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The Dupree Brothers
Faith • Family • Service

The Dupree Brothers. Sounds like a great novel or a feature film. And it could be! The backstory of these two men is compelling and even historic. But make no mistake about it, neither of these dignified gentlemen has ever sought the spotlight, either in career or in this issue of The Journal. The gravitas with which Timothy and Mark Dupree carry themselves could be intimidating. Both are extremely accomplished professionally and personally; both are expressive and well spoken. But their humility, humor and genuine kindness readily offset their imposing stature and strength of personality.

Timothy Dupree (41) was elected in 2014 to serve as a district court judge for Wyandotte Co. Mark Dupree (35) was elected the District Attorney-elect in Nov. 2016. On Jan. 9th, 2017, Judge Timothy Dupree had the singular pleasure and honor of swearing-in his brother Mark as Wyandotte County District Attorney. The Duprees are the first brothers in history to be elected as a district court judge and a district attorney in the same county, and Mark is the first African-American elected to serve as a district attorney in the state of Kansas.

Tim and Mark were born in Wyandotte County to Alvin and Linda Dupree. The brothers grew up there, attending Kansas City, Kan. public schools. Tim and Mark, in turn, attended Kansas City Kansas Community College, received their undergraduate degrees from the University of Kansas and ultimately earned their law degrees from Washburn University in Topeka, Kan.

Their family did not have a lot of money. However, Tim says he remembers his father being a conscientious and hard worker who poured himself into whatever position he had, working tirelessly to support his wife and six children. Both men credit their parents with instilling in them a strong work ethic, and even more significantly, planting within them a deep Christian faith. The Duprees state unequivocally that their faith set their life paths, as they strove to follow the call they heard to serve their Lord and their fellow citizens.

Parents Alvin and Linda Dupree were pastors in their church, and Tim and Mark continue that tradition, serving as pastors in their home church. Visiting with them, one can hear clearly the traces of an evangelistic voice. When discussing family, profession, philosophy and faith, however, there is not a trace of hellfire or damnation. Their evangelism speaks in a firm, eloquent, positive voice. Both men very obviously love their community, its residents, and the law they swear to uphold.

The brothers suffered a sad loss in the fall of 2016 with the death of their mother, Linda. Both speak of her with great love, Tim saying, “Even though she never got to further her education and get a degree, she was smart. She was smarter than any of us!” Mark agreed, adding with a smile, “Yes, and she’d let you know that, too!”

Interestingly enough, Judge Dupree did not aspire to the bench from an early age. In fact some, including a high school guidance counselor, would have directed him toward learn-
ing a trade rather than pursuing a higher education. They saw only that he was a minority, from a family living below poverty level, dwelling in the inner city and attending public school. Timothy Dupree defied those odds and became a first generation college graduate, a source of pride and inspiration for all his family.

Once accepted to Washburn Law School, though, Tim immediately dreamed of becoming a criminal law judge. That dream came to fruition in Nov. 2014. After brother Mark was sworn in as district attorney, however, Tim had to be assigned only civil cases to avoid the appearance of any impropriety regarding cases prosecuted by the district attorney’s office. Tim feigned outrage at this turn of events, saying, “My baby brother wins an election, and I have to give up my dream!” Mark laughed and countered, “Tim will do a great job in civil court, even if it’s not his first choice.” Their affection for each other and pride in each other’s accomplishments are more than evident.

When he was only eight years old, out riding his bicycle, Mark Dupree saw his first dead body on the street. Even at that age, he felt keenly something had to change. He saw the legal system as an avenue for that needed change. Mark ran for office with a desire to focus on prosecution and prevention. He intends to focus on delivering justice equitably, proactively confronting violence and crime that affect the standard of living throughout the community. He plans to carry out the four-point platform on which he was elected: 1) smart prosecution; 2) community prosecutor’s unit; 3) fiscal responsibility; and 4) investment in youth.

Mark said simply, “Just because I can empathize with a person’s circumstances and challenges does not mean I can or would ever go easy on them. My responsibility is to the community that elected me, to treat all people equally, regardless of the neighborhood they grew up in.”

Tim Dupree married his high school sweetheart, Tamara Dupree; they have six children. Mark Dupree married his law school sweetheart and current law partner Shanelle Dupree; they have four children. Both families remain in Wyandotte Co., where their children have continued to attend public schools.

These good men, Tim and Mark Dupree, acquiesced to having this story run for only one reason, “…if our story can serve to inspire any person – regardless of race or economic status or any other factor. If you let faith lead you, you’ll go farther than you ever dreamed.”

The Dupree Brothers. A very compelling story, indeed.

The Duprees as young men, growing up in Wyandotte Co. Tim is standing at the far right. Mark is seated, at left. One can see the same spirit in these young faces as in the photo above!

About the Author

Patti Van Slyke took the reins of The Journal in late Oct. 2016. Her background includes nearly two decades on leadership staff in the Kansas Senate; desktop layout and design in the private sector, speechwriting and campaign material development in local, state and national elections; activities director for the chronically mentally ill, coffeehouse singer, and Montana cowgirl. Van Slyke is a graduate of Marymount College, with a BA in Speech and Drama.
Interested in hosting this event? Please contact: ldaugharthy@ksbar.org
In December, I attended the swearing in ceremony for Amy Hanley, recently appointed to the district court bench in Douglas County. Amy is a great attorney I got to know when we worked together in the attorney general’s office. Attorney General Derek Schmidt introduced Judge Hanley and covered her many accomplishments leading up to becoming a judge—a path on which Judge Hanley succeeded at every step.

With Judge Hanley’s appointment, five of Douglas County’s six judges—including its chief judge—are women. Perhaps it was because that statistic did not seem that remarkable that it felt like progress. But are women advancing broadly in the legal profession across our state? It can be hard to measure, and it depends where you look, and there is definitely work to be done.

In the Kansas judiciary, two out of seven Kansas Supreme Court Justices are women (29%), three out of fourteen court of appeals judges (21%), and two out of eight Kansas federal district court judges (25%). If you look at district judges in Kansas’ six largest counties, there is a mixed record: Johnson (26%), Sedgwick (7%), Shawnee (44%), Wyandotte (13%), Douglas (84%), and Leavenworth (0%). Leavenworth has excellent judges, including one of my law school classmates; however, the bench would benefit from a more diverse perspective. Judges are appointed or elected in Kansas, and there are a number of factors that bring a judge to the bench.

What about law professors? KU’s faculty is about 50% female and Washburn about 40%. In other practice areas it is difficult to find Kansas-specific data. In general, reports indicate women make up one-third of the profession but only about one-fifth of law firm partners and a little over 15% of equity partners in larger firms. Awareness of the representation is important so the legal profession can strive to improve diversity.

Johnson County added its first African-American judge, Rhonda Mason, in January—a significant milestone deserving recognition. Racial diversity in the Kansas legal profession, however, needs much more work. Law is reported to be the least diverse profession in the country.¹ There are diverse members of the judiciary, law professors, and law partners, but not in representative numbers. The numbers of racially and ethnically diverse lawyers practicing in Kansas is not great. What can be done?

The Kansas Bar Association has tried different approaches whether through its diversity committee or by working to fold diverse members into its Board of Governors—but there is a need for continued effort. At the most basic level, lawyers must be aware of structural and cultural bias and then work to ensure it does not explicitly or implicitly hold diverse attorneys back. A small step, but a start, is to ensure you are not contributing to the problem. Be aware of biases you have, acknowledge them, and eliminate them. This will be a small but significant step to creating a working atmosphere where all are welcome. Increased diversity has been difficult to achieve, but as Martin Luther King, Jr. explained: “Human progress is neither automatic nor inevitable . . . Every step toward the goal of justice requires sacrifice, suffering, and struggle; the tireless exertions and passionate concerns of dedicated individuals.”

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About the KBA President

Steve Six is a partner at Stueve Siegel Hanson in Kansas City, Mo. He specializes in complex litigation, focusing on class actions and commercial litigation.

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The start of February concludes my least-favorite month. While the deep chill of winter is unappealing, I find January resolutions far drearier. I am a dedicated exerciser and use the gym during my lunch break whenever possible. It has been my routine for the past eight years, and the influx of resolution-inspired gym memberships messes with my flow.

Or more accurately, the outflux of new members messes with my flow. I find the new attendees add a healthy dose of energy to the gym, which combats any inconvenience of waiting for swim lanes, treadmills, or an open shower. Nevertheless, after years of observing the enthusiasm of a new year, I have also repeatedly seen the gym inevitably empty as February arrives.

Part of me wants to be the voice of accountability to help others remain steadfast with their resolutions. I find joy in seeing others take those first steps toward fitness and want to encourage others to keep up the good work. But no one wants to be the creepy guy approaching strangers at the gym, and it is most often a person firmly within a circle of influence who is best suited to help others push onward.

My gym commitment extends from my parents instruction to be healthy in body, mind, and soul—all of which have become lifelong pursuits. As 2017 begins, however, I find myself considering all the ways the workday undermines the practice of wellness. The Census Bureau calculates that over 90% of Americans take a vehicle to work. Most Americans then spend more than half their waking days in a sedentary manner. This is despite medical experts recommending between two and four hours of standing each day. Unfortunately, these collective ills do not even reach the larger concerns that plague the practice of law.

Attorneys have their own wellness issues that extend beyond traditional concepts of fitness. Lawyers register a 20% rate of alcohol dependency, a 28% depression rate, and similarly high rates of anxiety and stress. Beyond each of these concerns, the rates of suicide within the legal profession significantly exceed the national average for all Americans. None of this offers much hope for those who practice law or those who might someday join the field.

This all ties back to being the voice of accountability for those around us. It may violate gym protocol to tell a stranger swimming in the lane next to you to keep up the good work and come back for another swim tomorrow, but there should be no hesitation to encourage our fellow attorneys with whom we share a connection. If we are aware of the signs that someone around us is faltering, then it is vital to say something.

Terrell Ciobanu’s ABA article on suicide offers these warning signs for depression and suicide:
1. Loss of interest in most all activities;
2. Loss of pleasure or enjoyment in what were enjoyable activities;
3. Indecisiveness;
4. Fatigue;
5. Difficulty sleeping or sleeping too much;
6. Significant weight gain or loss without dieting;
7. Feelings of worthlessness.

Even if you do not possess the professional tools to assist someone in distress, you do have the capacity to be a friend and steer that person toward the help they need.

We are fortunate in Kansas to have the Kansas Lawyers Assistance Program (KALAP), which exists to provide identification, peer intervention, counseling, and rehabilitation of Kansas attorneys and law students who are having personal difficulties which adversely affect their practice of law. These difficulties include physical or mental illness, substance abuse or emotional distress.

Anne McDonald, Executive Director for KALAP, added that the program also offers a free discussion forum for lawyers called the Resiliency Group. Dr. Rae Sedgwick is both a lawyer and a clinical psychologist who facilitates meetings in Topeka, Lawrence, Overland Park, and via Skype. The meetings last approximately an hour, and you need not be a KALAP client to participate. McDonald commented that the Resiliency Group is a welcoming environment for lawyers to discuss sensitive matters with other lawyers—a way for our profession to provide encouragement.

It is my 2017 desire that those of you reading this are well on your way to accomplishing your resolutions. I will also take this opportunity to offer my own encouragement to keep up the good work and do it again tomorrow. Even more, I offer my hope that you seek your own opportunities to encourage those in the legal community and beyond. You have a circle of influence, and there is power and responsibility that comes with influence. Your encouragement may help someone drop a few pounds or read a few more books. But for those in need, your encouragement could mean so much more.

About the YLS President

Nathan P. Eberline serves as the Associate Legislative Director and Legal Counsel for the Kansas Association of Counties. His practice focuses on public policy, legal aspects of management, and KOMA/KORA. Nathan holds a J.D. from the University of Iowa College of Law and a B.A. from Wartburg College in Waverly, Iowa.

eberline@kansascounties.org


5. Id.


7. Id.


Upcoming CLE Schedule

Live:

2017 Administrative Law CLE
Feb. 17, 2017
Kansas Law Center • Topeka

2017 Spring Oil, Gas & Mineral CLE
March 3, 2017
Fort Hays State University • Hays

Lunch & Learn: Leave Management Bootcamp – Making All the Pieces Fit
March 7, 2017 (Noon-1:00 PM)

Brown Bag Ethics: Preparing for the Unexpected (tentative title)
March 22, 2017
Kansas Law Center • Topeka

Brown Bar Ethics:
Nobody is Immune from Ethics Complaints
March 29, 2017
Kansas Law Center • Topeka

2017 Bankruptcy & Insolvency CLE
April 7, 2017
DoubleTree by Hilton • Lawrence

2017 Family Law CLE
April 21, 2017
DoubleTree by Hilton • Lawrence

2017 Litigation CLE
April 28, 2017
Kansas Law Center • Topeka

Mesa CLE Webinars:

Don’t be a Stupid Cupid – Avoiding Inappropriate Entanglements in the Practice of Law
Feb. 14, 2017 (Noon-1:00 PM)

The Passion of the Barrister – An Ethical Lawyer is a Happy Lawyer
Feb. 21, 2017 (Noon-1:00 PM)

KBA Webinars:

Problem Gambling & How to Address It – A Legal Perspective
Feb. 22, 2017 (Noon-1:00 PM)

Wages and Fair Labor Standards Act Update
March 2, 2017 (Noon-1:00 PM)

Leave Management Bootcamp – Making All the Pieces Fit
March 7, 2017 (Noon-1:00 PM)

Retaliation Update
March 9, 2017 (Noon-1:00 PM)

Two Worlds Collide – Social Media Meets the First Amendment
March 14, 2017 (Noon-1:00 PM)

Background Checks and Other Pre-Employment Issues
March 16, 2017 (Noon-1:00 PM)

Non-Profits –

How to Start and Maintain a Tax Exempt Organization
April 5, 2017 (Noon-1:00 PM)
LITIGATION CLE

April 28, 2017
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Be part of the 60th Anniversary Celebration!

Please save June 7, 2017 to attend the Kansas Bar Foundation Dinner in Manhattan. The dinner will be at the K-State Alumni Center followed by a cocktail and dessert reception at the Flint Hills Discovery Center.

The Kansas Bar Foundation has much to be proud of as it celebrates 60 years of providing funding to organizations that serve Kansans in need of legal services and education. Programs such as Kansas CASA, Kansas Legal Services, and the Kansas Coalition Against Sexual and Domestic Violence have benefited from KBF grants.

KBF grants also provide law-related education for students, educators, and the public. Through the KBA YLS Mock Trial Competition, high school students see firsthand how the legal system works and realize the commitment by real judges and attorneys to their future educational goals.

Each year the KBF awards scholarships to law students. The scholarship funds have been created by attorneys who recognize how financial support can make a difference to a student and to help encourage future attorneys to practice in Kansas. The scholarships are also a vehicle to recognize outstanding attorneys by naming a fund in their honor.

Thank you for helping to make “Justice For All” a reality in Kansas.

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Please contact Todd N Thompson, Kansas Bar Foundation President, at todd.thompson@trqlaw.com or Anne Woods at awoods@ksbar.org or 785.861.8838
Competitive Keyword Advertising

The Professional Ethics Committee for the State Bar of Texas took up an interesting issue in its July, 2016, Opinion 661. Texas asked: “Does a lawyer violate the Texas Disciplinary Rules of Professional Conduct by using the name of a competing lawyer or law firm as a keyword in the implementation of an advertising service offered by a major search-engine company?”

That question is illustrated by a vignette in the University of Illinois Law Review, “Jill Consumer...gets into a car crash and suffers personal injuries. She wants to hire a personal injury lawyer. She recalls seeing television ads for Joe Bob the Country Lawyer. She conducts a search for “Joe Bob” at Google. In addition to search results for Joe Bob’s official website, Jill sees the following ad:

![Ad Example](www.peggysues4U.com)

Jill interviews both Joe Bob and Peggy Sue. She decides that Peggy Sue is a better fit for her, hires Peggy Sue, and receives a large settlement that generates a substantial contingency fee for Peggy Sue – a fee that Joe Bob did not get.”


Rule 8.4(c)

In its brief opinion, Texas concludes that lawyers may follow Peggy Sue’s example and use competitive keyword advertising without running afoul of ethical guidelines. Most of the analysis in the opinion relates to Texas rules not duplicated in Kansas. Only the analysis under the Texas equivalent of our Rule 8.4(c) prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation is potentially relevant to Kansas attorneys. That analysis concludes, “In the opinion of the Committee, given the general use by all sorts of businesses of names of competing businesses as keywords in search-engine advertising, such use by Texas lawyers in their advertising is neither dishonest nor fraudulent nor deceitful and does not involve representation.”

That’s been interpreted to mean that no other business has an intellectual property right protecting against competitive keyword advertising so why should lawyers receive a judicially-created right so much larger than the general populace.

The Texas opinion notes that it takes a different view of competitive keyword advertising under Rule 8.4(c) than North Carolina but does not explain its departure. To be fair, North Carolina was not explicit in its own opinion prohibiting competitive keyword advertising. In 2010 Formal Ethics Opinion 14, North Carolina said, “The intentional purchase of the recognition associated with one lawyer’s name to direct consumers to a competing lawyer’s website is neither fair nor straightforward. Therefore, it is a violation of Rule 8.4(c) for a lawyer to select another lawyer’s name to be used in his own keyword advertising.”

On the depth of that analysis, the Grievance Committee of the North Carolina State Bar sanctioned an attorney (In re David J. Turlington, III, Censure No. 13G0121 (2013)). The analysis of why competitive keyword advertising is unethical amounts to, “Because we said so.”

Florida seemed inclined to agree with North Carolina’s vague reservations when it issued a proposed advisory opinion in 2013 (Florida Bar Standing Committee on Advertising, Proposed Advisory Opinion A-12-1). That proposed opinion suggested that competitive keyword advertising “… would almost always be inherently false and misleading.” The proposed opinion then immediately misstated the technological and commercial details of the practice.

That advisory opinion drew immediate scorn from intellectual property experts and attorneys, prompting the Board of Governors to withdraw the proposal. Competitive keyword advertising is, therefore, currently authorized in Florida, leaving North Carolina as the only state to take a strong but vaguely-reasoned opposition to the practice.

Kansas

To my knowledge, Kansas has no position on competitive keyword advertising. The Kansas Bar Association’s Ethics Advisory Committee does not appear to have addressed the issue. A lawyer’s informal query of Disciplinary Administrator staff at a CLE did not generate an answer and an email inquiry to that office about general impressions was unanswered at the time of this article’s submission.

The positions of Texas and Florida are more closely aligned with general commercial practices and do not require peculiar legal gymnastics to argue. The purchase of a competitor’s name as keyword does not interfere with that competitor’s information appearing in organic search returns. The purchasing lawyer’s own competing ad is conspicuously marked as advertising. Further, the purchase of keywords is generally non-exclusive, meaning lawyers can purchase their own name as keyword to press the competition in the ad section of the search results.

What Next?

Areas not yet addressed relate to judicial use of competitive keyword advertising. May parties seeking election to a judicial position buy opponent’s names as keywords? May attorneys opposing or supporting retention of judges or justices purchase those judges’ or justices’ names as keywords to drive...

Cont’d on Pg. 15, bottom right
A Non-Traditional Experience

Despite being a law student, I already have a dozen job titles: wife, mom, stepmom, household accountant, laundress, nurse, and storyteller, to name a few. Add to those the titles of law student, research assistant, teaching assistant, and law clerk, and there are precious few hours left in the day for anything else.

The decade gap between my undergraduate degree and my law school acceptance letter makes me a non-traditional law student. I spent those ten years working out in the “real” world and along the way found a loving husband, two step-children, and eventually a son.

I haven’t always wanted to be an attorney. A B.A. in theatre with a minor in dance doesn’t usually indicate a desire for the legal field. I started college in theatre as a performer but eventually found my niche backstage as a stage manager. After graduation, I set off on an adventure working backstage in a theatre on a cruise ship. The floating city visited destinations all over the world, and I interacted with people from dozens of different countries.

Due to a work-related injury, I was forced to hang up my sailor shoes and return to the mainland on workers’ comp. Becoming restless, I moved to Kansas City on a whim and wanted a “regular” nine-to-five job. I interviewed for what I thought was a secretary position at a law firm. During the interview, however, I discovered the position was actually a legal assistant position supporting seven attorneys. Citing my only legal experience as being a diehard fan of Law & Order, the firm took a chance and hired me. Throughout my tenure with that firm and others, I worked my way up the ranks of legal assistant, legal secretary, and paralegal.

After being part of legal support staff for eight years, I found myself wanting to grow. However, there are few options in between the ranks of paralegal and attorney. I was hesitant to make the leap from paralegal to law school. Not only because of the law school horror stories many attorneys shared with me, but also because my household of five depended on two incomes. Attending law school would mean a significant cut to the household income. It is scary to take a leap into the unknown. I was in a set routine of a steady job and a constant stream of family activities. To throw everything into flux was daunting. But after much reassurance and encouragement from my husband, I decided to take the leap.

I was concerned about being older than many of the other law students. In my first law school class, I sat next to a few other female students who had kids, and we were lovingly deemed “the mom row.” We were armed with an arsenal of Kleenexes and granola bars in case anyone sneezed or forgot lunch. There are times when I am a bit out of touch due to my age; I had to have one of the younger students explain what “Netflix and chill” meant, and have had to learn many of the commonly used text abbreviations. But my time in the real world put me ahead of the curve in other areas, such as being able to understand a professor’s class example involving a mortgage, or having first-hand experience with the Federal Rules of Civil Procedure.

Law school thus far has been a roller coaster, to say the least. My law school acceptance letter should have been addressed to both myself and my husband. He has shouldered the burden of countless household duties and also sacrificed many of the precious hours at night after the kids are asleep when we would normally sit together and relax. As much as I try to complete all my school work during the day, some tasks inevitably spill over into time normally reserved for just us. Although he doesn’t have homework, he’s still very much affected by the rigors of law school.

Unlike many, I love law school. I certainly had to dust the cobwebs off my brain to be able to absorb so much new knowledge. But I have never had so many passionate discussions with other people. Topics from class permeate beyond the law school walls into everyday interactions and trigger good-spirited debates with fellow students. Even some topics that might initially seem boring become exhilarating once all the pieces come together. For so long, I prepped the “shell” of motions and pleadings as a paralegal but left the meaty, legal topics to the attorneys. It’s exhilarating to be able to fill in the pieces on my own.

All my job titles combined with law school, a family, and working part-time require a balancing act rivaled only by Barnum and Bailey. But a wise attorney once told me I can do anything with the right tools. The last tools I need are a JD and a passing bar exam score to change my “law student” title to “attorney.”

About the Author

Megan Carroll is a second year law student at the University of Kansas. She is originally from Wichita, and earned a Bachelor of Arts in theatre with a minor in dance from Millikin University in Decatur, Illinois. She is president of the Non-Traditionals in Law Association at KU law school, and is on track to graduate a semester early. Following graduation, she plans to pursue a legal career in civil litigation.

Cont’d from Pg. 14, bottom right

traffic to political action committee sites? It is hard from the legal reasoning provided by the few bar associations weighing in so far to see how such practices do not pass ethical muster without creating a spur of intellectual property rights solely addressing lawyers and judges.

About the Author

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In 2016, the Kansas Legislature totally revamped the Juvenile Justice Code, and Governor Sam Brownback signed the bill without hesitation.1 Virtually all aspects of juvenile justice were revisited, from case length to where (or if) juvenile offenders serve time in a secured facility, and most sections of the Code were substantially revised if not replaced entirely. Seldom does the legislature throw out the status quo and replace it with something so dissimilar that few of even the most experienced lawyers would recognize the new iteration, but that is exactly what happened with SB 367. Why change course in such a profound, dramatic, and paradigm-shifting way?

"Research has long shown that locking up young people puts them at greater risk of dropping out of school, joining the unemployment line and becoming permanently entangled in the criminal justice system."2 Other studies purportedly show that incarcerating juveniles doesn’t decrease recidivism rates.3 Education not incarceration is the answer to our juvenile justice problem!4 However, anyone who has been involved in the system as an advocate or otherwise knows there’s more to the story than whether we educate or incarcerate offenders. There are broken families. There are bad role models in the juveniles’ families, their neighborhoods, and their schools.5 There’s also an inherent lack of respect for authority in many crime-ridden cities. One would think that the catalyst of such a dramatic reformation nationwide was a total failure of the system. However, "[j]uvenile arrests for violent crime have dropped to a 30-year low, and fewer teens are being locked up than at any time in nearly 20 years, the National Center for Juvenile Justice (NCJJ) found in its latest periodic national report on offenders and victims. The number of killings committed by youth under 18 is at the lowest point in at least three decades."6 In Kansas, the reduction is even more profound, with overall juvenile arrests plunging 52% in 2015, to 10,064, versus 19,167 in 2005.7 However, there is another side of the juvenile justice coin, money. "In a survey of state expenditures on confinement in 46 states, the Justice Policy Institute (JPI) found that the average costs of the most expensive confinement option for a young person was $407.58 per day, $36,682 per three months, $73,364 per six months, and $148,767 per year."8 SB 367 "is expected to save the state [of Kansas] money – an estimated $72 million over five years."9

Whatever led our legislature to take on juvenile justice reform, it’s here and we need to prepare for what it means to juvenile offenders subject to its provisions, the lawyers who practice juvenile law, and others who serve a role in the system.

Subsequent to the initial draft of this article, the Kansas Revisor of Statutes issued the 2016 Juvenile Justice Code and Revised Juvenile Justice Code.10 Not all of the revisions referenced in the legislature’s summary of SB 36711 were included in this release, nor is it practicable for me to address every revision in the space allotted for this article. I addressed the most important aspects of the legislation that will have the most immediate impact. I recommend that you review the summary so you know what to expect as more of the reforms are implemented.12

NEW TERMINOLOGY

SB 367 introduces new terminology into the juvenile justice lexicon. The most notable and important definitions are:

*(h) “Evidence-based” means practices, policies, procedures and programs demonstrated by research to produce reduction in the likelihood of reoffending.*

*(i) “Graduated responses” means a system of community-based sanctions and incentives...used to address violations of immediate interventions, terms and conditions of probation and conditional release and to incentivize positive behavior.*

*(j) “Immediate intervention” means all programs or practices developed by the county to hold juvenile offenders accountable while allowing such offenders to be diverted from formal court processing...* (aa) “Technical violation” means an act that violates the terms or conditions imposed as part of a probation disposition...that does not constitute a new juvenile offense or a new child in need of care violation...*13

Most of the other definitions are unchanged, but these added terms are important since many of the outcomes under the revised code depend on their interpretation, and are utilized in the new and revised sections discussed below.

In 2016, the Kansas Legislature totally revamped the Juvenile Justice Code, and Governor Sam Brownback signed the bill without hesitation.1 Virtually all aspects of juvenile justice were revisited, from case length to where (or if) juvenile offenders serve time in a secured facility, and most sections of the Code were substantially revised if not replaced entirely. Seldom does the legislature throw out the status quo and replace it with something so dissimilar that few of even the most experienced lawyers would recognize the new iteration, but that is exactly what happened with SB 367. Why change course in such a profound, dramatic, and paradigm-shifting way?

“Research has long shown that locking up young people puts them at greater risk of dropping out of school, joining the unemployment line and becoming permanently entangled in the criminal justice system.”2 Other studies purportedly show that incarcerating juveniles doesn’t decrease recidivism rates.3 Education not incarceration is the answer to our juvenile justice problem!4 However, anyone who has been involved in the system as an advocate or otherwise knows there’s more to the story than whether we educate or incarcerate offenders. There are broken families. There are bad role models in the juveniles’ families, their neighborhoods, and their schools.5 There’s also an inherent lack of respect for authority in many crime-ridden cities. One would think that the catalyst of such a dramatic reformation nationwide was a total failure of the system. However, “[j]uvenile arrests for violent crime have
CASE, PROBATION, & DETENTION LENGTH LIMITS

Before SB 367, although the court was limited in low level cases to a maximum confinement of 28 days in a Juvenile Detention Facility, as well as out-of-home placement with the Kansas Department of Corrections, it could retain jurisdiction until the juvenile’s 23rd birthday (confinement up to the 22.5th year, with six months post release supervision), and could extend probation long enough to allow the juvenile to complete its terms and conditions. SB 367 imposes substantial limits on case and probation lengths while increasing total detention time to 45 days for low level felonies and misdemeanors.14

1. Case length limits.
   TOTAL case length limits are imposed under SB 367. They are:
   • Misdemeanors, up to 12 months;
   • Low-risk & moderate risk felons, up to 15 months; and
   • High-risk felons, up to 18 months;15

   The time begins running when the juvenile is adjudicated, which is the date the court accepts the plea or finds the juvenile guilty after trial.16 However, “there shall be no overall case length limit for a juvenile adjudicated for a felony that, if committed by an adult, would constitute an off-grid felony or a nondrug severity level 1 through 4 person felony.”17 Technically, the court’s jurisdiction can extend to the juvenile’s 23rd birthday, but only if the overall case length limit has not expired.18

   Under the old legislation, a court could run cases consecutively. That option isn’t a tool to increase the case length under SB 367 since the most severe case controls case length, and cases pending at the same time shall run concurrently. The same goes for multiple counts in the same case, but the court has discretion to determine which count will control case length, so could rule that the lesser count’s case length controls.19

2. Probation length limits.
   Probation length limits have also been drastically reduced primarily due to the limits placed on extending the length in the event a juvenile fails to complete terms and conditions. The base limits are:
   • Misdemeanor low-risk & moderate risk, and low-risk felons, up to 6 months;
   • Misdemeanor high-risk & moderate-risk felons, up to 9 months; and
   • High-risk felons, up to 12 months.20

   However, “[t]he probation term limits do not apply to those offenders adjudicated for an off-grid crime, rape as defined in K.S.A. 2015 Supp. 21-5503(a)(1), and amendments thereto, aggravated criminal sodomy as defined in K.S.A. 2015 Supp. 21-5504(b)(3), and amendments thereto, or murder in the second degree as defined in K.S.A. 2015 Supp. 21-5403, and amendments thereto. Such offenders may be placed on probation for a term consistent with the overall case length limit.”21

   Juveniles’ probation terms and conditions shall be determined by a “risk and needs assessment.”22

   The court’s ability to extend probation is limited. “The court may extend the term of probation if a juvenile needs time to complete an evidence-based program as determined to be necessary based on the results of a validated risk and needs assessment. The court may also extend the term of probation for good cause shown...” Thus, the court may extend probation as needed for completion of “evidence-based programs,” but is limited when extending “for good cause” to:
   • Up to one month for low-risk offenders;
   • Up to three months for moderate-risk offenders; and
   • Up to six months for high-risk offenders.23

   When a court extends probation it must make findings on the record justifying extension, either to enable the juvenile to complete evidence-based programs, or findings of good cause. Moreover, the court may only extend probation incrementally and may not extend beyond the overall case length limit.24 There are also mandatory reporting and tracking functions for court services officers when a court extends probation.25

3. Detention length limits.
   Prior to SB 367, the maximum confinement for a juvenile for low level felonies or misdemeanors was 28 days. Confinement for nongrid or nonperson level 1-4 person felonies was up to the juvenile’s 22.5th year with post-release supervision to the juvenile’s 23rd birthday; the only change for these felonies under SB 367 is that confinement extends to the juvenile’s 23rd birthday. Under the new legislation, for low level felonies and misdemeanors, the court shall set the cumulative detention limit at sentencing, and the total cumulative detention shall not exceed 45 days or extend beyond the overall case length limit. Again, this 45 day limit does not apply to nongrid or nondrug severity level 1-4 person felonies, but the case length limit still restricts how long a court may detain a juvenile (e.g., to the case length limit or 23rd birthday, whichever comes first).26

GRADUATED RESPONSES

Arguably, the biggest change imposed by SB 367 is the use of graduated responses for probation violations, which removes sanctions in juvenile cases from the court’s hands in most situations. Previously, a court could direct the probation officer to take violators into custody regardless of the severity of the violations. Effective January 1, 2017, once a juvenile is sentenced, the community supervision officer shall develop a case plan with the juvenile and his or her family, integrating "the results of the risk and needs assessment, referrals to programs, documentation on violations and graduated responses and shall clearly define the role of each person or agency."27 Once in place, the juvenile will be subject to graduated, community-based responses to violations of the case plan.28 As to the court’s involvement:

A technical violation shall only be considered by the court for revocation if: (1) It is a third or subsequent technical violation; (2) prior failed responses are documented in the juvenile’s case plan; and (3) the community supervision officer has determined and documented that graduated responses to the violation will not suffice. Unless a juvenile poses a significant risk of physical harm to another or damage to property, community supervision officers shall issue a summons rather than request a
When Detention is Justified

Except for the most heinous of offenses or a juvenile’s blatan
t criminal actions or disregard of court orders, detention
of juveniles will soon be a relic. SB 367 curtails the power
of law enforcement, probation officers, and courts to detain
juveniles. Specifically,

• For initial intake, default is that law enforcement shall re
lease the juvenile to parents unless there’s “reasonable grounds
to believe [that it’s not] in the best interests of the child or
would pose a risk to public safety or property”;30

• For detention in general, only upon completion of a “deten
tion risk assessment” (DRA) and the court’s probable cause
findings adopting DRA recommendations for detention may
a juvenile be removed from his home;31 and

• A juvenile may be detained upon probable cause findings
that he or she committed an offense, violated probation or
conditional release, or escaped from a correctional facility. 32

Detention Alternatives

The most substantive if not profound change is the limit on
modes of detention. Practitioners must advise their clients on
the options available to the court, and also know what limits
are now imposed on courts. These options and limitations will
be:

• The alternative to place in custody of parent or “other suit
able person” now excludes group homes and other licensed
child care facilities;33

• The Court may commit the juvenile to a Juvenile Cor
rectional Facility (JCF) if he is otherwise eligible for commit
ment under the placement matrix.34 The court must make
written findings that the juvenile poses a substantial risk of
harm to another or damage to property;35

• Detention as a sanction is generally limited to situations
where all other alternatives are exhausted, or a specific excep
tion applies, such as picking up a new criminal charge; 36 and

• Detention is not permitted for solely technical violations
of probation, contempt, violation of a valid court order, to
protect from self-harm, or failure of state or county to find
adequate alternatives.37

Training

One aspect of SB 367 that bodes well for everyone involved
in the juvenile justice system, including juvenile offenders,
is its provisions for training. First, there’s mandatory semi
annual training for:

1. Community supervision officers;
2. Juvenile intake and assessment workers;
3. Juvenile corrections officers; and
4. Any individual who works with juveniles through a
contracted organization providing services to juveniles.38

Moreover, SB 367 provides that “[t]he office of judicial
administration shall designate or develop a training protocol
for judges, county and district attorneys and defense attorneys
who work in juvenile court.”39 Given the dramatic changes
imposed by SB 367, this training is essential to ensure courts’
proper application of its provisions, and attorneys’ effective
representation of their juvenile offender clients.

Fewer Arrests for Misbehavior at School

The above illustrates that the primary thrust of SB 367 is a
focus on community-based resources instead of incarceration.
Yet, much of a juvenile’s life is spent in school. Consequently,
much of the misbehavior that leads to juveniles’ involvement
in the juvenile justice system happens there, not at home or
during their leisure time. The legislation deals with this reality
by mandating training for educators and education administra
tors. Specifically, the attorney general shall develop a skill
development training program for all school superintendents
or their designees, and the law enforcement officer assigned to
each school, focusing on the following skills:

1. Information on adolescent development;
2. Risk and needs assessments;
3. Mental health;
4. Diversity;
5. Youth crisis intervention;
6. Substance abuse prevention;
7. Trauma-informed responses; and
8. Other evidence-based practices in school policing to
mitigate student juvenile justice exposure.40

The hope is that if school authorities are trained to deal
with juvenile misbehavior themselves, they won’t be forced to
bring in law enforcement and thereby preclude the necessity
of transferring juveniles into the juvenile justice system. No
charges will be filed and there will be no risk that the juveniles
will be labeled as juvenile offenders. This training must be
available by January 1, 2017.

Immediate Intervention (a.k.a. Diversion)

The legislature revised K.S.A. 38-2346 to scale back district
or county attorneys’ involvement and discretion in imple
menting immediate intervention programs. Such programs
enable juveniles with limited criminal records to avoid pros
cution. Once a juvenile complies with the terms of condi
tions of her immediate intervention plan, and a set period
of time lapses (typically from three to six months), the case
is dismissed. Beginning January 1, 2017, the department
of corrections will collaborate with the office of judicial ad
ministration to “develop standards and procedures to guide
the administration of an immediate intervention process and
programs developed pursuant to K.S.A. 38-2346...and alter
native means of adjudication pursuant to K.S.A. 2015 Supp.
38-2389....Such standards and procedures shall include, but
not be limited to:

1. Contact requirements;
2. Parent engagement;
3. Graduated response and discharge requirements; and
4. Process and quality assurance.”41
Moreover, instead of the prosecutor being responsible for developing and supervising immediate intervention programs, the director of juvenile intake and assessment services of the particular county shall be the primary agency responsible for such programs. While the district or county attorney has input on some cases, it is the director who makes the final determination as to whether a juvenile will be permitted to participate. Also, immediate intervention is mandatory and not discretionary. If a juvenile has no prior convictions and the charges are misdemeanors, he must be allowed to participate in the program.

If a juvenile fails to comply with the program, the case shall be referred to a multidisciplinary team that will decide whether to give him more time to complete (up to four months) or terminate the plan as successfully completed. Inability to pay fees and costs is no longer grounds for termination from the program. If the juvenile fails to comply with the revised plan, the case shall be referred to the district or county attorney for further action.

PROSECUTION AS AN ADULT & EXTENDED JUVENILE JURISDICTION PROSECUTION

The legislature amended K.S.A. 38-2347 to make it more difficult to prosecute juveniles as adults. First, Motions for Adult Prosecution (MAP) or Motions for Extended Juvenile Jurisdiction Prosecution (EJJP) may only be filed for juveniles 14 years of age or older. Second, “[t]he juvenile shall be presumed to be a juvenile, and the presumption must be rebutted by a preponderance of the evidence.”

The Court shall consider the following factors when ruling on good cause:

1. The seriousness of the alleged offense and whether the protection of the community requires prosecution as an adult or designating the proceeding as an extended jurisdiction juvenile prosecution;
2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;
3. Whether the offense was against a person or against property. Greater weight shall be given to offenses against persons, especially if personal injury resulted;
4. The number of alleged offenses unadjudicated and pending against the juvenile;
5. The previous history of the juvenile, including whether the juvenile had been adjudicated a juvenile offender under this code or the Kansas juvenile justice code and, if so, whether the offenses were against persons or property, and any other previous history of antisocial behavior or patterns of physical violence;
6. The sophistication or maturity of the juvenile as determined by consideration of the juvenile’s home, environment, emotional attitude, pattern of living or desire to be treated as an adult;
7. Whether there are facilities or programs available to the court which are likely to rehabilitate the juvenile prior to the expiration of the court’s jurisdiction under this code; and
8. Whether the interests of the juvenile or of the community would be better served by criminal prosecution or extended jurisdiction juvenile prosecution.

As to EJJP motions, the district or county attorney may only file a motion for off-grid felonies or nondrug severity levels 1-4, and “the burden of proof is on the prosecutor to prove the juvenile should be designated as an extended jurisdiction juvenile.” Notice of revocation and revocation hearings for EJJP cases are now mandatory.

GOOD INTENTIONS?

In conclusion, juvenile justice reform has changed most aspects of prosecuting and defending juveniles charged with crimes in Kansas. It also gives judges an entirely new set of tools to deal with juvenile offenders, and takes away some tools that helped reduce juvenile arrests in Kansas to record low levels. We do not yet know what impact these reforms will have on juvenile crime. We also don’t know how much this reform will cost or save Kansas taxpayers, even with the legislation’s provision that all money saved from decreased detention of juveniles will be used to fund community-based programs. We do know that prosecutors, defense attorneys, probation officers, court services officers, and everyone else who plays a role in the system must be prepared to implement these reforms as early as Jan. 1, 2017. Attorneys must be equipped to advise their clients on the consequences of adjudicated juvenile offenses in Kansas, or the lack thereof, and all Kansas counties must put in place community-based resources to meet the increased demands the reform will create.

Get ready for a whole new world.

About the Author

Hon. Kevin Mark Smith is a judge in the 18th Judicial District, Sedgwick County, where he currently serves in juvenile court. Judge Smith practiced law in Kansas for more than 16 years before Gov. Brownback appointed him to the bench in Dec. 2015. He graduated cum laude in 1999 from Regent University School of Law where he served as Issue Planning Editor of Law Review.

Endnotes

1. See SB 367, the bill enacted by the legislature and signed by Governor Sam Brownback on April 12, 2016 (goo.gl/pjQY5w). Note that Internet web addresses are shortened via the Google URL Shortener throughout the footnotes for reader convenience. See also a summary of the changes on the Kansas Legislature’s website, goo.gl/7FDJ8n.
4. Id.

(Cont’d on Pg. 20)
Free KBA Membership for Kansas Paralegal Students

Several years ago, paralegals were allowed to join the Kansas Bar Association as nonvoting members. As a long-standing member of the KBA Paralegal Committee, I have witnessed the KBA’s support for the paralegal profession and the paralegal programs offered at the colleges and universities throughout Kansas.

The KBA and the KBA Paralegal Committee are very excited to announce one of the newest benefits for Paralegal students in the state of Kansas. Membership in the KBA is now available FREE OF CHARGE to all paralegal students in the state. Students must provide proof of enrollment in a Kansas college or university and document that they are currently working toward a paralegal degree or certificate.

The benefits of student membership in the KBA include use of Casemaker—a Googelike online research tool—and discounts on law practice handbooks. Students may also attend CLE seminars free of charge, attend the KBA Annual Meeting, and take part in KBA sections and committees. Students members will have access to an electronic copy of The Journal of the Kansas Bar Association; these are just a few of the benefits of student membership.

Being a member of the KBA will present valuable networking opportunities for students which will serve them well upon graduation. The link below provides a brochure on the free membership and a full list of KBA membership benefits for students.

http://www.ksbar.org/?page=paralegal_resources

If you are a paralegal student, or if you are reading this and know a paralegal student, please refer them to this link so they can take full advantage of this wonderful benefit for our Kansas paralegal students.

About the Author

Cheryl L. Clark, ACP, has a combined 40 years of experience in the legal field and has worked for Fleeson, Gooing, Coulson & Kitch, LLC for the last 20 years. She obtained her associate’s degree in Legal Assistant studies from Hutchinson Community College, her Certified Legal Assistant and her Advanced Certified Paralegal designation from the Nat’l. Assn. of Legal Assistants. She is a past chair and current member of the KBA Paralegal Comm., past President of the Kan. Assn. of Legal Assistants, and a past member of the Certifying Board for the NALA. She currently serves as chairperson for the KBA Task Force for state certification for Kansas Paralegals, and coordinates the Paralegal program at Hutchinson Community College.

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Getting a Handle on Field Burning Cases

If you drive through rural Kansas in springtime you are likely to encounter smoke on the roadway caused by field burning undertaken to remove dead grass and weeds. Unlike a minority of states passing laws to terminate prescribed field burning, Kansas is part of the majority choosing to regulate the practice. Unfortunately, many farmers are unaware of state and county regulations designed to make “controlled burns” safe—safe for neighboring properties and motorists on adjacent roadways. While many farmers have acquired safe practices through years of experience, the danger remains for motor vehicle accidents due to diminished visibility and encroaching flames.

When accidents occur and litigation ensues, counsel for plaintiff and defendant should take the following steps to identify the obligations and duties imposed on farmers who undertake field burning adjacent to a public roadway:

1. Review State Regulations. The central provision is K.A.R. 28-19-648, “Agricultural Open Burning,” which was enacted by the Kansas Department of Health and Environment. It requires that notification be provided to the “local fire control authority” before commencing a burn. K.A.R. 28-19-648(a)(1) The regulation precludes any burning that “creates a fire safety hazard,” and requires prior notification to appropriate traffic control authorities if “conditions exist that may result in smoke blowing toward a public roadway.” K.A.R. 28-19-648(a)(2) The local sheriff’s office is commonly designated to receive prior notification. K.A.R. 28-19-648 also requires the burning to be supervised until the fire is extinguished. K.A.R. 28-19-648(a)(4) Failure to comply with any of these requirements could support a negligence cause of action. 1

2. Determine If County Regulations Exist. Some Kansas counties have passed burn regulations based on the County Home Rule Act, which provides that “[t]he board of county commissioners may transact all county business and perform all powers of local legislation and administration it deems appropriate. . . .” K.S.A. 19-101a(a). County Home Rule powers are “liberally construed” to give counties “the largest measure of self-government.” K.S.A. 19-101c (“The powers granted counties pursuant to this act shall be referred to as county home rule powers and shall be liberally construed for the purpose of giving to counties the largest measure of self-government.”) See also, Barnes v. Bd. of County Comrs. of Cowley County, 47 Kan. App. 2d 353, 358 (2012) (same). The board of county commissioners is vested with the power to enforce all resolutions passed pursuant to county home rule powers, . . .”) Enforcement may result in conviction, with punishment taking the form of fines and/or imprisonment. Hence, county resolutions in Kansas have the full force and effect of law.

3. Contact the Sheriff’s Office for Call Logs, Weather Records, and Burn Ban Records. Sheriff’s records will often show if a party called prior to burning, what the weather conditions were, and whether a “burn ban” was in effect on the day in question. In some jurisdictions, the sheriff’s office will provide weather information to the caller such as wind speed and direction. The information and records maintained by the sheriff will vary greatly from county to county, but such records are invaluable in assessing whether parties complied with pertinent regulations. If weather records are not available from the sheriff, they can and should be obtained independently.

4. Review Available Literature on Prescribed Burns. Reading available literature is an excellent way to identify factual issues and learn standard protocol. Kansas State University publishes a “Prescribed Burning Notebook” and oversees workshops designed to educate the public on how to burn safely. Resources such as these can also be helpful in identifying potential experts.

In closing, a word of caution is in order regarding jury trials. Be sure you know your venue. Jurors in farming communities are familiar with field burning procedures. They will bring knowledge, experience, and a rural viewpoint into deliberations that will affect the outcome of the case. While regulatory provisions may favor the motorist, rural juries balance equities that consider the farmer’s vantage point. The rural mindset is that motorists passing through areas where burning is underway need to be cautious, and under some circumstances, they may need to take an alternate route to avoid smoke and fire. Rural juries do not automatically conclude a farmer was negligent for creating fire along the edge of the road and smoke in the roadway.

About the Author

Arthur Rhodes, partner at Smithyman & Zakoura, Chtd. in Overland Park, graduated from Washburn Law School in 1996. His practice consists primarily of business litigation and insurance defense.
Let's Break Some Rules

There’s an old story about a woman who always prepared her brisket the same way. Following her mother’s recipe, she sliced about a third off one end of the brisket, added seasoning, browned the meat, then left it to braise with onions in the pan. Eventually, it was time to teach her daughter how to make this family recipe. She showed her daughter how to slice off the end of the brisket and the rest of the steps. The daughter asked, “Why do you cut off the end? It seems like a waste.” The woman answered, “That’s how your grandmother taught me.” Then, curious, they called the grandmother to ask her why it was so important to slice off the end of the brisket before cooking. The grandmother laughed, “I do it because it’s the only way the brisket will fit in my pan!”

As legal writers, how do we know we’re not needlessly throwing away the end of the brisket, figuratively speaking? Do we know why we follow the writing “rules” we impose on ourselves? Are we sure they’re actually rules? As in the following three examples, re-examining or disobeying an old “rule” can make our writing more effective.

Starting a Sentence with But or And

Most of us probably learned at some point that it’s incorrect to begin a sentence with a coordinating conjunction (for, and, nor, but, or, yet, and so). Contrary to this conventional wisdom, however, it is grammatically correct to start a sentence with these words, as long as the writer avoids a sentence fragment. And it can be useful.

In legal writing, starting a sentence with and or but can provide valuable emphasis that is tough to achieve any other way. Consider the contrast between these two sentences:

- At-will employment means the employer may fire an employee for any reason, or for no reason at all. This discrimination, however, is grammatically correct to start a sentence with these words, as long as the writer avoids a sentence fragment. And it can be useful.
- At-will employment means the employer may fire an employee for any reason, or for no reason at all. But this discrimination oversteps that power.

In the second example, the coordinating conjunction beginning the second sentence signals an abrupt, powerful transition. That argumentative contrast is weaker in the first example’s more conventional syntax. So using a coordinating conjunction to begin a sentence gives the argument punch.

There are a few pitfalls to avoid when writing with this technique. First, punctuate correctly: Do not place a comma after the coordinating conjunction that begins the sentence. Second, use the transition sparingly: Because of the transition’s force, overuse risks losing its impact. Finally, avoid accidental fragments like “The plaintiff left her job because of the reduced pay. And the harassment.” The second sentence is a fragment and is grammatically incorrect. But used correctly, a coordinating conjunction at the start of a sentence can give a powerful boost to a key point.

Split Infinitives

It’s grammatically correct to split infinitive verbs, despite a common misconception that English grammar prohibits the split. In a split infinitive, an adverb appears between the word to and the verb. The classic example “to boldly go where no man has gone before” is not only correct, it sounds more natural than the alternatives “boldly to go” or “to go boldly where no man has gone before.” Split infinitives allow us to write like we talk, achieving coherence and readable style.

Nevertheless, some legal writers insist on adherence to a nineteenth-century prohibition on split infinitives. To stay in the good graces of those old-school grammarians, avoid the problem by placing the adverb at the end of the sentence: The judge ordered the defendant to respond immediately. As you do so, however, remember: It’s a preference, not a rule.

Contractions

There’s a longstanding rule that contractions are inappropriate in legal writing. That rule now seems to be at a crossroads, with some legal writers preferring contractions even in formal briefwriting.

The old school of thought is that contractions’ informality is somehow offensive. “Formality bespeaks dignity. . . . [I]f you use contractions in your written submissions, some judges . . . will take it as an affront to the dignity of the court. . . . There is, in short, something to be lost, and nothing whatever to be gained [from incorporating contractions].” The prohibition on contractions, however, might be outmoded adherence to an overly formal style that actually makes legal writing less readable.
What’s the benefit of using contractions in legal writing? The very informality that the traditional rule seeks to avoid. Contractions help remove stuffiness. Readers are more likely to engage with writing in a more conversational style. In a legal argument, that conversational style can make it easier for a reader to understand something complicated. Contractions are also an easy way to make the writing style more personal in contexts where that’s beneficial, like advice letters. It’s worth considering whether to use contractions to make legal writing more effective.

Adherence to these rules can be as wasteful as needlessly throwing away the end of the brisket, because they needlessly prohibit techniques that can improve legal writing. Re-examine those old rules and conventions. Breaking some of them might be the key to making our writing more readable, clear, and persuasive.

About the Author

Joyce Rosenberg is a clinical associate professor and director of the Field Placement Program at KU Law School. She is a 1996 graduate of KU Law, where she served as editor in chief of the Kansas Law Review.

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Cultural Background Considerations: a place in prosecutorial charging decisions

Culture, and gender for that matter, are two things I normally do not consider when making day-to-day decisions as a prosecutor. Our pleadings are entitled, “The People of the State of Colorado v. ______”, and as representatives of “The People”, as prosecutors throughout the state refer to themselves, we’re obligated to ensure all accused are treated fairly (both as state peace officers and ethically as attorneys): “Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: “The United States wins its point whenever justice is done its citizens in the courts.” However, the prospect of viewing an offender’s conduct through the lens of cultural tradition and background is certainly an interesting proposition.

This absolutely didn’t occur to me until I received a simple misdemeanor harassment/domestic violence case involving a Chinese couple who were on student visas studying at the local state university. It had been referred to me by a sheriff’s deputy for assault, but I had to charge harassment based on the lack of cooperation by the victim in making a statement to police about what had occurred. In fact, without an eyewitness to the male party hitting the female party in the face, the case would have been nonexistent: the female party completely denied that anything had occurred. Certainly, this isn’t a surprising factual scenario with cases involving domestic violence. However, I later learned both parties spoke minimal English, the victim was in agony over being shamed (read: blamed) by her family and the defendant’s family for the defendant’s arrest and jail time; and the domestic violence tag on any conviction (despite the harassment charge being the lowest level of misdemeanors) could be a basis for the male party’s deportation back to China under his student visa.

One of the most critical stages in a criminal proceeding for a prosecutor is, of course, the initial charging decision (which arguably is one of the most politically controversial powers of a prosecutor). Though I wasn’t the charging deputy on this particular case, I would have made the same decision, since the facts available to me at the time were, A hit B, B denied it occurred, and C witnessed the whole thing. Later, however, with the prospect of A’s possible deportation on the table with a guilty plea or conviction at trial, and the victim’s cultural suffering during the entire proceeding—should this all be taken into account? It’s low-level criminal conduct (no bodily injury occurred), the defendant had no criminal history, and the victim was completely uncooperative. But are these reasons not to move forward in a criminal prosecution—should a defendant in these circumstances get a free pass for hitting someone in the face, despite the rather significant consequences that could follow?

This seems to me to be the type of current cultural dilemmas faced by prosecutors in present day. Obviously, the last century has reflected decades of racial and ethnic bias with charging decisions by prosecutors, as statistics have shown that a prosecutor’s discretion and freedom from scrutiny creates a “greater potential for discrimination at the pre- and post-trial stages than at the convicting and sentencing stages.” The absolute disparate treatment of minorities has been a grave consequence of the unhindered freedom of a prosecutor’s charging power. And charging cases of domestic violence (and following through with proceeding with recanting victims at trial) has been one of the most recent challenges for a prosecutor today. But what about that cultural lens?

Ultimately, I’ve concluded that it’s a double-edged sword. Sure, I think someone’s cultural background should be taken into account in viewing their conduct, but I don’t think a “cultural defense” should apply in all situations as justification for the criminal conduct occurring. Culture should be considered, in my opinion, in all stages of criminal prosecution (charging, plea negotiations and sentencing) but cannot be an excuse or an explanation for a victim’s suffering. In my case, I referred the defendant to our diversion department, where he successfully completed community service, anger management treatment classes and payment of a fine. As a first-time offender, he will likely think twice before hitting his girlfriend again, knowing that consequences in our country absolutely apply to domestic violence situations. However, if his name comes across my desk again, I will turn a blind eye to his cultural circumstances.

About the Author

Katherine Lee Goyette, a 2010 graduate of Washburn Law (JD) and a 2012 graduate of the University of Kansas School of Law (LLM) is a felony prosecutor in southern Colorado, where she resides with her active-duty Army husband. Katherine has been a member of the KBA’s Diversity Committee since 2011, and served as co-chair of the Diversity Committee from 2015-2016. Katherine also serves as a board member for the Military Spouse JD Network, a military spouse bar association.
Obituaries

Stephen G. Dickerson

Stephen G. Dickerson, 68, of Olathe, KS, passed away unexpectedly on Monday, December 26, 2016. A visitation will be held from 1 - 3 p.m., Friday, December 30 at Southminster Presbyterian Church followed by a memorial service. In lieu of flowers, the family suggests contributions to the American Heart Association. Steve was born October 2, 1948 in Kansas City, Mo. to Gene and Cara Lee Dickerson. He grew up in Shawnee, Kan., where he was active in scouting and achieved the Eagle Scout Award. He received his Bachelor’s Degree from the University of Kansas in 1971 and his Juris Doctorate from UMKC in 1974. He was Past President of the Kansas Trial Lawyers Association and recipient of the Distinguished Service Award in 2008 and the Arthur C. Hodgson Award in 2013, among others. He was a sustaining member and currently served on the Board of Governors of the American Association for Justice. "Steve was a good man and a good attorney who cared about his clients. . ." Steve’s character was defined by his endless devotion for the care of others. Steve married Linda Chase on Aug. 22, 1987 in Scottsdale, Ariz. He is survived by his wife, Linda; sons Caleb, of Olathe, Kan., Colin, of Denver, Colo., and daughter, Callee, of Olathe; his parents, Gene and Cara Lee, of Olathe; sisters Shara (Kent) Runyan, of Columbia, Mo. and Julee (Robert) Oppici, of Woodbury, Conn. and many aunts, uncles, nieces, nephews, and cousins. Steve was a member of the Peace Christian Church UCC. He was a devoted husband, father, son, and brother who loved his family, and dogs Mollee and Benji. He was an avid Kansas Jayhawk fan. Rock Chalk!!!! Conmessages can be expressed at www.amosfamily.com. The Amos Family Funeral Home, Crematory, Chapels. 913-631-5566 amosfamily.com

Myles Jennings Memorial c/o Renwick Education Foundation. Wulf-Ast Mortuary, Garden Plain.

Arnold C. Nye

A good man and an accomplished attorney died today, December 3, 2016. Arnold C. Nye passed at the perfect moment after many long years in the practice of law and of a loving relationship with his wife and his children and their children and their children.

He was born under the cover of the whitest blizzard in Newton, Kan. on Dec. 17, 1925. He was the youngest of three children born to J. Sidney and Grace (Cochran) Nye. Arnold graduated from Newton High in 1943, and with the permission of his parents, joined the U.S. Navy at age 17. He served on the USS Solomons CVE 67.

After his service Arnold married his childhood sweetheart, Kathy Ashbaugh. For more than 70 years they learned to live in the broadest and most loving way. Their union created three exceptional children who loved them to the end of eternity.

Arnold learned to practice law in the 9th Judicial District, to be an attorney for 30 years with his father, J. Sidney, and another 30 years with his son, Gregory. And he learned to practice his profession with kindness that he discovered in his uncountable years, that this kindness is more comforting than showmanship, more useful than control and more lasting than even wealth. And he arrived, without surprise, knowing that power is weak, that glory is not needed and authority should not always be obeyed. From the beginning he had not realized how rewarding this adventure would be.

Arnold is survived by his wife Kathy of Newton, his daughter Pam Behymer of Newton, his sons Gregory of Newton, and Chris of Idaho. Arnold was blessed with six grandchildren and six great grandchildren.

Myles Dean Jennings

GARDEN PLAIN-Jennings, Myles Dean 29, passed away on November 28, 2016. Myles was born April 7, 1987 in Oakley, KS, the son of Greg and Tammy (Kester) Jennings. The Rosary was held Friday, Dec. 2, 2016; the Funeral Mass was Saturday, December 3, 2016, both at St. Anthony Catholic Church in Garden Plain, Kan., with Fr. Sam Pinkerton officiating. Myles is survived by his wife, Anna; daughter, Kennedy; son, Coleman; parents, Greg and Tammy Jennings; grandmothers, Marie Kester, Lucille Jennings; brothers, Kody and wife, Brianna Jennings and daughter, Landry, and Lucas Jennings; mother-in-law, Suzy Perry; sister-in-law, Jana and husband, Eddie Weber and daughters, Hazel and Nora; brothers-in-law, Randy and wife, Megan Perry, Kyle and wife Katie Perry. Memorial Fund is to the
Marvin Ellis Rainey

Marvin Ellis Rainey passed away December 3, 2016. He was born October 29, 1933, the son of Olen Henton Rainey and Valeda Valentine Ellis. Marvin was preceded in death by his wife Elisabeth, married on Valentine’s Day, 1960, and his brother Charles. He is survived by his son Ellis and wife Amy (Soetaert), his son Mark and wife Carey (Wagoner), and his daughter Anne and husband Brent (Clancy). He was blessed with 13 wonderful grandchildren.

Marvin was raised on a farm homestead outside Albany, Missouri, and graduated from the original Shawnee Mission High School. He received a Bachelor of Arts degree with a major in political science and a law degree from the University of Missouri at Kansas City. In 1959 he was licensed to practice law in the Kansas state and federal courts, in 1983 the Tenth Circuit United States Court of Appeals, and in 1993, the United States Supreme Court.

Marvin was appointed by Governor George Docking as Johnson County Election Commissioner in 1958. He was elected as the second Mayor of Overland Park in 1963, and re-elected in 1965. While Mayor he served as President of the Council of Mayors of Northeast Johnson County. He later served as President of the Overland Park Chamber of Commerce in 1970. His civic activities included the Johnson County Jaycees, service as Vice President of the Johnson County Sports Authority, and President of the Johnson County Community College Foundation. He served as the City Attorney of Shawnee, Kan., following his appointment in 1974. He was the very proud recipient of the 2012 International Municipal Lawyer Association Mulligan Distinguished Public Service Award.

His memory will forever be carried forward in our hearts and thoughts every day.
The second week of December had more than its share of important news developments. Take your pick –Aleppo, Trump transition, Kansas City Chiefs beating Oakland in Arrowhead, Bill Self’s 600th collegiate victory against UMKC.

But it was the headline in the Wall Street Journal on Friday, December 9 that seemed to eclipse everything else: “U.S. Revisits In-Flight Phone Calls.” The article began this way: “Airline travelers already upset about shrinking seats and rising fees should steel themselves for a potential new cabin reality: listening to another passenger yakking on a mobile phone.” The following day, the New York Times headline blared: “Cell calls in flight could be coming.”

Yes, this was the news item that pushed everything else out of the news cycle.

Reaction among travelers was, well, tepid.

— “I can’t think of a more uncomfortable place where you’re trapped for so long. Having said that, I’m all in favor of allowing calls provided those using their cell phones step out to make or receive calls.”

— “If this must be, I think it should be by zone. Just as there are window seats & aisle seats, and used to be smoking section etc. There should be phone-seats in a bloc together, so anyone choosing those seats knows there’s going to be yakking going on around them.”

— “This is a great idea. The airlines could remove the rest rooms and make them phone booths! After all, they have removed legroom, reclining seats, headroom, decent food, more than two drinks, customer service, decent baggage service….. This I see as a big win!!!”

— “Only if those callers agree to be stuffed into the overhead bins to have their conversations.”

Air travel is already miserable, and for some reason the people at DOT seem determined to make it even worse. However, I should add, that for the time being, the US airlines are rejecting any interest in allowing calls.

There was a time, long ago, where air travel was glamorous. Flying on a plane was like joining an exclusive club, and you looked the part. TWA was an acronym synonymous with style and elegance.

Few had a better vantage point on this golden era than my first cousin Judy Chadd Vavrek. Judy is tall, elegant, and with a sense of style that showed little evidence of having grown up on a farm in Stafford, Kansas. You see, Judy wasn’t simply a flight attendant. She was a stewardess. She flew for 30 years with TWA, starting in 1963. “We served all hot meals no matter the size of the plane or the destination” she told me recently. “The food was served on Rosenthal China, with our ambassador logo. Drinks were poured from and into crystal. International flights had 7 choices of entrées including Lamb Chops and Filet Mignon.”

“Over the years we greeted Elizabeth Taylor, Zsa Zsa Gabor, Lucille Ball, Paul Newman, Wilt Chamberlin among others. No one flew on private jets.”

“And the passengers dressed up. Hat and gloves were common. And I don’t mean baseball hat turned backwards covering hair in desperate need for a comb.”

“I had the benefit of great timing.”

Indeed.

But in fairness, for the airline employees like Judy, there were aspects of her work lifted straight from a scene from Mad Men. “To be hired we had to meet certain weight and height requirements. Back in those days we had girdle checks. If you didn’t have a girdle, you got a demerit.”

Ok. Some things we don’t miss.

Now? I’d like to say it’s akin to a bus with wings, but let’s not insult buses. The recent news might portend a whole new era. Just wait until the twenty-something sales guy starts dialing for dollars, trying to close the deal while you are trying to read something intelligent and thoughtful – while eating your peanuts. ■

About the Author

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

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- Phil Lewis Medal of Distinction
- Distinguished Service
- Professionalism
- Pillars of the Community
- Distinguished Government Service
- Courageous Attorney
- Outstanding Young Lawyer
- Diversity
- Outstanding Service
- Pro Bono

Learn more about the awards online at http://www.ksbar.org/awards.
2017 KBA Awards

The KBA Awards Committee is seeking nominations for award recipients for the 2017 KBA Awards. These awards will be presented in June at the KBA Annual Meeting in Manhattan. Below is an explanation of each award and a nomination form for completion. The Awards Committee, chaired by Sara Beezley, of Girard, appreciates your help in bringing worthy nominees from throughout the state of Kansas to the committee’s attention! **Deadline for nominations is Friday, March 3.**

**Phil Lewis Medal of Distinction**

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

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

**Distinguished Service Award**

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

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

**Professionalism Award**

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

**Pillars of the Community Award (NEW)**

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

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

This award may be but need not be given every year. More than one recipient can receive the award in one year.
Distinguished Government Service Award
This award recognizes a Kansas lawyer who has demonstrated an extraordinary commitment to government service. The recipient shall be a Kansas lawyer, preferably a member of the KBA, who has demonstrated accomplishments above and beyond those expected from persons engaged in similar government service. The award shall be given only in those years when it is determined that there is a recipient worthy of such award.

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

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

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

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

The award will be given only in those years when it is determined there is a worthy recipient.

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

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

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

**Pro Bono Award(s)**

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

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

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

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

**Volunteers Make This Work – Can you judge a round?**

**2017 KBA Mock Trial Competition**

This year, participants argue a civil case involving an unmanned aerial vehicle, or drone, crashing into and causing damage to several gnomes. The question: Is the Estate of Orville Earhart liable for damages incurred by Taylor Tompte?

Volunteer forms are available at: http://www.ksbar.org/mocktrial_judges

- Regional Rounds on Saturday, March 4 in Olathe and Wichita
- State Rounds on Saturday, April 1 and Sunday, April 2 in Topeka

Learn more: kansasmocktrial@gmail.com
KBA Awards Nomination Form

Nominee’s Name

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

- Phil Lewis Medal of Distinction
- Distinguished Service Award
- Professionalism Award
- Pillars of the Community Award (NEW)
- Distinguished Government Service Award
- Courageous Attorney Award
- Outstanding Young Lawyer
- Diversity Award
- Outstanding Service Award
- Pro Bono Award/Certificates

Nominator’s Name
Address
Phone         E-mail

Return Nomination Form by Friday, March 3, 2017, to:

KBA Awards Committee
Attn: Deana Mead
KANSAS BAR ASSOCIATION
ANNUAL MEETING
2017
MANHATTAN
JUNE 7-9
HILTON GARDEN INN
410 S 3RD ST.
Freedom of Contract
and the
Kansas Supreme Court
By
Professor David E. Pierce
Washburn University School of Law
Freedom of contract is the foundation of the American economy and our capitalist society. Courts can either support or weaken this foundation. Legislatures can protect, limit, or eliminate freedom of contract.¹ Having devoted most of my legal career to teaching contracts and property, and that unique mix of the two we call “oil and gas” law, I have followed with great interest the Kansas Supreme Court’s regard for freedom of contract. In this article I examine how the court has addressed difficult personal and commercial contract issues during the past fifteen years while remaining true to the freedom of contract principle.² This article also highlights how lawyers can use this freedom to benefit their clients.

I. The Basic Principle

Contract is the product of an agreement parties enter with the expectation courts will enforce the agreement as made. “It is an ancient legal maxim that contracts freely and fairly made are favorites of the law.”³ To ensure contracts are the product of free will, courts protect the formation process from acts of duress, undue influence, and misrepresentation.⁴ Freedom of contract is meaningless if the contract is not the product of each party’s free will. This includes the freedom to make good deals and bad deals. It even includes, for example, the liberty to adhere to the non-negotiable terms offered by a credit card company.⁵

Once past the list of formation defects, courts readily enforce the informed and uninformed deal. Parties to a contract cannot insulate themselves from a bad deal by proclaiming they failed to read or understand the contract terms.⁶ As will be seen, the unconscionability analysis, when properly applied, provides a principled limit on contract terms that are, under certain circumstances, so grossly unfair as to warrant court intervention.

II. Formation Principles

It is easy to make a contract. The parties, by their outward appearances, must manifest agreement.⁷ In most instances consideration is required.⁸ The resulting contract may or may not need to be in writing.⁹

A. The Formation Process

Freedom of contract includes allowing a party to design how agreement will be signified and thereby control the offer and acceptance process.¹⁰ The Kansas Supreme Court explored the outer limits of the process in Wachter Management Co. v. Dexter & Chaney, Inc.¹¹

In Wachter the issue was whether software license terms were part of the parties’ original software purchase contract. The court’s 4/3 decision resulted from varying interpretations of a letter accompanying the proposed contract stating “[t]he proposal includes modules and licenses.”¹² The majority noted the software licensing terms were not attached, incorporated, or otherwise revealed in the proposal. Therefore, the majority held the licensing terms, when later presented, were not part of the contract but rather an attempt to amend the contract.¹³ The dissent believed the reference in the cover letter was adequate to alert the buyer that licensing terms were part of the deal. Alternatively, the dissent believed the reference to licenses alerted the buyer it was being offered a “layered contract” requiring two acts of assent: the first when the proposal was signed and the second when the software was opened and used. Another alternative was that acceptance was not complete until the buyer assented to the proposal and to the licenses.¹⁴

The parties negotiated for purchase of a construction management software system and associated services that culminated in an Oct. 15 written proposal from Dexter & Chaney, Inc. (DCI) that was signed by Wachter in Kansas on October 17.¹⁵ DCI’s offices were in Seattle; DCI was incorporated in Washington. Wachter was a Missouri corporation with offices in Kansas.¹⁶ The dispute arose from the subsequent shipping and installation of the software which was packaged with a “shrinkwrap” agreement stating that “opening this sealed disk package” resulted in agreement to the terms presented when the software was loaded.¹⁷ Among the terms were choice of law and choice of venue provisions making Washington law applicable to the transaction and requiring “that any disputes would be resolved by the state courts in King County, Wash.”¹⁸ These terms were not mentioned in the October 17 contract.

When software problems arose Wachter sued DCI in Kansas for breach of contract and other claims. DCI moved to dismiss, asserting improper venue based upon the choice of forum clause in the software licensing agreement. The district court denied DCI’s motion, finding the additional software licensing terms were not part of the parties’ contract.¹⁹ The Supreme Court affirmed, holding the shrinkwrap terms constituted a proposal to modify the parties’ existing contract that was never expressly accepted and “Wachter’s actions in continuing the preexisting contract do not constitute express assent to the terms . . . .”²⁰

Nationally, a division of authority exists whether shrinkwrap terms will be given effect. The point of contention is the degree of advance notice required to alert the customer that shrinkwrap terms are part of the original offer. If the customer is made aware, during the contract formation process, that to-be-disclosed software licensing terms are part of the deal, the customer can either accede to the revealed terms or return the product for a refund. If the
customer is not made aware of the terms during the contract formation process, the later disclosed terms are deemed to be proposals to modify the existing contract that require new assent rather than the mere use of the previously contracted-for software.21

The majority and dissent both allow for broad freedom of contract in contract formation. The difference of opinion in Wachter is whether the offeror effectively exercised the available freedom. It did not. This is not a failure by the court to provide the necessary freedom, it is a failure by the parties to use it effectively. The rules for contract formation are simple. When, however, they are not effectively used, courts are reluctant to fill in the gaps at the critical contract formation stage. Because it is easy to make a contract, courts should expect the parties to make proper use of the available contract tools to effectively manifest their intentions.

This case also highlights the importance of beginning any contract analysis by determining the body of law that governs the agreement. In this case the choice was between general contract law and Article 2 of the Uniform Commercial Code. The substantive contract rules vary considerably between general contract law and Article 2, particularly when it comes to contract formation.22 In Wachter the court applied a predominant factor test to conclude that the contract was a sale of goods governed by Article 2 of the U.C.C. The court found the contract was predominantly a sale of a software product – “goods” – with services being incidental to the sale. Therefore, the U.C.C. would apply to all aspects of the parties’ contract. 23

B. Policing the Formation Process: Too Much Freedom?

A document that has all the appearances of an agreement may be unenforceable because of a defect in the formation process, such as fraud or misrepresentation.24 In theory no language within the document at issue can be used to avoid the defect because a contract was never formed.25

The problem commonly arises when a seller of a home makes false material statements regarding the condition of the home, such as the “dry basement.” Two of the four elements of a misrepresentation claim are that the statements are false and material.26 To recover, however, the buyer must also prove it relied on the statements and that its reliance was reasonable.27 The issue is whether terms of the challenged contract can be used to negate buyer’s reliance. The document at issue typically contains many disclaimers that the buyer is accepting the home “as is” or that buyer is not relying upon anything the seller or real estate agent may have said but instead has the ability to conduct an inspection. The problem is that often the buyer is likely to rely upon the seller’s misrepresentation in determining whether to make further inquiry. 28

Nationally, there is disagreement among courts whether contract terms tainted by misrepresentation or fraud can be used to evaluate the buyer’s reliance.29 The Kansas Supreme Court, in 2004, addressed fraud and contract formation in Alires v. McGehee.30 The court used terms in the agreement to evaluate the buyer’s reliance and thereby negated what was otherwise a material misrepresentation regarding the dry base-

ment. The agreement terms instructed the home buyer to inspect the home and not rely upon the seller’s representations. It also stated that a failure to inspect constituted a waiver of any claims associated with defects that would have been revealed by an inspection.31

In Alires the buyer did not have the house inspected because the seller’s disclosure statement indicated there were no major problems with the house.32 “Mr. Alires testified that he did not have the foundation inspected because he trusted Mrs. McGehee’s representation that the basement did not leak.”33 The reliance issue should focus on whether there was any reason for Mr. Alires to believe that Mrs. McGehee’s statements were false or otherwise unreliable. The language of the document Mr. Alires was induced to sign in response to the representation should be considered only to ascertain whether McGehee was lying or it reveals she knew nothing about the subject matter of her representation. For example, it would be a duty-to-read issue if the disclosure document stated: “I am a liar, don’t rely on anything I say” or “I have never seen the property so don’t rely on anything I say.”

The court instead gave effect to the disclaimer language in the tainted document stating: “the Alireses, not only contractually assumed a duty to inspect the property and failed to have the property inspected, but the Alireses agreed that if they failed to have inspections performed, they waived ‘any claim, right or cause of action relating to or arising from any condition of the property that would have been apparent had inspections been performed.’” 34 The duty to inspect and waiver provisions were designed to insulate the misrepresentations that were part of the same transaction the seller sought to enforce. Conceptually it should not be possible for the parties to contract that the buyer cannot rely on the seller’s statements when the focus of the inquiry is the validity of the very document containing the inspection and waiver provisions. The court elevates form, the document language, over substance, the validity of the document, to impose on the buyer a more demanding reliance standard. The court held “it was incumbent upon the Alireses to provide evidence that, even if an inspection had been performed, the water leakage problems in the basement would not have been apparent.”35

The court’s approach in Alires runs counter to freedom of contract because it permits conduct that corrupts the free will associated with the mutual assent required to form a contract. In 2011, with Osterhaus v. Toth,36 the court began to isolate its Alires holding.

In Osterhaus the seller misrepresented the dry basement but the buyer had an inspection conducted. Although foundation issues were noted in the inspection report, the water problem was not identified. The court sought to limit Alires to its specific facts but did not question its prior analysis. Instead it held that whether a buyer’s reliance was reasonable depended upon whether a “reasonable inspection prior to purchase” would have revealed “a seller’s false representation.” After Osterhaus the seller is still able to combine fraudulent representations with tainted document language to create a duty to inspect that can negate a buyer’s fraud and misrepresentation claims. In 2013 the court in Stechschulte v. Jennings38 considered
another act of fraud by a home seller who failed to disclose window problems that allowed water to enter the home. The fraud combined false disclosures with the usual document language disclaiming liability for disclosures and defects. As in Osterhaus the buyer had the house inspected. The inspection did not reveal the window problem so the ultimate factual issue, as in Osterhaus, was “whether the plaintiff buyer’s general reliance on the false disclosure was reasonable.”40 If it was, and the window water problem was not discovered, then the buyer’s reliance on the false disclosure was reasonable. The major contribution made by the court in Stechschulte is to emphasize that the reasonableness of the buyer’s inspection must be evaluated “in view of the disclosures that were made” and that inquiry is “a genuine issue of material fact for trial.”41 It appears the court is content with letting a jury sort these issues out. The predictable outcome when these facts are presented to a jury is: liars lose.

Buyers like those in Alires, Osterhaus, and Stechschulte, should not be forced to respond to boilerplate designed to protect the real estate industry when a key component of the protection mechanism is the seller’s disclosure.42 It is an af-front to freedom of contract to give any effect to document language that assists a seller’s fraudulent acts.

III. Interpretation Principles

The greatest threat to freedom of contract arises when a court engages in interpretation. Freedom to agree on contract terms is meaningless unless courts give terms their intended effect. Freedom of contract is therefore a matter of judicial grace because justices decide what contract language means. Unless the court declares a contract “ambiguous,” the jury has a very limited role in the process because the meaning of the unambiguous contract is an issue of law.43

A. Ambiguity

Determining whether document language is ambiguous is a subjective undertaking often influenced by the desired outcome. I have referred to the ambiguity analysis as one of “[t]he most fickle of the analytical tools used to ‘interpret’ documents . . . .”44 The fickle nature of the concept is demonstrated by opinions of the court where four justices find something is, or is not, ambiguous with the other three justices finding otherwise.45 The ambiguity analysis is particularly outcome-sensitive when a finding of ambiguity also triggers an interpretive maxim—such as resolving the ambiguity against one of the parties.

Justice Miller alluded to this problem in his dissent in Crawford v. Prudential Insurance Company of America46 where he noted the plaintiff’s sad situation improperly triggered “a tortured reading of the clear language of the policy in order to impose liability on the health insurer . . . .”47 In Gilmore v. Superior Oil Company48 and Schupbach v. Continental Oil Company,49 the court first found the lease terms at issue ambiguous and then turned to the maxim that “[c]onstruction of oil and gas leases containing ambiguities shall be in favor of the lessor and against the lessee.”50 This was the vehicle for the court to create a better deal for the lessor through interpretation. Justice Fontron, commenting on the court’s actions in Gilmore and Schupbach, noted the outcome in each case “offends my sense of logic . . . .”51 As discussed below, the current court has returned to logic, and principle, by refusing to ignore contract language to improperly favor one party over the other.52

An ambiguity analysis is often used to determine whether courts can consider extrinsic evidence to ascertain the meaning of a contract. This too is often impacted by the desired outcome. If the contract is declared “ambiguous” the evidence comes in; if it is unambiguous, it is excluded. The ambiguity predicate for certain applications of the parol evidence rule ensures the rule is as subjective and unpredictable as the ambiguity analysis.53

B. Implied Terms

Implied terms are particularly vexing when dealing with the oil and gas lease. Professor Maurice Merrill devoted a treatise to the topic with the mission of developing a contract interpretation theory that allows courts to modify or ignore express terms of the lease contract.54 Professor Merrill advocated for “radical departure” from freedom of contract to allow courts to treat oil and gas leases as though they were unconscionable contracts and subject to a judicial rewrite to enhance the lessor’s position.55 Professor Merrill adopts an implied in law approach to implied covenants that gives courts a free-ranging interpretive license to rewrite the oil and gas lease as it sees fit. As Merrill candidly notes: “the implied covenant is a fiction, used like other fictions by the law in order to achieve a desired result.”56 Merrill thought this was necessary because the lessee usually selected the lease terms and therefore the contract, as written, would offer little to protect the lessor.57 Although Merrill personally felt the oil and gas lease was an unconscionable contract, courts had already held the common forms of oil and gas lease were not unconscionable.58

The Kansas Supreme Court considered and rejected Professor Merrill’s implied-in-law approach in Smith v. Amoco Production Company.59 Commenting on the Oklahoma Supreme Court’s prior rejection of Merrill’s approach, the court in Amoco stated:

The Indian Territory Court observed in 1941 that it had found no support for Professor Merrill’s implied in law doctrine in the adjudicated cases. . . . Sixty years later, based on the briefing here, we share the same observation. We choose to join Oklahoma, Texas, and Montana in holding that the covenants are implied in fact. Our holding follows the early development of oil and gas law in Kansas. [citing Brewster v. Lanyon Zinc Co., 140 F. 801 (8th Cir. 1905) and Howerton v. Gas Co., 91 Kan. 553, 106 P. 47 (1910)].60

Commentators have asserted the implied-in-law vs. implied-in-fact analysis is of little significance. Most recently it has been stated: “The difference has had little effect on case outcomes.”61 They are wrong. Although a court may not use the implied-in-law or implied-in-fact terminology, its analysis of interpretative issues is fundamentally impacted by whether
it pursues an implied-in-law versus implied-in-fact approach. I believe it is the most important inquiry when interpreting oil and gas lease obligations. The choice is between interpreting what the parties have expressly agreed to, and giving it effect in the implication process, or ignoring what the parties have expressly agreed to in favor of a “better” contract of the court’s making. One approach honors freedom of contract while the other destroys it. Few things could be as significant to freedom of contract.

The process of implication is designed to deal with the “omitted term” in a contract. When a contract fails to address a matter, courts will be called upon to provide the omitted term. Freedom of contract principles require that the omitted term adopted by the court be consistent with the parties’ other contract terms. This means the implication process begins with looking to the contract terms to answer the question. If the express terms do not address the matter, then the court will fashion an implied term that fills the gap while remaining true to the intent of the parties as gleaned from the express contract terms. This is the implied-in-fact approach. The implied-in-law approach is much simpler. First the court declares an omitted term exists and then fashions an implied term that changes the contract’s express allocation of risks and rewards in order to benefit a party of the court’s choosing.

Under an implied-in-law approach courts merely make up whatever terms they think are “fair” or “more fair,” and impose them on the contracting parties. In the oil and gas context the process often requires the court to ignore troublesome express terms in the oil and gas lease. For example, terms indicating the lessee’s marketing efforts, and royalty calculation, can be satisfied by selling oil or gas on the leased premises or “at the well.” Because extracted oil and gas increase in value as they move downstream from the leased premises, lessors will seek to have their royalty calculated on higher downstream values instead of the value on the lease. Therefore, a producer’s royalty payments are often challenged by lessors because they reflect proceeds or values “at the well” instead of at an interstate pipeline or other marketing facility miles from the leased land. Using an implied covenant to market theory, lessors in Colorado have been successful at negating express lease language that indicates royalty values are to be determined “at the well.” Using an implied-in-law approach, the Colorado Supreme Court determined “at the well” and similar language had no meaning. The court, however, rejected a total prohibition on the ability to shorten a statutory limitations period by contract. K.S.A. 60-501 states: “The provisions of this article govern the limitation of time for commencing civil actions, except where a different limitation is specifically provided by statute.” After analyzing the history of 60-501, the court concluded: “The plain language of K.S.A. 60-501, however, does not preclude parties from entering into contracts shortening the statute of limitations period set out in statutes.” Nor did the court find any sort of implied prohibition.

The Kansas Supreme Court, in *Fawcett v. Oil Producers, Inc. of Kansas*, rejected Colorado’s implied-in-law approach by refusing to ignore express “at the well” lease language in defining the content of the implied covenant to market. The court instead held that the content of the implied marketing covenant must be consistent with the intent of the parties as revealed by the express terms of the lease. This analysis is wholly consistent with freedom of contract principles because it gives effect to the express terms of the parties’ agreement in defining the implied terms. One commentator, critical of the court’s analysis in *Fawcett*, uses 78 pages and 289 footnotes to argue that “at the well” does not mean “at the well.” That can only be the case if Merrill’s implied-in-law theory is used. The Kansas Supreme Court wisely rejected Merrill’s theory in *Smith v. Amoco Production Company* and the wisdom of the court’s holding in *Smith* is borne out in *Fawcett*.

IV. Competing Public Policies

In *Pfeifer v. Federal Express Corporation* the Kansas Supreme Court had to balance freedom of contract against protecting employees from retaliatory discharge for exercising workers compensation rights. In her employment contract with Federal Express, Pfeifer agreed to bring any claim she may have against Federal Express “within the time prescribed by law or 6 months from the date of the event forming the basis of my lawsuit, whichever expires first.” K.S.A. 60-513(a) (4) provided for a 2-year statute of limitations; the contract provided for a 6-month contractual limitations period. Pfeifer brought suit 15 months after she was fired. The federal district court held the action was barred by the contract terms, Pfeifer appealed, and the issue was presented to the Kansas Supreme Court as a certified question from the 10th Circuit Court of Appeals.

The court held the statutory 2-year period to bring suit could not be shortened by contract. There was a “strongly held public policy interest at issue” that transcended the freedom of contract of not only Federal Express but also Pfeifer. Allowing Pfeifer to agree to a shortened period to bring a workers compensation retaliatory discharge claim “impedes the enforcement of that right and the public policy underlying it.” This she could not do because “our legislature has provided 2 years to bring a cause of action that protects the exercise of statutory rights under the Workers Compensation Act.” Enforcing these sorts of claims, brought within the 2-year statute of limitations, is something of interest to the public in general. As the court put it: “we must consider the impact such agreements would have on the deterrent effect underlying the cause of action.”

The court, however, rejected a total prohibition on the ability to shorten a statutory limitations period by contract. K.S.A. 60-501 states: “The provisions of this article govern the limitation of time for commencing civil actions, except where a different limitation is specifically provided by statute.” After analyzing the history of 60-501, the court concluded: “The plain language of K.S.A. 60-501, however, does not preclude parties from entering into contracts shortening the statute of limitations period set out in statutes.” Nor did the court find any sort of implied prohibition.

The *Pfeifer* holding imposes a limit on freedom of contract while at the same time defining vast opportunities to exercise freedom of contract. *Pfeifer* informs that it is possible to contractually limit the time period for bringing suit – so long as it does not conflict with a “strongly held public policy.” This is an important freedom that lawyers must consider when counseling clients.

A similar degree of precision, designed to maintain freedom of contract while accommodating a competing public policy, was employed by the court in *Frazier v. Goudschaal*. This case involved a “co-parenting agreement” between the mother of a child and her partner that was entered into when the mother
was artificially inseminated. The partner was not the sperm donor and by law the donor had no parental rights. When the biological mother and her partner separated, the partner sought to enforce the child visitation terms of the contract; the biological mother argued the contract was against public policy and unenforceable.

The court refused to invalidate the contract on any general policy notion but instead focused on the contract terms that implicated precise public policies. The court held the biological mother of the children had it within her power to “share custody with another . . . so long as it is in the best interests of the children.” The only public policy the court found implicated was protection of the children involved. Therefore, the court held the co-parenting agreement was valid and remanded the case to the district court to “further explore the best interests of the children and, in that regard, to appoint an attorney to represent the children’s interests.” The court also observed that the children had rights in the co-parenting agreement as third-party beneficiaries.

The court in Frazier, as in Pfeifer, is careful to preserve the parties’ freedom of contract to the extent it does not conflict with a well-defined public policy. In each case the court’s holding is crafted to preserve freedom of contract to the greatest extent possible while fully accommodating the competing public policies. For example, in Pfeifer, had the employee’s cause of action not related to her retaliatory discharge claim, the six-month limit for bringing suit would most likely have been enforced. In Frazier the co-parenting agreement is fully enforceable between the biological mother and her partner so long as the terms are in the best interest of the children.

Dicta in Pfeifer suggests the court may still have freedom of contract issues with the 6-month limit, even when not associated with, a “strongly held public policy.” The court stated: “Notably, Pfeifer does not allege the contractual provision at issue is unconscionable, the product of unequal bargaining power, or that the agreement was an adhesion contract. We do not address what impact, if any, such allegations might play in another case of this type.” This statement is troubling because “unequal bargaining power” or “an adhesion contract” are not grounds for refusing to enforce a contract. Unconscionability, however, is.

V. Unconscionability: Protecting Freedom of Contract

Unconscionability offers a principled analysis to police contracts instead of unprincipled creative interpretation. Unconscionability analysis requires courts to address gross unfairness issues in a frank and deliberate manner. The Uniform Commercial Code and the Restatement (Second) of Contracts have similar unconscionability provisions requiring that contract conscionability be evaluated based upon the circumstances existing “at the time the contract is made.” If the contract is found to be unconscionable, the court can refuse to enforce the contract, refuse to enforce an unconscionable term, or limit application of an unconscionable term to avoid an unconscionable result.

My pick for the worst contract law decision ever issued by the Kansas Supreme Court is an unconscionability decision. It was decided with the court’s 1993 and 1995 opinions in Kansas Baptist Convention v. Mesa Operating Limited. The court violated the basic requirement that conscionability be evaluated at the time the contract was made, in this case 1952. This fundamental error was grossly compounded by the court’s failure to properly adjust what it deemed to be the unconscionable portion of the contract – resulting in a $1.9 million windfall to the assignee Hugoton Energy Corporation. Mesa’s rights were created by a long-term negotiated agreement where each party was represented by competent counsel and the contract was profitable to the Convention for over 36 years. Unfortunately for Mesa, the contract was re-written by the court, under the guise of unconscionability, when market conditions made it no longer a good deal for the Convention.

The present court has not relied upon the unconscionability analysis in Kansas Baptist Convention. Hopefully the decision will remain nothing more than a bad moment for a prior court that thought it was being “fair.” It is, however, a useful reminder that unconscionability is a dangerous tool with the capacity to destroy freedom of contract when not used properly.

For a principled analysis, there must be a working definition of unconscionability so courts know when it is proper to intervene and write a different contract than the one created by the parties. Although the Uniform Commercial Code does not define unconscionability, the comments to § 2-302 offer guidance. “The principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power.” The comments also instruct: “The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.”

The comments to Restatement (Second) of Contracts § 208 offer a description that reflects the path unconscionability cases have taken: “A bargain is not unconscionable merely because the parties are in unequal bargaining position, nor even because the inequality results in an allocation of risks to the weaker party.” Instead the situation must be so aggravated as to approach duress resulting in terms that are so oppressive as to defy any real assent. As the Restatement notes: “[G]ross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.” Often the substantive “oppression” is coupled with procedural “unfair surprise” because of the way the contract terms are presented – this is the “deception” component of the equation.

The Restatement identifies the following unconscionability indicators: (1) it is unlikely the weaker party will be able to fully perform the contract; (2) the stronger party recognizes the weaker party will be unable to obtain substantial benefits from the contract; and (3) the stronger party has knowledge the weaker party is unable to protect its interests due to physical or mental infirmities, ignorance, illiteracy or inability to un-
derstand the language of the agreement, or similar factors.”

This is in line with the Kansas Supreme Court’s description of unconscionability: “It is directed against one-sided, oppressive and unfairly surprising contracts, and not against the consequences per se of uneven bargaining power or even a simple old-fashioned bad bargain.”

VI. The Class Action: Destroying Freedom of Contract

Until recently the class action procedural device has been routinely used to destroy freedom of contract. When contract terms and factual contexts are not identical, the class action allows the class representative to substitute its contract terms and factual situation for those of all class members. It thereby negates terms not only favorable for the defendant but also for class members with contract terms and a factual story superior to those of the class representative.

In the oil and gas context Kansas courts have certified classes to litigate royalty disputes as though the oil and gas lease was just another credit agreement from a credit card company. Instead of being an adhesion contract with American Express, the oil and gas lease is frequently the product of face-to-face negotiation resulting in documents that vary from lease to lease is significant ways. Lawyers are frequently involved on both sides of the transaction. The landowner ultimately has the upper hand in the leasing transaction because there is no obligation to lease and there is often intense competition for leased acreage. The Kansas Supreme Court has noted: “There is no standard form for an oil-and-gas ‘lease.”

Which means “[e]ach instrument must be interpreted in the light of its own peculiar provisions.”

The typical justification for disregarding lease contract differences is that the lessee employs a uniform interpretation for payment purposes thereby itself ignoring contract differences. But, as with any contract, the contract terms must be consulted when a breach is alleged. The lessee may be overpaying, underpaying, or paying correctly. Liability exists only when the payment is an amount less than that required by a lessor’s specific contract. To answer that question, one must consider the parties’ specific contract and facts, not those of a non-party class representative strategically selected by class counsel. The U.S. Supreme Court recognized this reality in Wal-Mart Stores, Inc. v. Dukes.

In Wal-Mart, the court focused on the ability to arrive at “common answers” to “common questions” raised by the proposed class. Prior to Wal-Mart, courts tended to find commonality from common questions without regard for “‘[d]issimilarities within the proposed class’” that have “‘the potential to impede the generation of common answers.” Therefore, merely asking whether the lessee breached the oil and gas lease by a uniform approach to royalty calculation cannot be answered when the lease contracts, and the underlying facts, are not identical. Courts must consider individual contract terms and the facts that impact application of the terms. This analysis was applied in Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc., where the 10th Circuit Court of Appeals held the district court abused its discretion in certifying a class of lease royalty owners because XTO used a “uniform payment methodology.”

To illustrate how the class action procedural device can negate contract terms, consider a lessee and lessor with an alternative dispute resolution clause in their oil and gas lease. The clause requires the lessor to give the lessee advance notice of a dispute so the parties can try and negotiate a solution, or the lessee can cure the breach and avoid litigation. Many leases in Kansas contain a clause similar to the following:

“In the event lessor considers that the lessee has failed to comply with any obligation hereunder, express or implied, lessor shall notify lessee in writing, specifying in what respect lessor claims lessee has breached this lease. The service of such notice and elapse of sixty (60) days without lessee meeting or commencing to meet the alleged breaches shall be a condition precedent to any action by lessor for any cause. If, within sixty (60) days after the receipt of such notice lessee shall meet or commence to meet the breaches alleged by lessee, lessee shall not be deemed in default hereunder.”

Most oil and gas leases encountered in Kansas, however, do not contain such a clause. Can the clause be eliminated from the parties’ contract by some third party bringing a class action relying on a class representative’s lease that does not contain the clause? What if the lease contains variations that relate to the calculation of royalty that is the focus of the lawsuit? What if material facts associated with the lease are different from those of the class representative? These significant freedom of contract issues are typically ignored by courts desiring to give the class, and class counsel, their “day in court.”

The practical effect of a certification order is it increases the risk of an unfavorable decision; thereby increasing the settlement value of the dispute. Many royalty cases in Kansas have been settled for large sums of money because the aggregated value of hundreds or thousands of contracts, combined with an aggressive theory of liability, created financial risks the defendants were ultimately unwilling to accept. In Kansas alone tens of millions of dollars have been paid to settle royalty class actions; payments that turned out not to be justified by the law but fully justified by the risk created by class certification.

VII. Conclusions

The Kansas Supreme Court is the guardian of freedom of contract. It must be vigilant that this freedom is not inadvertently compromised by rulings that are outcome-driven instead of policy-driven. When freedom of contract clashes with other policies, the court has acted to ensure competing policies are properly accommodated. When freedom of contract must yield to a competing policy, the court has been careful to define the preempted area to avoid unnecessarily restricting freedom of contract. It is often a difficult and delicate task, but the Kansas Supreme Court has done it remarkably well during the 15-year time frame examined for this article. Contract law is alive and well in Kansas. It is up to lawyers practicing in Kansas to ensure this freedom is exercised to realize its full potential for their clients.
Endnotes:

1. E.g., K.S.A. 16-121 (restricting certain indemnity agreements).
2. This time frame coincides with when the first of the current justices, Chief Justice Nuss, joined the court in 2002.
7. This is the objective theory of contracts where the parties signify their mutual assent through the process of offer and acceptance. Although there are thousands of cases that refer to the process as a “meeting of the minds,” the objective theory does not require that the parties’ minds “meet.” Instead the objective theory considers what a reasonable person would conclude a party meant when observing the party’s outward manifestations. E. Allan Farnsworth, Contracts 114, 115 (4th ed. 2004) (noting that “courts universally accept” the objective theory and have abandoned the subjective theory, except for the “much-abused metaphor” requiring a “meeting of the minds”).
8. Under Article 2 of the Uniform Commercial Code the consideration requirement is relaxed for some transactions, such as “firm offers” and “modifications.” K.S.A. 84-2-205 (firm offers); K.S.A. 84-2-209 (modifications).
9. This is an example where Article 2 can be more demanding. For example, K.S.A. 84-2-201 requires a writing for a “contract for the sale of goods for the price of $500 or more . . . .” The statute of frauds applicable to certain non-goods contracts does not require a writing when the agreement can be performed “within the space of one year from the making . . . .” K.S.A. 33-106.
10. This is one of the most empowering aspects of freedom of contract: the ability to control the terms and process by which an enforceable agreement is made. It is also one of the most under-used tools available to contracting parties. David E. Pierce, Professional Responsibility and the Transactional Lawyer: The Drafting Context, 57 ROCKY MTN. MIN. L. INST. 19-1, 19-4 (2011) (discussing the ability of the transactional lawyer to “make facts”).
12. Id. at 370 (majority), 378 (dissent), 144 P.3d at 751 (majority), 756 (dissent).
13. Id. at 370, 144 P.3d at 751.
14. Id. at 378-79, 144 P.3d at 756.
15. Id. at 366, 144 P.3d at 749.
16. Id.
17. Id. at 366-67, 144 P.3d at 749.
18. Id. at 367, 144 P.3d at 749.
19. Id. at 367, 144 P.3d at 749-50.
20. Id. at 378, 144 P.3d at 755.
21. Id. at 377-78, 144 P.3d at 755.
22. Most notable are the U.C.C. Article 2 rules governing rejection and counter-offer (K.S.A. 84-2-207) and the ability to modify a contract without consideration (K.S.A. 84-2-209).
23. 282 Kan. at 369, 144 P.3d at 750-51. For a more explanatory analysis of the predominant factor test and the “mixed contract” problem see Care Display, Inc. v. Didde-Glaser, Inc., 225 Kan. 232, 238-39, 589 P.2d 599, 605 (1979) (contract was predominantly for services with goods being incidental and therefore general contract law applied instead of U.C.C. Article 2).
24. The distinction between fraud and misrepresentation is that fraud requires either the intent to defraud or negligence while misrepresentation does not. The key requirement for misrepresentation is that the inaccurate statement be material to the transaction. E. Allan Farnsworth, Contracts 243 (4th ed. 2004).
25. It would also recognize the very transaction tainted by the fraud or misrepresentation.
26. “Misrepresentation” is the term used when a party makes an untrue statement that is material but not necessarily fraudulent. If the untrue statement is made with an intent to deceive, it is labeled “fraud.”
28. This includes a more focused inquiry of a problem that was effectively covered up by an inaccurate disclosure.
31. Id. at 401, 85 P.3d at 1194.
32. That is most likely the reasoning the seller made the misrepresentation.
33. Id. at 401, 85 P.3d at 1194.
34. Id. at 410, 85 P.3d at 1199 (emphasis added).
35. Id.
37. Id. at 776, 249 P.3d at 900.
39. The court noted: “the inspector did not review the disclosure form before conducting the inspection.” Id. at 9, 249 P.3d at 1090. Although that would seem to impact the reliance inquiry, it would not resolve it. Had a problem been noted in the disclosure, the buyer may have focused on it – and directed the inspector to focus on it. In any event the inspector should always be provided a copy of the seller’s disclosures.
40. Id. at 21, 298 P.3d at 1097.
41. Id.
42. Buyers would be better served by hiring an attorney to draft a “buyer’s contract” instead of entering into the common three-party contract tendered by the real estate agent that is primarily designed to protect the agent and its agency.
44. The Court was unimpressed with that observation. Central Natural Resources, Inc. v. Davis Operating Co., 288 Kan. 234, 245, 201 P.3d 680, 688 (2009) (I represented Central Natural Resources, Inc.).
47. Id.
51. Schupbach, 193 Kan. at 409, 394 P.2d at 5.
52. Fawcett v. Oil Producers, Inc. of Kansas, 302 Kan. 350, 364, 352 P.3d 1032, 1041 (2015) (“at the well” language in the oil and gas lease means “at the well” and not somewhere downstream from the well). I participated in this case by preparing an amicus curiae brief for the Eastern Kansas Oil & Gas Association.
54. Maurice H. Merrill, The Law Relating to Covenants Implied in Oil and Gas Leases (2d ed. 1940). John McArthur picks up Professor Merrill’s quest to judicially rewrite the oil and gas lease in JOHN BURRITT M’CARTHUR, OIL AND GAS IMPLIED COVENANTS FOR THE 21ST CENTURY (2014).
should not be enforced as written because it would "be better for farmers". See David E. Pierce, Beyond the Jurisprudential Underpinnings of the Implied Covenant to Market, 48 ROCKY MTN. MIN. L. INST. 10-1, 10-7 to 10-9 (2002).


62. I have previously demonstrated the importance of the analysis by referring to the implied-in-fact approach as interpretive "science" designed to give effect to the parties' contract and the implied-in-law approach as interpretive "art" designed to mask destruction of the parties' contract. David E. Pierce, Royalty Jurisprudence: A Tale of Two States, 49 WASHBURN L. J. 347, 348-49 (2004).

63. When using an implied-in-law approach to "interpret" the royalty clause it is always a zero-sum game where rights are taken away from one party to the contract and given to the other. David E. Pierce, Royalty Jurisprudence: A Tale of Two States, 49 WASHBURN L. J. 347, 348-49 (2004). In addition to the damage done to freedom of contract, there can be other losses to society. John W. Broomes, Waste Not, Want Not: The Marketable Product Rule Violates Public Policy Against Waste of Natural Gas Resources, 63 KAN. L. REV. 149 (2014).

64. This will take place only when one of the parties engenders judicial sympathy and the other general social antipathy. Such as the "farmer" lessor and the "oil company" lessee.

65. David E. Pierce, Exploring the Origins of Royalty Disputes, 23 PETROLEUM ACCOUNTING AND FINANCIAL MANAGEMENT J. 72, 77-78 (2004). This theory also creates the critical economic "spread" required by class action counsel to make investment in a case attractive.


67. Id. at 897.


69. Id. at 365, 352 P.3d at 1042.

70. Id. ("We hold that when a lease provides for royalties based on a share of proceeds from the sale of gas at the well, and the gas is sold at the well, the operator's duty to bear the expense of making the gas marketable does not, as a matter of law, extend beyond that geographical point to post-sale expenses.").


74. Justice Biles, writing for a unanimous court, observed in the opening sentences of his opinion: "The issue presented is lodged squarely between two long-standing public policy interests that are at odds in this case. One concerns the protections afforded injured workers against retaliatory discharge when exercising statutory workers compensation rights. The other is the freedom to contract." Id. at 548, 304 P.3d at 1228.

75. Id. at 550, 304 P.3d at 1229.

76. Id. at 548, 304 P.3d at 1228.

77. Id.

78. Id. at 559, 304 P.3d at 1234.

79. Id. at 558, 304 P.3d at 1234.

80. Id. at 558, 304 P.3d at 1233-34 (emphasis added).

81. Id. at 556, 304 P.3d at 1232.

82. Id. at 553, 304 P.3d at 1231.

83. Id.

84. This includes express statutory limitations such as K.S.A. 84-2-725(1) that provides: "An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it." (Emphasis added). This one-year provision, however, would not apply to the Pfeifer contract because it was a contract for services as opposed to a sale of goods. 85. 296 Kan. 730, 295 P.3d 542 (2013).

86. There were two agreements. The first for a child born in 2002 and the second for a child born in 2004. In both cases the biological mother was Goudschaal. Id. at 733, 295 P.3d at 546.

87. K.S.A. 23-2208(f) provides: "The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman."

88. Id. at 747, 295 P.3d at 554 ("Goudschaal summarily dismisses the agreement as unenforceable, apparently believing that such an agreement is always contrary to public policy and, thus, invalid as a matter of law.").

89. Id. at 753, 295 P.3d at 557.

90. Id. at 756, 295 P.3d at 558.

91. Id. at 753, 295 P.3d at 557.

92. Pfeifer, 297 Kan. at 549, 304 P.3d at 1229.

93. U.C.C. § 2-302 cmt. 1 (1977); Restatement (Second) of Contracts § 208, 1201.

94. David E. Pierce, Exploring the Jurisprudential Underpinnings of the Implied Covenant to Market, 48 ROCKY MTN. MIN. L. INST. 10-1, 10-6 (2002) ("Although critics of unconscionability may view it as an affront to freedom of contract, when properly applied it actually promotes freedom of contract by imposing a principled analysis on courts desiring to rewrite contracts.").

95. K.S.A. 84-2-302(1); Restatement (Second) of Contracts § 208.

96. Id.


100. Kansas Baptist Convention, 253 Kan. at 718-20, 864 P.2d at 206-07.


104. Id.


106. Id.

107. Id. at cmt. b.

108. Id. at cmt. d.


111. Previously in my capacity as an expert witness called by defendants contesting class certification I have examined thousands of oil and gas leases entered into during the past 95 years. Often the leases exhibited, on the face of the document, evidence of the sort of give-and-take you would expect in a negotiated transaction.


113. Id.


115. Id. at 350, 131 S. Ct. at 2551, 180 L. Ed.2d at 390.

116. 725 P.2d 1213 (10th Cir. 2013).

117. Id. at 1217. I was hired by XTO to review a sample of the oil and gas leases encompassed by the proposed class.

119. The risk is illustrated by the court’s opinion in *Coulter v. Anadarko Petroleum Corp.*, 296 Kan. 336, 292 P.3d 289 (2013), where it considered an objection to a proposed $33 million class settlement where the challenger alleged the claim was worth $149 million under its more aggressive theory. *Id.* at 350, 292 P.3d at 299. Approving the $33 million class settlement the court noted that the claim could also be worth $0. *Id.* at 363-64, 292 P.3d at 306-07. In *Hershey v. ExxonMobil Oil Corp.*, No. 07-1300-JTM, 2013 WL 66075 (D. Kan. Jan. 4, 2013), aff’d 550 Fed. Appx. 566 (10th Cir. Dec. 16, 2013), a $60.5 million settlement was approved, including award of 1/3rd of the total settlement to class counsel in attorney fees. The court’s subsequent decision in *Fawcett v. Oil Producers, Inc. of Kansas*, 302 Kan. 350, 352 P.3d 1032 (2015), makes it clear that the class members were not entitled to royalty on the downstream values that were the basis for the claimed liability and settlements in *Coulter* and *Hershey*—and many other cases.

This case.

er factors, which was reasonable and supported by the evidence in

on considerable deference given to district court's balancing of

Bark-

further proceedings was reversed.

nity to do so, and the obvious prejudice from Ellison's confinement

lay, its shortcomings in justifying the delay when afforded opportu-

the State's substantial responsibility for the largely unexplained de-

extraordinary length of delay in providing Ellison his day in court,

in light of the

solely on length of delay, and correctly applied

Barker

sion drawn from those facts. In this case, district court did not rely

proceedings. Appellate court is to review factual findings for sub-

ate ad hoc approach to evaluate claims of undue delay in KSVPA

provides the appropri-

and compared tests in

Mathews v. Eldridge

, 424 U.S. 319

Barker

agreed that

State's argument for presumption of missing findings in its favor,

agreed that Barker was the appropriate framework, but reversed and

remanded based on district court's failure to make adequate factual

findings and incorrectly basing its release order solely on length of

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ISSUE: Due Process - Undue Delay in Civil Commitment Pro-

Held: District court's judgment was affirmed. KSVPA was re-

viewed. Ellison's detention under KSVPA was a deprivation of lib-

erty that requires due process protection, and opportunity to be heard

within a meaningful time imposes limits on time that could elapse

between Ellison's probable cause hearing and trial. Court discussed

and compared tests in Barker v. Wingo, 407 U.S. 514 (1972), found the
delay violated Ellison's due process rights, dismissed the action, and

ordered Ellison's release. State appealed. Court of Appeals rejected

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granted. Sole issue on review is whether the delay violated Ellison's
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CITATION: -59a01 et seq., -59a02(a), -59a02(f), -59a03(a), -59a04(a), -59a05(a), -59a05(b), -59a05(d), -59a06(a), -59a06(c), -59a06(e), -59a07(a), -59a08(a), -59a09, 60-2010(b)

ISSUES: (1) Lawfulness of Search of Passenger's Personal Effects, (2) Validity of Consent to Search

Held: Appellate panel erred in finding a passenger's presence

becomes voluntary or consensual once the driver gives consent or

voluntarily remains on the scene after conclusion of the traffic stop.

A driver of a vehicle subjected to a traffic stop does not have the

authority, as a matter of law, to waive the Fourth Amendment rights

of passengers in the stopped vehicle. Totality of circumstances in this
case did not support State's theory that Cleverly voluntarily con-

sented to prolong his traffic stop detention beyond the issuance of a
traffic citation to the driver. Cleverly was unlawfully detained from

termination of the traffic stop until search of the cigarette packages,

and there was no attenuation of officer's continuing unlawful deten-

tion of Cleverly.

Under totality of circumstances in this case, nature of Cleverly's

unlawful seizure rendered his consent to search of the cigarette pack-

age involuntary. District court erred in denying motion to suppress

this evidence. Court of Appeals erred in affirming the district court's

judgment.

STATUTE: K.S.A. 22-2401(d), -3216(2)
CRIMINAL LAW—STATUTES
STATE V. CORBIN
SALINE DISTRICT COURT—REVERSED AND REMANDED
NO. 113,585—DECEMBER 23, 2016
FACTS: Corbin entered no contest plea to premaditated murder of son. Prior to sentencing he filed motion under K.S.A. 2015 Supp. 21-6222(b) asking court to determine if he was a person with "intellectual disability" not subject to mandatory imprisonment. District court denied the motion, stating the reports of Corbin's standardized intellectual testing were insufficient to find he was a person with intellectual disability as defined by the statute, or to warrant a full evidentiary hearing on his status. Hard 25 year sentence was imposed. Corbin appealed. While appeal was pending, supplemental briefing was ordered on the effect, if any, of 2016 amendment of K.S.A. 76-12b01, the statute that supplies part of the definition of intellectual disability in K.S.A. 2015 Supp. 21-6222(g).
ISSUE: Statutory determination of intellectual disability
HELD: Statutory two-step process to be followed when district court considers a convicted defendants' claim of intellectual disability was outlined. Legislature amended K.S.A. 76-12b01(i) to allow defendants to establish sub-average general intellectual functioning by means in addition to standardized intellectual testing. As parties do not challenge retroactivity of the 2016 amendment, it is assumed without deciding that the amendment applies retroactively. Case was reversed and remanded to district court with directions to reconsider Corbin's motion under current version of K.S.A. 76-12b01 in conjunction with K.S.A. 2015 Supp 21-6222(g).
STATUTES: K.S.A. 76-12b01, -12b01(i); K.S.A. 2015 Supp. 21-6620, -6622, -6622(b), -6622(c), -6622(e), -6622(f), -6623, -6624, -6625, 22-3601(b)(3), -3601(b)(3), 76-12b01(i)

COURT OF APPEALS

PROTECTION ORDERS
KERRY G. V. STACY C.
HARVEY DISTRICT COURT—AFFIRMED
NO. 114,757—DECEMBER 9, 2016
FACTS: Kerry filed a petition for an order of protection against Stacy. After three involuntary sexual encounters, Kerry sought criminal charges against Stacy. While Stacy was on bond awaiting trial, Kerry believed that Stacy was violating the bond condition forbidding him from having contact with her. Those actions prompted Kerry to file her request for a protective order. After Kerry detailed the unwanted sexual touching, the district court determined that abuse – as defined by the Protection from Abuse Act – had occurred. The court based its protection order on the sexual misconduct and not on the alleged violations of the no-contact order. Stacy appealed, claiming that no abuse occurred, rendering the protective order inappropriate.
ISSUE: Under the facts of this case, did Kerry prove that Stacy committed unwanted sexual acts and, if so, does that constitute "bodily injury"?
HELD: Substantial evidence, in the form of Kerry's testimony, supported the district court's finding that Stacy continued to sexually touch Kerry after she told him to quit. The testimony was corroborated by e-mails and text messages from Stacy. Kerry was the only witness at the hearing, and the district court accepted her testimony. Kerry's testimony alleged facts that, if true, would prove rape. Under the Protection from Abuse Act, any unwanted sexual touching would cause "bodily injury" as that term is used in the statute.
STATUTES: K.S.A. 2015 Supp.21-5501, 5503(a)(1)(B), 22-4902(c), K.S.A. 60-3101(b)(3), -3102(a)

EMPLOYMENT—RETIATION—TORT CLAIMS ACT
HILL V. STATE
SHAWNEE DISTRICT COURT—AFFIRMED IN PART, REVERSED IN PART, DISMISSED
NO. 114,403—DECEMBER 9, 2016
FACTS: Hill was hired as a Kansas Highway Patrol (KHP) officer in 2008. He was based out of Troop H, located in Cherokee County. Hill was terminated for insubordination in Nov. 2011. He appealed his dismissal to the Kansas Civil Service Board (KCSB), and the punishment was changed to a 1-year unpaid suspension. When he returned to work, Hill was sent to Troop E, in Finney County. There was an urgent need for troopers in that area, as staffing had dropped to dangerously low levels. Hill's moving expenses were paid, and he returned to his same pay grade and sick leave balance. Hill was displeased, though, and filed a motion with the KCSB asking that he be returned to his original position in Troop H. The request was denied, but Hill was later allowed to transfer to Troop G, covering the Kansas Turnpike. Unhappy with the decision, Hill filed suit against the KHP alleging a violation of the "common-law tort" of retaliatory transfer and discrimination. Hill alleged, essentially, that his assignment to Troop E was a disciplinary measure. The district court granted the State's motion for summary judgment because Hill failed to show that his assignment to Troop E was an adverse employment action and because the State provided a reason for the transfer (manpower shortage in Troop E) that was not merely pretextual. Hill appealed, and the State cross-appealed an earlier denial of a motion to dismiss.
ISSUES: (1) Must all KCSB orders be appealed through the KJRA; (2) Does the Kansas Civil Service Act (KCSA) create a private right of action; (3) Is there a public policy exception to at-will employment in Kansas; (4) In cases such as this, does the State waive its immunity under the Kansas Tort Claims Act (KTCA); (5) Was summary judgment inappropriate if Hill established that the reason for the transfer was pretextual?
HELD: An employee suing an agency for a tort is not required to exhaust administrative remedies. Hill did not pursue relief under the KCSA; he chose to pursue an action for a common-law tort. Thus, he never tried to add a private right of action to the KCSA. There are five public policy exceptions to at-will employment involving retaliatory discharge and retaliatory demotion. There is a strongly held public policy against punishing employees for using the KCSB appeal process, and Hill did not have an adequate alternate remedy to gain relief. But in this case, Hill suffered no harm and did not lose his job, job status, pay, or benefits. Accordingly, the district court erred by recognizing the existence of a common-law tort for retaliatory job placement, and the district court should have granted the State's motion to dismiss. Because a private actor could not be liable for the nonexistent tort of retaliatory job placement, the State has not waived its immunity under the KTCA. Hill failed to prove that his placement in Troop E was an adverse employment action. But even if he had been able to prove that fact, he cannot overcome his burden to prove that the State's explanation for the transfer was pretextual.

Cont'd on Pg. 50
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Todd LaSala, Stinson Leonard Street L.L.P.
Hon. Steve Leben, Kansas Court of Appeals
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**Wednesday, June 28, 2017, 2:30 – 4:10 p.m.**
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STATUTES: K.S.A. 2015 Supp. 60-5201, 75-2929h, 75-6103(a), -6104(c), -6104(e), 77-612; K.S.A. 74-2106, -2114, 75-2925, -2929d(a)(1), -2949(d), -2949(e), -2949(f), -2949(g), -2949h, -2957, -6103(a), 77-602(b)(3), -606, -612

CIVIL COMMITMENT—CONSTITUTIONAL LAW
EVIDENCE
IN RE CARE AND TREATMENT OF RAMAGE
SEGDWICK DISTRICT COURT - AFFIRMED
NO. 114,652 – DECEMBER 9, 2016

FACTS: Ramage was convicted in 1998 on five counts of indecent liberties with a child. Petition filed in 2000 to commit Ramage under the Kansas Sexually Violent Predator Act (KSVPA) was dismissed for violation of KSVPA time limits. Ramage returned to prison in 2002 after parole was revoked. In 2012 State filed second KSVPA petition. District court denied Ramage’s motion to limit evidence introduced at trial and relied on by experts to material generated after the 2000 case was dismissed. Dr. Kohrs reviewed Ramage’s record, including all previous programs, and testified as State’s expert witness. Jury found Ramage to be a sexually violent predator. Ramage appealed, arguing: (1) trial court erred in finding that no good cause supported Schaefer's presentence motion to withdraw his plea; and (2) trial court erred in finding that no good cause supported Schaefer's presentence motion to withdraw his plea. Schaefer also sought review of district court’s holding that defense counsel's failure to inform Schaefer about possibility of KSVPA involuntary commitment did not deprive Schaefer his right to effective assistance of counsel. Court of Appeals affirmed in unpublished opinion with a concurrence.

ISSUES: (1) Denial of motion to withdraw plea, (2) ineffective assistance of counsel

HELD: Schaefer showed no good cause for withdrawal of plea. Record does not support claim that district court applied an incorrect legal standard by ignoring relevant factors other than the three factors in State v. Edgar, 281 Kan. 30 (2006). Court of Appeals is affirmed based on agreement in the concurring opinion that the holding should be narrowly tailored to facts on record in this case which show no more than a remote possibility of a KSVPA proceeding upon Schaefer's completion of his prison term. No need at this time to adopt bright-line rule that defense counsel never has a duty to advise client of KSVPA consequences of a plea to a sexually violent offense. District court’s finding that Schaefer’s plea was not

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coerced by his attorney is accepted without re-weighing the evidence or assessing witness credibility. There was no abuse of district court’s discretion by finding Schaefer’s plea was voluntary, knowing, and intelligent.

Because Schaefer failed to establish that plea counsel’s representation was incompetent under Edgar factors, his claim of unconstitutional ineffective assistance of counsel failed. Also, prejudice prong cannot be satisfied when district court found Schaefer would have pled no contest even if he had known about possible KSVPA consequences.

STATUTES: K.S.A. 2015 Supp. 22-3210(d); K.S.A. 21-3502(a)(2), 59-29a01 et seq., -2902(a), -29a03, -29103(a)(4), -29a07(g)

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**Criminal**

**Criminal Law—Restitution**

**State v. Futrell**

**Riley District Court—Affirmed in Part, Reversed in Part**

**NO. 115,160—DECEMBER 23, 2016**

FACTS: Burglary and theft charges were filed against Futrell for (a) breaking into SUV, taking over $6000 in cash, and causing damage to the vehicle; and (b) breaking into SUV owner’s home three weeks later, stealing a wedding ring, and damaging back door. In a separate case, Futrell, charged with criminal damage to property for smashing girlfriend’s phone, Futrell entered no contest plea to the residential burglary charge, and State dismissed all other charges in the two cases. District court placed Futrell on probation, and ordered restitution for damage to the vehicle, damage to the house and cash taken from therein, and for destruction of the phone. Futrell appealed the restitution order.

ISSUES: (1) Restitution - vehicular break-in, (2) restitution - smashed phone, (3) restitution - residential burglary

HELD: Restitution order in relation to a vehicular break-in that was unconnected to Futrell’s residential burglary conviction was reversed. Futrell cannot be required to pay restitution based on those dismissed charges.

Restitution order for girlfriend’s smashed phone was affirmed. In plea agreement, Futrell agreed to pay for that damage and reserved right to challenge the amount. Evidence supporting the value of the loss is not disputed.

Restitution order arising from the residential burglary was affirmed, noting a departure from State v. Miller, 51 Kan.App. 2d 869 (2015). A criminal defendant convicted of burglary and placed on probation may be ordered to pay restitution for property taken during the break-in even if the defendant neither agreed to do so nor was convicted of theft. The burglary conviction and property loss have a sufficient causal connection to satisfy K.S.A. 2015 Supp. 21-6607(c)(2), governing restitution orders.

CONCURRENCE and DISSENT (Leben, J.): Concurs with majority on all issues but for restitution ordered for Futrell’s burglary of the home. Applying Miller and State v. Dexter, 276 Kan. 909 (2003), Futrell should not have been ordered to pay restitution for cash stolen from home because burglary - the crime of conviction - was connected to but did not cause loss of that cash.

STATUTE: K.S.A. 2015 Supp. 21-5413(b)(1)(B), -5801(a)(1), -5807(a)(1), -6607(c), -6607(c)(2)

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**Constitutional Law—Criminal Law—Search and Seizure—Venue**

**State v. Torres**

**Lyon District Court—Affirmed**

**NO. 114,269—DECEMBER 23, 2016**

FACTS: Torres sold drugs to a buyer who was using money with police-recorded serial numbers. After the sale the police stopped Torres’ car, arrested him, searched the car, and discovered the recorded funds. Torres was charged with distributing methamphetamine and using a communication device (cell phone) to commit a drug felony. Torres filed motion to suppress evidence of the funds, claiming the warrantless search of his car was illegal. District court denied the motion, and jury convicted Torres on both charges. Torres appealed, claiming district court erred in denying motion to suppress. He also claimed there was insufficient evidence that he used his phone in Lyon county, where he was charged and tried, to support the required venue element of the communication-device charge.

ISSUES: (1) Warrantless search of car, (2) venue - sufficiency of the evidence

HELD: District court’s denial of motion to suppress was upheld. Under facts in this case, search of Torres’ car was justified as a search incident to arrest and under the automobile exception to the warrant requirement, even if district court erred in also finding that the search was justified by the plain-view exception.

Under facts in case, it was reasonable for jury to conclude that Torres used his phone to commit a drug felony while Torres knew the buyer was in Lyon County when at least one of the phone calls related to the drug sale was made. Compliance with State v. Castleberry, 301 Kan. 170 (2014), was noted, but panel questioned whether Castleberry really intended to create a knowledge requirement to establish venue.

STATUTES: K.S.A. 2015 Supp. 21-5707(a)(1); K.S.A. 22-2602
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