.S.A. 2018 Supp. 21-5805(c)

HELD: K.S.A. 2018 Supp. 21-5805(c) is interpreted as issue of first impression. The statute is plain and unambiguous. State’s argument that statute prohibits possessing any kind of tool or device capable of removing a theft detection device is rejected. Instead, when words of K.S.A. 2018 Supp. 21-5805(c) only prohibits possession of either a tool or device specifically designed to remove or defeat theft detection devices on merchandise.

ISSUE: K.S.A. 2018 Supp. 21-5805(c)

HELD: K.S.A. 2018 Supp. 21-5805(c) is interpreted as issue of first impression. The statute is plain and unambiguous. State’s argument that statute prohibits possessing any kind of tool or device capable of removing a theft detection device is rejected. Instead, when words of K.S.A. 2018 Supp. 21-5805(c) only prohibits possession of either a tool or device specifically designed to remove or defeat theft detection devices on merchandise. Viewing evidence in light most favorable to the State, no rational fact-finder could have found Justice-Puett guilty of possessing a tool or device designed to allow the removal of any theft detection device. Without evidence of what tool she may have used, the burden of proof regarding the intentional design element is not met. Defendant’s motion for judgment of acquittal should have been granted.

STATUTE: K.S.A. 2018 Supp. 21-5805(c)

OIL AND GAS UNITIZATION
LARIO OIL & GAS COMPANY V. KANSAS CORPORATION COMMISSION
SCOTT DISTRICT COURT—AFFIRMED
NO. 120,121—AUGUST 23, 2019

FACTS: Lario owns and operates working interests in several wells. Lario applied to the KCC for unitization and unit operations for one unit. Most of the working interest and royalty holders approved of unitization, but some did not, and they filed a protest to the application. After hearing extensive witness testimony, the KCC denied Lario’s application to unitize. The KCC specifically found that Lario did not meet its burden to show that the proposed unit constituted a single-pressure system. Lario appealed to the district court, which affirmed the KCC, finding substantial competent evidence in the record to support the KCC’s finding that Lario failed to establish a single-pressure system. Lario appealed.

ISSUES: (1) Whether the KCC misapplied the law; (2) existence of substantial competent evidence to support unitization; (3) whether KCC orders are arbitrary and capricious

HELD: The KCC did not improperly require full communication between pressure systems. It properly interpreted and applied the statutes when denying Lario’s application. The witnesses who testified against unitization had experience and expertise on which the KCC could have relied. The KCC properly considered all of the evidence and weighed it when making a decision. The KCC’s decision was not arbitrary or capricious.

STATUTES: K.S.A. 2018 Supp. 77-621(c)(8), -621(d); K.S.A. 55-1302, -1302(b), -1304(a)(1), -1304(a)(2).
Appellate Practice Reminders
From the Appellate Court Clerk's Office


For those starting their law career or even unfamiliar with appellate practice, the best advice ever is to utilize those resources that are literally at your fingertips. On the Kansas Judicial Branch website (www.kscourts.org) are two of the most comprehensive appellate practice resources that can answer almost any question about the appellate universe.

The Kansas Appellate Practice Handbook contains information, guidance and practice notes on every aspect of appellate practice in Kansas. One of the best items in the Handbook is a comprehensive set of forms for appellate court pleadings. Don’t reinvent the wheel—just get in the car and drive!! Under the guidance of the Hon. Stephen D. Hill and the assistance of the Kansas Judicial Council, in early 2019 the Handbook was revised and updated from front to back. An incredible committee of practitioners and court personnel created one of the best appellate practice manuals you will find.

Of no less importance is the Appellate Procedure Outline created and maintained by the world-famous Office of the Clerk of Appellate Courts. We update the outline annually to keep practitioners apprised of changes in Kansas Supreme Court Rules. This outline is a good resource for the applicability of specific Kansas Supreme Court Rules from the start to the end of an appeal. Again, there are sample forms that provide some best practice examples of many of the documents.

Using your available resources will make you look like a pro. And don’t forget that the Clerk’s Office is always here to assist you—just gives us a call. We won’t tell you what course of action to take, how to do your job, or how the Appellate Courts will apply the rules to your specific situation, but we’ll probably direct you to the applicable rules that may help answer your questions.

For questions about these or other appellate procedures and practices,
Call the Office of the Clerk of the Appellate Courts, (785) 296-3229
Douglas T. Shima, Clerk.
### The Journal of the Kansas Bar Association

#### Table of Contents

1. Publication Title: The Journal of the Kansas Bar Association
2. Publication Number: 474
3. Filing Date: 09/11/19

#### Extent and Nature of Circulation

<table>
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<th>Issue Published</th>
<th>No. Copies of Single Issue</th>
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<td>09/2018</td>
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#### Issuance Information

- Volume Number: 474
- Number of Pages: 0
- Date of Issue: 09/11/19

#### Other Information

- Contact Person: Patti Van Slyke, KBA, 1200 Harrison St., Topeka, KS 66612
- Telephone: 785-234-5696
- Fax Number: 785-234-5696

#### Payment Information

- Annual Subscription Price: $25/members, $45/nonmembers
- Payment Method: Mailed In-County Paid Subscriptions Stated on PS Form 3541
- Total Paid Distribution: 5,295
- Percent Paid: 40
- Total Distribution: 5,482
- Copies not Distributed: 0
- Total Free or Nominal Rate Distribution: 5,518
- Percent Paid: 35
- Total Free or Nominal Rate Copies Mailed at Other Classes Through the USPS: 5,295
- Total Distribution: 5,482

#### Publisher Information

- Complete Mailing Address: 1200 SW Harrison St., Topeka, KS 66612
- Publisher: Kansas Bar Association
- Managing Editor: Patti Van Slyke
- Editor: Meg Wickham
- Managing Editor: Patti Van Slyke

#### Subscription Information

- Issue Frequency: Monthly; July/August and November/December combined
- Number of Issues Published Annually: 12
- Annual Subscription Price: $25/members, $45/nonmembers

#### Issuance Information

- Volume Number: 474
- Number of Pages: 0
- Date of Issue: 09/11/19

#### Payment Information

- Annual Subscription Price: $25/members, $45/nonmembers

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- Volume Number: 474
- Number of Pages: 0
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- Annual Subscription Price: $25/members, $45/nonmembers
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No. Copies of Single Issue Published Nearest to Filing Date

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October 2019
Kansas Bar Association Director of Communications and Membership Services Meg Wickham 9/11/19

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Attorney Position Available. Young, Bogle, McCausland, Wells & Blanchard, a downtown Wichita law firm seeks associate or lateral hire. At least three years’ experience in civil litigation/general practice and must be admitted to the Kansas Bar. Equal opportunity employer. Competitive benefits, including health insurance. Email resume, introductory letter, writing sample, and salary requirements to Paul McCausland, p.mccausland@youngboglelaw.com.

Crow & Associates, Leavenworth. We are expanding our 4-lawyer firm. Opportunity for attorneys in family law, personal injury or estate/probate. Send email to Mike Crow at mkcrow@crowlegal.com or call (913) 682-0166.

Evans & Dixon, LLC seeks to hire an attorney with strong transactional expertise for our Overland Park office. We offer a rewarding work environment with a commitment to creating long-term relationships with our clients by providing excellent service. Email cover letter and resume to lhaufl-vitale@evans-dixon.com

Overland Park/Corporate Woods Law Firm. Jones & McCoy, PA. seeking experienced associate attorney with 3+ years of civil litigation experience in business, estates and trust, family law, personal injury and other civil matters. Must have Kansas and Missouri licenses. Great opportunity for the right person to learn and grow their practice. Please send cover letter and resume to brant@jones-mccoy.com.

Part-Time Legal Assistant. A private law firm in Topeka has an immediate opening for a qualified Legal Assistant. Responsibilities include scheduling, answering phone calls, document organization, basic drafting and filing, and general administrative work. This position is flexible and would work 15-40 hours per week. Email resume to bascolaw.com or via fax (785) 233-2384.

Wanted. Lawyer with a minimum of 3 years’ experience in estate and business law with a desire to become the owner of a central Kansas firm that has a very predictable gross revenue. The firm limits its practice to estate planning, probate, trust settlement and business planning. Please send your resume to kslawyerrecruit2019@gmail.com.

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Workers Compensation Administrative Law Judge. The Kansas Department of Labor is accepting applications for a Workers Compensation Administrative Law Judge position in Topeka. Applicants are required to be an attorney regularly admitted to practice law in the State of Kansas, have at least 3 years’ experience as an attorney and must have at least one year of experience practicing law in the area of workers compensation. To apply, please go to www.jobs.ks.gov Job ID Number 193714.

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


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

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Social Security Disability Services. Your clients that are dealing with serious injuries or illness may have a claim for Social Security disability. We have lots of experience, get good results, and are ready to help and to augment your reputation. If you have questions, let’s talk. Our practice is limited to Social Security disability. We can travel anywhere in Kansas, Missouri, Nebraska or Colorado. Contact: Pat Donahue at Western Law (785) 832-8521 or phd@wpa-legal.org.

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

Office Space Available

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

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Manhattan Office Space for Rent. Located in the Colony Square office building in downtown Manhattan. One minute from the Riley County Courthouse. The available space consists of two offices and an area for a secretary/paralegal. Large reception area and kitchen. High speed internet. Open to either office sharing or “Of Counsel” arrangement. For more information, all 785-539-9300 or email to office@jrklaw.com

Office Space Available on Ward Parkway in south Kansas City, Missouri. This is a great location for attorneys licensed in MO & KS. Large suite with 12 offices with two conference rooms. There are 3 available offices. Full services provided, including phones answered, internet, supplies, and copier. Contact Kevin Hoop at 816-519-9600 or k hoop@kevinhooplaw.com.

Office for Lease, Corporate Woods. Approximately 300 sf office space available within a working law firm. Convenient location to meet with clients, with access to conference rooms and kitchen. Comes with all the amenities of a working law firm; witnesses, notaries, fax/copy machine, internet, phone, etc. On the top floor of a building with a fantastic view. Please contact Tim Winkler at 913-890-4428 or tim@kcelderlaw.com.

Ottawa, KS Office Space for Rent - 950 sq. ft. for business office. Reception area, conference room, 4 private rooms, loft area for storage, kitchenette, back storage area, restroom. $600/month Please call (785) 893-0494 for more information. The location is 110 W 3rd St, Ottawa, Kansas. Pictures available upon request.

Overland Park- Offices for Rent. Law offices located in Old Downtown Overland Park, in remodeled historic building. Includes: free parking, reception area, kitchen, conference room, fax, scanner, copier, phones, voicemail, and high speed internet access. The offices are in walking distance of coffee shops, restaurants and retail stores. More than fifteen highly respected attorneys in an office-sharing/networking arrangement. For more information contact James Shetlar at 913-648-3220.

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

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

WYCO Office Suite Available at 134 N. Nettleton, Bonner Springs, KS 66012. 1100-2000 sf. Waiting area, receptionist area, break room, conference room, large and small offices, private parking, ADA Accessible. 1.25/sf/mo. Utilities included. For more information, call (913) 422-1620.

Other

Due to retirement, will sell complete set of Kansas Reports and Kansas Appellate Reports. Price negotiable. Will deliver in KC area. Call 620-215-0236 or email: danielmeera22@gmail.com

One of a kind walnut 4x8 conference table/desk/Board of Directors table. Four drawers each side and embossed leather top. Priced to sell $575 by retiring lawyer. Topeka location. 785.766.2084.

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