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IOWA DEFENSE COUNSEL ASSOCIATION

DEFENSE UPDATE

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As this issue of the *Defense Update* goes to press, the Iowa Legislature is considering changing the way in which persons who serve on judicial nominating commissions are chosen and how candidates for some judicial offices in the state are selected. The Board of Editors thought it would be appropriate to devote much of this issue to, first, an explanation of the changes that the legislature is contemplating and, second, a presentation of articles discussing why the proposed changes are detrimental to a selection system that has served Iowans quite well for over 50 years. While we seriously doubt that our publication of these articles will ultimately change the vote of any legislator, we at least want to go on record publically as opposing the proposed changes. If you share our concern for protecting our current system, we encourage you to share this information with others and contact your elected representatives to voice your concerns.

Analysis of House File 503* Prepared February 22, 2019

• Section 1—Appointments by the Governor—Statewide Nominating Commission

• Current Law

- Governor appoints 8
- Subject to Senate confirmation
- Chosen without reference to party affiliation
- Gender and geographically balanced
- Does not matter profession of the appointees

- 6-year terms
- Silent regarding number of candidates sent to Governor—the number (which is 3) is provided for in the Constitution
- Can serve no more than one full 6-year term

• The Proposed Legislation

- Governor appoints 8
- Not subject to Senate Confirmation
- Chosen without reference to party affiliation

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WHAT'S INSIDE

Analysis of House File 503* Prepared February 22, 2019 1
 Maintain Iowa's Judicial Selection System 6
 Iowa's Merit Selection of Judges Works 7
 Best Practices for Judicial Selection 8
 Iowa Business Court Rule Amendment Provides a Process to
 Get Unwilling Participants into Business Court 9
 New Lawyer Profile 10
 IDCA Annual Meetings 11



- Gender and geographically balanced
 - At least half attorneys
 - Cannot be an executive office holder
 - 6-year terms but can serve a partial and a full 6
 - There must be at least one commissioner from each congressional district
 - No more than two commissioners from each congressional district unless there are two in each district
 - Silent regarding number of candidates sent to Governor—the number (which is 3) is provided for in the Constitution
 - Can serve no more than one full 6-year term
- **Section 2—Appointment of State Judicial Nominating Commissioner by Supreme Court**
 - **Current Law**
 - There is no current law
 - **The Proposed Legislation**
 - Supreme Court by majority vote shall appoint one eligible elector to the state judicial nominating commission
 - Term of six years
 - Chosen without reference to party affiliation
 - Court shall give due consideration to area representation when making an appointment
 - May only serve one full 6-year term
 - Cannot be an executive office holder
- **Section 3—Appointment by the Legislature—Statewide Nominating Commission**
 - **Current Law**
 - Elected by licensed attorneys—8
 - Gender balanced
 - Without consideration of party
 - Gender and geographically balanced
 - All lawyers
 - **The Proposed Legislation**
 - Appointed by legislative leaders—8
 - Two appointed (one of each sex) by each of the following:
 - Speaker
 - House Minority Leader
 - Senate Majority Leader
 - House Minority Leader
 - One of the two appointed by each legislator must be a licensed Iowa attorney
- Each leader must appoint from two congressional districts
 - Cannot be an executive office holder
 - Can serve no more than one full 6-year term
 - Chosen without reference to party affiliation
 - Gender balanced and staggered terms based on structure in Section 4 - (46.2A)
- **Section 4—Special Appointments/Start dates**
 - Terminates the terms of all currently elected and appointed members of the state judicial nominating commission at 11:59 PM on the effective date and none shall holdover
 - New commissioner terms beginning at midnight the following day
 - Staggered length of terms depending on who appoints and where located
 - New commissioners must be appointed after the expiration of the original terms in this section
 - Language on commission addressing vacancy at time of effective date
 - May extend the nomination process or start over
- **Section 5—Appointments by Governor—District Judicial Nominating Commissions**
 - **Current Law**
 - Governor appoints 5 for each district
 - Six-year terms
 - Gender Balanced
 - Without reference to political party
 - No more than one per county, with exceptions
 - Silent regarding number of candidates sent to Governor—the number (which is 2) is provided in Constitution
 - **The Proposed Legislation**
 - Governor appoints 4 for each district
 - Six-year terms
 - Gender Balanced
 - Without reference to political party
 - No more than one per county, with exceptions
 - Cannot be an executive office holder
 - 6-year terms but can serve a partial and a full 6
 - Silent regarding number of candidates sent to Governor—the number (which is 2) is provided in Constitution
 - Terms commence February 1 of even-numbered years
- **Section 6—Appointment of district judicial nominating commissioner by supreme court**
 - **Current Law**
 - There is no current law

- **The Proposed Legislation**
 - Supreme Court by majority vote shall appoint one eligible elector to the state judicial nominating commission
 - Term of six years
 - Chosen without reference to party affiliation
 - Court shall give due consideration to area representation when making an appointment
 - May only serve one full 6-year term
 - Cannot be an executive office holder
- **Section 7—amending existing code section 46.4 by adding a new subsection**
 - New subsection on election of district judicial nominating commissioners
 - May serve only one full 6-year term
- **Section 8—Special Appointments/start dates and genders for district nominating commissions**
- **Section 9—Vacancies and Resignations**
 - All are filled by the same appointing authority that appointed the previous commissioner
 - Removes Senate confirmation language and makes conforming changes on appointment entity
 - Provides that a commissioner is deemed to have resigned if they fail to attend a properly noticed meeting that conducted interviews or selects a nominee
 - The appointing authority had the discretion to accept or reject such resignation
 - A special election shall be called to fill an elected position if the term has more than 90 days remaining. Special election shall be called within 90 days
 - If the vacancy is the chair, the commission members shall elect a new chair as provided in 46.6
 - Members shall not hold over until their successor is elected and qualified
- **Section 10—Chairperson**
 - **Current Law**
 - The chair is the senior judge
 - **The Proposed Legislation**
 - Commissioners shall elect a chair from their own members
 - Two-year term expires January 31 of odd-numbered years
 - May be reelected to a second or third term
 - Notify Governor and commissioners if want to step down as chair
 - Commissioners shall elect a new chair
- **Section 11—Eligibility to Vote**
 - **Current Law**
 - Contains language on congressional district residency
 - Address is based on most recent CLE filing
 - **Proposed Changes**
 - Removed congressional district residency as it is not relevant after removal of election of state judicial nominating commissioners
 - Address is based on residency of home address on CLE and client security documents or bar admission records
- **Section 12—Certified List**
 - Changes current law to require the state court administrator to maintain a list instead of certifying a list of names. Makes change to remove state list
- **Section 13—Conduct of Elections**
 - Adds the following to current 46.9
 - Election results, including the number of votes cast for each elector and the total number of members of the bar eligible to over in the election
 - Shall be made publicly available on the judicial branch website
 - Shall be reported to the Governor and the General Assembly within 10 days of the conclusion of the election
- **Section 14—Notice Preceding Nomination of Elective District Judicial Nominating Commissioners.**
 - Updates the section based on ending statewide
 - Adds notice requirements on vacancy, nominations, and elections
 - Require the judicial branch website to have information on same
 - Mandates that the election shall not commence until at least 30 days post notice
- **Section 15—Nomination of elective District Judicial Nominating Commissioners**
 - Changes current law on needing 10 signatures from resident members of the bar to 10 signatures from “eligible electors”
 - Removes restriction that bar members can only sign as many petitions as there are commissioners to be elected
 - Adds that the electronic voting format must provide for a voter to write in the name of an eligible elector
 - FYI—46.25 provides: “As used in this chapter, the term “eligible elector” has the meaning assigned that term by section 39.3”

- FYI—39.3 provides: “Eligible elector” means a person who possesses all of the qualifications necessary to entitle the person to be registered to vote, whether or not the person is in fact so registered
- **Section 16—Certification of Commissioners**
 - Corrective changes based on new appointment procedures
- **Section 17—Call for meeting of commission**
 - When a vacancy occur in the supreme court, court of appeals, or district court the commissioner of elections shall alert the Governor (formerly the chair of the nominating commission was notified)
 - The Governor shall call a meeting of the judicial nominating commission
 - If Governor does not call, then the Chief Justice shall
- **Section 18—Notice of meetings and application process**
 - Five-day notice of meetings of commissions—same a current
 - Judicial branch is tasked with supporting commissions in publishing items on the judicial branch website
 - Two weeks minimum posting on website of commission accepting applications for vacancy
 - Post on website copies of non-confidential application materials submitted by applicants
 - Post schedule of applicant interviews
 - Post list of nominees submitted by the commission to Governor and Chief Justice
 - Affirmatively states that commissioners may conduct individual interview with applicants in advance of commission meetings
 - Requires the state judicial nominating commission to adopted uniform rule for both state and district commissions. They must have 30 days of public comment. Rules must be adopted within 6 months of the effective date
- **Section 19—Intra Judicial District Residency & notification by commission to Governor and Chief Justice of nominees**
 - **Current Law**
 - Applicants must reside in their judicial district to apply for a vacancy
 - Notice to Governor and Chief Justice can be done via snail mail
 - **The Proposed Legislation**
 - Intra judicial district residency allowed
 - Notice must be done by electronic mail
- **Section 20—Court of Appeals—nominees**
 - Changes number of nominees submitted by a commission from 3 to 5
- **Section 21**
 - District court judge must live in judicial election district before assuming and for the entire term of office
- **Section 22—Severability and Judicial Review**
 - General severability provision
 - Commissioners serving at the time the act may be found invalid will continue to serve for their current term
 - The commissioner’s office shall not be filled at the expiration of their terms
 - If any provision is preliminarily enjoined, no commission shall meet to nominate judges
- **Section 23—Repeals 302.11111 - Judicial nominating commissions for election districts 5A and 5C.**
- **Section 24—items in this division are effective on enactment.**
 - All current commissioners will be terminated at 1159 the day it is signed
- **Section 25—Associate Judge Selection**
 - Allows the Chief Justice to hold open, for budgetary reasons, notification to a judicial nominating commission of a vacancy in a district associate judge, associate juvenile judge, or associate probate judge
- **Sections 26 and 27**
 - Conforming changes inserting notice to chair of district judicial nominating commission of a substitution of a DAJ in lieu of magistrate or the converse
- **Section 28—District Associate Judges**
 - **Current law**—district associate judges are appointed by the district judges of the judicial election district
 - **The Proposed Legislation**—appointed and replaced by the Governor from persons nominated by the district nominating commission in same manner as district judges. Positions cannot be held open. The commissions must be called within 10 days of notice to Governor from commissioner of elections



- **Section 29**
 - Opens District Associate Judges to intra district residency before appointment
- **Section 30**
 - Removes the prohibition that a member of the magistrate nominating commission cannot be nominated or appointed to district associate judge, associate juvenile judge, or associate probate judge
- **Section 31—Same as Section 28 but for full time Associate Juvenile Judges**
- **Section 32—Opens Associate Juvenile Judges to intradistrict residency before appointment**
- **Section 33—Same as Section 28 but for full-time Probate Judges**
- **Section 34—Opens Probate Judges to intradistrict residency before appointment**
- **Section 35—Effective on enactment**
- **Section 36—Selection of Chief Justice**
 - **Current Law**
 - Court selects and chief holds position for term of their office
 - **The Proposed Legislation**
 - First meeting of each odd-numbered year, the court designates a chief
- **Section 37—Transition Provisions**
 - Current chief stays until first meeting in January of 2021. Then election by court

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Maintain Iowa's Judicial Selection System

By Rachel Paine Caufield, Ph.D., Drake University, Des Moines, Iowa

American democracy depends on fair courts. Our courts function to guarantee equal justice and serve as an important check on politicians in the executive and legislative branches. We must safeguard Iowa's courts by resisting efforts to inject politics into the judicial selection process. When politics drives the selection of judges, our courts lose their impartiality.

In states that elect judges, like Illinois, political parties or interest groups choose and fund candidates. Sometimes it's Democrats vs. Republicans. More often, it's unions, trial lawyers, environmental groups, and civil rights groups on one side, corporations, gun manufacturers, and certain religious organizations on another side. Voters choose between two extremes. Candidates make promises about how they'll rule before ever seeing the facts of a case. That is not a fair and impartial justice system.

The federal system is broken, and getting worse. When an executive—a president or governor—is given the power to unilaterally choose nominees to the court, we end up with judges whose first qualification is their loyalty to a specific ideology. It's led to a game of political chicken between Republicans and Democrats over recent nominees to the U.S. Supreme Court, like Judge Garland and Justice Kavanaugh.

Iowa does judicial selection better. A non-partisan commission evaluates applicants and selects the most qualified, sending a list to the governor, who makes the final choice. It's called merit selection because it puts fairness, impartiality, and qualifications ahead of politics.

Iowa's merit selection system ensures accountability and transparency. While judges are nominated by a commission and chosen by the governor, voters have the final say. In 2010, three Iowa Supreme Court justices were removed in a retention election. While many may doubt the wisdom of that result, no one can claim that voters lack a voice. And the process is transparent. When the statewide nominating commission vets applicants for a vacancy on the Iowa Supreme Court, all applications and interviews are available online, and remain online after the appointment is made.

I offer no claim that Iowa's system is perfect, but Iowa's courts are regularly ranked as among the best in the country.

Recently, Iowa politicians have complained about Iowa's process, claiming it gives too much power to the Iowa State Bar Association. It doesn't.

In fact, the bar association has no role or power in the merit selection system. Iowa's system provides that applicants are thoroughly evaluated by non-lawyer representatives appointed by the governor, as well as legal professionals selected by their peers in their communities. Twenty-two states use some form of this system. It produces well-qualified judges, it keeps political motivations at bay, and it's proven to work better than all known alternatives.

Following the 2010 elections, activists spent two legislative sessions trying, unsuccessfully, to dismantle merit selection in Iowa. Sen. Chuck Grassley was a state lawmaker when Iowa's merit selection system was established. In 2012, he stepped in to remind Iowans of the bigger picture: "I'm the guy who voted in 1959 and 1961 for (Iowa's) present way of selecting judges . . . it was a very forward-looking thing to do what we did 50 years ago."

Iowa has been lucky to hold on to this system since 1962. It hasn't been easy. It has required legislative leaders who resist the pressures of extremists at either end of the political spectrum.

In other states, and at the federal level, the judicial selection process puts politics first. Not in Iowa. Let's keep it that way.

Rachel Paine Caufield, Ph.D., is a professor of political science at Drake University, an advisor to the Justice Not Politics coalition in Iowa, and spent 10 years examining state judicial selection methods as a Research Fellow with The American Judicature Society.

Iowa's Merit Selection of Judges Works

By Guy Cook

Governor Kim Reynolds made her first appointment to the Iowa Supreme Court last August by selecting Susan Christensen, a district court judge from western Iowa. Christensen replaced retiring Justice Bruce Zager.

More than half a century ago, Iowans amended the Iowa constitution to remove elective politics from the selection of judges and adopted a non-partisan merit selection and retention process. Our merit system has produced some of the most qualified and impartial judges in the country. As a consequence, the Iowa judiciary has been recognized as producing fair and impartial decisions.

This is achieved through a non-partisan commission made up of an equal number of lawyers and non-lawyers. As the very name implies, merit selection is a system designed to produce high quality judges, based on merit, in lieu of the influence of politics.

Here, the State Judicial Nominating Commission acted with transparency and innovation by publishing the complete applications online and conducting public interviews of all the candidates, streamed live on the internet.

To suggest that lawyers have too great an influence in this process is unfounded and misguided. Removing the lawyer members of the commission would undermine the effectiveness of the focus on merit in selecting judges for consideration by the governor.

Critics who argue the merit selection system is undemocratic fail to recognize judicial independence, not democratic accountability, is the most important consideration in deciding how to select judges. Merit selection is not designed to be accountable to politicians, because a judge's role as a defender of the constitution requires the judge to be above politics.

As Alexander Hamilton said in the Federalist Papers, citizens "of every description" should value judicial independence "because no man can be sure that he may not be tomorrow the victim of a spirit of injustice."

Lawyers are not a special interest group on the nominating commission. Politics or party affiliation does not influence the search for the best candidate. Lawyers have only the common goal of ensuring judges are selected who are the best qualified, with the highest integrity, and the greatest temperament.

The would-be crusade and scripted efforts launched to weaken or scrap the merit selection process represents precisely what the system is designed to avoid, namely, special interests. Interest groups opposing merit selection share one thing in common. They believe contested judicial elections can work to their advantage.

We need not guess or speculate as to whether the present merit selection process has worked. We need only look at the historical data which shows the high quality of judges in Iowa since adopting the merit selection process and the gridlock and partisanship that takes place at the federal level in the selection of judges. Meddling with or abandoning the merit selection process would be a great step backwards.

Iowans can be proud of how judges are selected and appointed to the bench.

Guy R. Cook, is past president of the Iowa State Bar Association, the Polk County Bar Association, and a former member of the State Judicial Nominating Commission.

Best Practices for Judicial Selection

By Laila Robbins, Brennan Center for Justice at NYU School of Law

Judges are obligated to apply the law impartially, even when doing so is unpopular or frustrates those in power. But politicized judicial selection systems can undermine the independence of state supreme courts and the public trust that undergirds their legitimacy.

The dramatic increase in spending in state supreme court elections, used by 38 states as part of the process for selecting or reselecting state supreme court justices, is well documented. Multi-million-dollar judicial campaigns are becoming the norm: one-third of all elected state supreme court justices currently serving have run in a million-dollar race—even Iowa's once-quiet retention elections saw \$1.4 million in spending in 2010. In the 2015-16 election cycle, outside spending by interest groups—most of which was nontransparent—shattered previous records. When donors can be identified, they are often frequent players in state courts.

This spending can undermine the appearance and reality of the judiciary's ability to deliver impartial justice. One survey of state court judges revealed that 46 percent believed campaign contributions have some impact on judicial decisions, while another found that nearly 90 percent of voters believe campaign cash affects judicial decision making.

But appointment systems, even in states like Iowa that use commissions to vet and recommend candidates for appointment, are also vulnerable to political and special interest pressures. Governors and legislatures have often used judicial appointments, and appointments to judicial nominating commissions, to reward political insiders and donors.

The Brennan Center conducted a multi-year study of judicial selection methods to determine what systems for picking judges best promote fair and impartial justice while maintaining accountability. Ultimately, the Brennan Center recommends that states eliminate judicial elections and adopt a publicly accountable appointment process. Such an appointment process would include an independent nominating commission to evaluate judicial candidates on nonpolitical criteria and produce a binding short list of names. The governor should be empowered to make the final appointment decision from the commission's list.

Judicial nominating commissions can minimize political self-dealing and special interest influence. As legal historian Jed Shugerman has said, because “the governor and the parties

do not get the first crack at selecting judges,” a nominating commission adds a “thicker layer of insulation from the political parties with a new set of veto points.” An American Judicature Society study found that nominating commissions can reduce “arbitrary or politically motivated decision-making.” Another analysis found that states with nominating commissions were less likely to have justices linked to major political offices than appointment states without commissions.

But the details of a commission's structure and procedures are critical to its effectiveness and the public's trust in it. Too much control by political actors removes the insulation from politics and cronyism, while no political control over the ultimate appointment would leave the process unaccountable. Therefore, the Brennan Center recommends the following best practices for structuring and operating nominating commissions:

- The nominating commission should be bipartisan and of diverse membership, including non-lawyer citizen members. The power to appoint commissioners should be diffuse, with no single source or political party having majority control.
- The process for selecting commissioners should include concrete measures to encourage diversity among commissioners, such as requiring appointing authorities to consider race, gender, and other demographic factors. Commissioners should serve staggered terms to preserve institutional memory and prevent the formation of voting blocs.
- Nominating commissions should adopt measures to enable outsiders to meaningfully evaluate how well the commission is working, including a clear and open application process with standardized selection criteria, public interviews, and opportunity for public comment.
- The commission's vote should be public, to make it clear whether candidates have bipartisan support or if the commission has broken into factions. Commissioners should be regulated by ethics rules, and public data should be collected about the diversity of candidates at each stage of the process.

Politicized judicial selection processes can undermine the public's confidence in its courts and the judiciary's ability to mete out fair and impartial justice. Contemporary threats to these systems call for new reforms, but those reforms must be carefully crafted to ensure the independence and legitimacy of state courts.

Iowa Business Court Rule Amendment Provides a Process to Get Unwilling Participants into Business Court

By Susan M. Hess



Susan Hess

*This article is a summation of the information found at: <https://www.iowacourts.gov/iowa-courts/district-court/iowa-business-specialty-court/>

History of Business Specialty Court:

In February, 2016 after implementation of a pilot program for the Business Court, the Iowa Supreme Court adopted the business court as an ongoing component of the Iowa court system.

The purpose of the business court is to move business and complex commercial litigation cases through the court system more effectively. In order to meet the criteria for business court, the case must involve a claim for compensatory damages totaling \$200,000 or more or involve claims seeking primarily injunctive or declaratory relief. In addition, the case must also satisfy one or more of the following criteria:

- Arise from technology licensing agreements, including software and biotechnology licensing agreements, or any agreement involving the licensing of any intellectual property right, including patent rights.
- Relate to the internal affairs of businesses (i.e., corporations, limited liability companies, general partnerships, limited liability partnerships, sole proprietorships, professional associations, real estate investment trusts, and joint ventures), including the rights or obligations between or among business participants, or the liability or indemnity of business participants, officers, directors, managers, trustees, or partners, among themselves or to the business.
- Involve claims of breach of contract, fraud, misrepresentation, or statutory violations between businesses arising out of business transactions or relationships.
- Be a shareholder derivative or commercial class action.
- Arise from commercial bank transactions.
- Relate to trade secrets, non-competes, non-solicitation, or confidentiality agreements.
- Involve commercial real property disputes other than residential landlord-tenant disputes and foreclosures.
- Be a trade secrets, antitrust, or securities-related action.
- Involve business tort claims between or among two or more business entities or individuals as to their business or investment activities relating to contracts, transactions, or relationship between or among them.

At the time of implementation of the business specialty court, the process for getting the case before the specialty court required that *both* parties consent to the transfer of the case to the business court docket by agreement acknowledging that the case meets the above criteria.

Amendment: As of January 15, 2019, there are new rules that could impact litigants involved in cases that meet the criteria for entry into business court. According to a process outlined in the Amended Memorandum of Operation, *any* party may now move to transfer eligible cases by filing a Motion to Transfer Case to the Iowa Business Specialty Court with the district court where the case is filed. The filer must identify the status of the case, the names of any other parties joining the motion and other additional information for consideration by the chief judge. The chief judge of the judicial district in which the case is filed will then rule on the motion with or without hearing. In the event the motion is granted, the State Court administrator is notified and will assign one of the three business court judges to the case. Any party may move to transfer the case from the business court docket back to the regular court docket. The presiding business court judge rules, with or without a hearing, whether upon good showing by the movant and lack of unfair prejudice to any other party, the case should be transferred back to the regular docket. The decision is not subject to review or appeal.

Time Constraints: The motion to transfer must be filed within 120 days of the filing of the Petition, or within 30 days of the service of an amended petition that adds claims or new parties. A form for the Motion can be found at: https://www.iowacourts.gov/static/media/cms/Mot_392D3BA5AF96E.pdf

Conclusion: There are a myriad of reasons why it may or may not be in the best interest of your client to have their particular case be heard in the business court. In the event you are representing a litigant that meets the criteria for business court, you may find your case in business court despite your objection to the transfer. The amended rules permit an appeal of sorts to the assigned business court judge for the granting of a motion to transfer out and back to the regular docket, however, you must be prepared to show good cause and lack of unfair prejudice to any party.

New Lawyer Profile



MaKenna Stoakes

In every issue of *Defense Update*, we will highlight a new lawyer. In this issue, we get to know MaKenna Stoakes of Smith Peterson Law Firm, LLP, in Council Bluffs.

MaKenna Stoakes is an associate at Smith Peterson Law Firm, LLP in Council Bluffs, where she primarily practices civil defense litigation. She practices law in the state courts of Iowa and Nebraska and the United States District Court for

the District of Nebraska. Her varied litigation experience includes representation of a wide range of clients on a number of issues, including wrongful death, breach of contract, general negligence, and insurance coverage disputes.

MaKenna graduated Creighton Law School in 2015. While attending law school, MaKenna served on Creighton's competitive trial team and was honored as an Honorable Lyle E. Strom Scholar in Trial Advocacy. She also served as Lead Articles Editor for the *Creighton Law Review*, which published her Note on the Freedom of Information Act in 2014. MaKenna enjoys being active in her community and has volunteered with numerous organizations such as Optimist International, Law Explorers, and the Nebraska High School Mock Trial Project. MaKenna and her husband, Evan, reside in Council Bluffs with their two dogs.



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September 12–13, 2019

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September 12–13, 2019

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September 17–18, 2020

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September 17–18, 2020

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57th ANNUAL MEETING & SEMINAR

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